

BLUE CIRCLE LTD

APPELLANT

and

THE VALUATION APPEAL BOARD OF

LICHTENBURG AND ANOTHER

RESPONDENT

Judgment by:

NESTADT, JA

CASE NO 108/89
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BLUE CIRCLE LIMITED

APPELLANT

and

THE VALUATION APPEAL BOARD OF
LICHTENBURG

FIRST RESPONDENT

THE TOWN COUNCIL OF LICHTENBURG

SECOND RESPONDENT

CORAM: JOUBERT, NESTADT, MILNE, KUMLEBEN JJA
et PREISS AJA

DATE HEARD: 25 FEBRUARY 1991

DATE DELIVERED: 28 MARCH 1991

J U D G M E N T

NESTADT, JA:

The underlying issue raised in this appeal is
whether correct principles were applied in valuing

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certain rateable property under the provisions of the Local Authorities Rating Ordinance, 11 of 1977, of the Transvaal.

The dispute between the parties goes back to 1985. In that year, the Town Council of Lichtenburg (the second respondent), caused a provisional valuation roll of rateable property within its municipality to be prepared. In doing so it acted under sec 10 of the Ordinance. This section requires that there be reflected in respect of each property recorded in the roll not only the value of the site, but also that of any improvements thereon. The reason for this is that by virtue of sec 4, read with sec 21(3), rates may be levied not only on land but also on the value of improvements on such land. One of the properties included in the roll was that of Blue Circle Limited (the appellant). The property is Portion 61 of the farm Lichtenburg Town and Townlands No 27,

Registration Division I.P., district Lichtenburg. The

following values were reflected in respect of it:

"Improved value	R25 150 000,00
Site value	R 150 000,00
Value of improvements	R25 000 000,00"

Blue Circle lodged an objection. It contended that an improved value of R13 100 000 should be substituted. The matter came before the valuation board which, after a hearing, partially upheld Blue Circle's objection. The valuation was altered to read:

"Improved value	R17 150 000,00
Site value	R 150 000,00
Value of improvements	R17 000 000,00"

This satisfied neither party. Each appealed to the valuation appeal board which, acting under sec 20(1), reheard the matter. By this time there was no longer any dispute about the site value of the land. The figure of R150 000,00 was accepted by Blue Circle. However, the disparity between what it alleged was the value of the

improvements and the Town Council's valuation thereof, had widened. Blue Circle now contended that the improvements had a nil value; the Town Council's case was that they were worth some R60 000 000,00. After a lengthy trial during which a number of expert witnesses expressed opposing views as to the value of the improvements, both appeals were dismissed. So the valuation of R17 000 000,00 stood. This led to the next step in the proceedings. It was an application by each side to the Transvaal Provincial Division to review and set aside the decision of the valuation appeal board (which was cited as a respondent). The matter came before DE VILLIERS AJ who dismissed Blue Circle's application (with costs). The learned judge, however, granted the application of the Town Council (and ordered Blue Circle to pay the costs occasioned by its opposition). He set aside the dismissal of its appeal by the valuation appeal board. He

directed that the matter be remitted to the valuation appeal board "met die opdrag dat hy sy plig ooreenkomstig die bepalings van die Ordinansie sal uitvoer". The parties were given the right to adduce further evidence before the valuation appeal board. Blue Circle's appeal, which is before us with the leave of the court a quo, is against these orders. The valuation appeal board is the first respondent. But it does not oppose.

It will be apparent from what has been said that the broad issue before us is whether there were good grounds for the review of the proceedings of the valuation appeal board or, more specifically, whether the court a quo's decisions in this regard were correct. Now there is no appeal against the valuation appeal board's decision which in terms of sec 20(1) is final. The review is of the second type referred to in Johannesburg Consolidated Investment Co vs Johannesburg Town Council 1903 TS 111 at

115. Relief cannot therefore be granted merely because the valuation appeal board's valuation is considered to be wrong. Nor would it suffice that it made a mistake on a point of law in relation to the merits (Goldfields Investment Ltd and Another vs City Council of Johannesburg and Another 1938 TPD 551 at 557 and 560-1; South African Broadcasting Corporation vs Transvaal Townships Board and Others 1953(4) SA 169(T) at 177 A-C). The principle is correctly stated by DE VILLIERS JP in Harpur and Others vs Steyn, NO 1974(1) SA 54(0) at 56 H. The learned judge said:

"The mere fact that a quasi-judicial body comes to a wrong conclusion in regard to a question of law which it was its duty to consider in arriving at a decision on the merits of the matter before it, does not afford a ground for setting aside its decision on review. Its decision can only be set aside if the mistake is in respect of the law which prescribes its duties with the result that it failed to apply its mind to an issue which it had to consider. Thus it was said in Doyle v. Shenker & Co. Ltd., 1915 A.D. 233 at p. 236:

'Now a mere mistake of law in adjudicating upon a suit which the magistrate has

jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear'."

One or more of the recognised grounds of review (in the sense indicated) would accordingly have to be established.

In so far as the facts of the present matter are concerned, this means showing that the valuation appeal board so misconceived the nature of the enquiry postulated by the Ordinance or its functions thereunder, that it failed to properly apply its mind to the true issues. In this event there would have been a gross irregularity resulting in a fair trial not having taken place.

This immediately brings me to sec 9 of the Ordinance. It defines what has to be valued and the manner of doing this. And, as a consequence, it determines what principles the valuation appeal board has to apply. So the importance of sec 9 is self-evident.

In so far as is relevant, it provides:

"9.(1) ... (A) valuer shall, for the purpose of this Ordinance, determine -

- (a) the improved value of land ... which shall be the amount which such land... would have realized if sold on the date of valuation in the open market by a willing seller to a willing buyer;
- (b) the site value of land ... which shall be the amount arrived at in like manner to that referred to in paragraph (a), but on the assumption that the improvements, if any, had not been made; and
- (c) the value of improvements which shall be arrived at by subtracting the site value of land ... from the improved value thereof.

(2) In determining the value referred to in subsection (1), a valuer shall -

...

- (c) not take into account any value accruing to the land ... by reason of the presence ... on or under the land concerned of -

...

- (ii) any machinery which, in relation to the land concerned, is immovable property, excluding a lift, escalator, air-conditioning

plant, fire-extinguishing apparatus, water-pump installation for a swimming-pool or for irrigation or domestic purposes or any other machinery which may be prescribed."

"Land" is defined in sec 1 to include "any improvements in, on or under such land" and "improvements" are in turn defined as "any building, whether movable or immovable, or any other immovable structure in, on or under such land ... excluding a structure constructed solely for the purpose of rendering the land concerned suitable for the erection of any immovable structure thereon".

"Machinery" is not defined.

The evidence placed before the valuation appeal board can be briefly summarised. The property in question is about 72 hectares in extent. As has been indicated, there are improvements on it. They comprise a cement factory which Blue Circle conducts on the property. The factory, which covers an area of some 18 hectares,

consists of various buildings and structures. These include a number of offices, workshops, stores, a laboratory, garages and a compound for employees. In addition there is, of course, a mass of machinery. Its presence, as will be seen, is central to the controversy between the parties.

Blue Circle's main witness was Dr P. E. Penny, a valuer. He explained how he set about assessing the improved value of the property. He firstly identified the machinery. He gave the word a wide meaning. He regarded it as consisting of whatever was integral to the manufacturing process. Thus buildings and structures the sole purpose whereof was to house or support the machine contained within or attached to it, were also regarded as part of the machinery itself. His reasoning was the following:

"We've already heard evidence that some of these structures would disappear if the machinery was

removed away. They've actually been built with the machinery so that they're an integral part of the machinery. If you characterised some portion of what you see there as being machinery and took it away, the rest would collapse. We're not dealing here with a multi-purpose factory out of which a machine can be taken and another machine can then be placed within that factory. That's not what we're dealing with. We're dealing with something which would cease to exist if the machinery were taken out. That's why I say it's part of the machine ... (T)he structures have no meaning without the machines."

On this basis a number of buildings and structures (or what would otherwise be classified as such) were ignored. The witness then took into account the improvements that remained. Approaching the matter in this way, his opinion was that the improved value of the property was nothing more than the site value, viz R150 000. This was because once he excluded or "thought away" (in terms of sec 9(2)(c)(ii)) any effect on the value of the land caused by the presence of machinery, the buildings and structures were valueless. There was no

willing purchaser for "what remained of the plant after the machinery had been 'removed'." Adopting the terminology put to him under cross-examination, he categorised the residue as an "empty shell" as opposed to a "going concern". He testified:

"Just one particular aspect Dr Penny. Let's assume for the moment a going concern. In a context such as this cement factory, if you take away the machinery, what happens to the going concern? ... It doesn't go."

The approach of Mr N G Griffiths, the Town Council's chief valuer, was rather different. In the first place he applied a narrower definition of machinery than Penny had. This resulted in a more extensive number of buildings and structures being taken into account. Secondly, he rejected the "empty shell" approach. Though he also excluded machinery from consideration, he did not do so in the same way as Penny. This was because he understood sec 9(2)(c)(ii) differently. His valuation was on the basis that the factory remained a "going

concern" despite the notional removal of the machinery.

In his words:

"We certainly don't remove the machine, we ignore the value attributable to the machine. That is what the Ordinance says ... But my purchaser is buying a cement works, your purchaser is buying a god-forsaken ... series of structures with ... which are empty and full of vermin and they're two totally different concepts. Obviously there's different figures".

Thirdly, he did not attempt to value the land as improved.

He set about valuing the buildings and structures

themselves. He did this on the basis of their

replacement cost. To make allowance for the fact that

they were not new, a depreciation factor was deducted.

This was calculated according to the number of years the

buildings and structures had been in use. A 15% "overall

project cost" was then added. In this way he arrived at

or "built up" (referred to as the "summation method") a

figure of R60 400 000 which in his opinion was the value

of the rateable improvements.

These then were the conflicting valuations and

methods of valuing which faced the valuation appeal board.

Somewhat cryptically, it held the following:

(i) As to Blue Circle's appeal:

(a) Whatever the meaning of machinery, the proposition that certain of the buildings and structures which would ordinarily not be regarded as machinery, acceded ("aanwas") to the machinery or underwent "n gedaante verwisseling", as Dr Penny had in effect contended, was rejected.

(b) This being so, Blue Circle had failed to rebut the presumption (created by sec 15(12) read with sec 19(4)) that the valuation of the valuation board was correct. Inherent in this conclusion would seem to have been a finding that the application of sec 9(2)(c)(ii) did not result in an "empty shell" of no

value being left over.

(c) In any event the reference to a willing buyer in sec 9(1) precluded a nil value being placed on the buildings and structures.

(ii) As to the Town Council's appeal:

(a) The summation method of valuing the buildings and structures was contrary to sec 9(1) and therefore not permissible; the value of the improvements had to be ascertained not by having them valued, but by subtracting the site value from the improved value.

(b) Griffiths' "going concern" approach was unacceptable. Such a valuation would include irrelevant factors such as goodwill, the profitability of the

business and the availability of raw materials and labour.

(c) In the result the Town Council too had failed to discharge the onus of showing that the valuation of the valuation board was wrong.

Do these reasons disclose any irregularities of the nature referred to earlier? In their respective review applications both parties alleged that they do. And both, of course, sought an order remitting the matter to the valuation appeal board. As I have said, the court a quo granted such an order. So to this extent there is no dispute between the parties. Each, however, relied on different grounds in order to review the proceedings and decision of the valuation appeal board. For two reasons those grounds remain relevant. Firstly, they affect the orders for costs that this Court will have to make.

Secondly, how they are decided will determine what principles the valuation appeal board should apply when reconsidering the matter.

I commence with the grounds relied on by Blue Circle. One was that the valuation appeal board committed reviewable errors in respect of (i) what I call the basic identification of the machinery and (ii) whether the buildings and structures housing or supporting the machinery are, for valuation purposes, to be regarded as having been absorbed by or integrated into such machinery so that they, in effect, cease to be buildings or structures. In its application, Blue Circle alleged that the valuation appeal board had misdirected itself in respect of both. I do not think this attack can be sustained. Indeed, before us Mr Heher on behalf of Blue Circle rightly did not pursue it. In essence both complaints relate to a question of fact, namely, the

extent of the machinery (cf Brick & Potteries Co Ltd v City Council of Johannesburg 1945 T 194 at 203-4). And (as regards (ii)) if the valuation appeal board erred in law, it was a mistake in relation to the merits. In either event and applying the principles referred to earlier, they do not fall within the ambit of review proceedings.

A second basis for Blue Circle's review rested on the valuation appeal board's finding that the reference to a "willing buyer" in sec 9(1) makes it imperative that a value be placed on the land and improvements. This finding is obviously incorrect. The postulation of a willing buyer does not preclude a finding that (in rare circumstances) such a buyer would not be prepared to pay anything for the property. In that event it would have no value. The issue is, however, academic since, as I have indicated, the valuation appeal board found that on the facts the buildings and structures did have a value (ie R17 000 000 as determined by the valuation board).

Blue Circle's third ground was that the valuation appeal board had misinterpreted and wrongly applied sec 9(2)(c)(ii). The point is also raised in the Town Council's review. So it would seem that both parties felt aggrieved by what the valuation appeal board was perceived to have decided in this regard. In fact, despite stating that "(h)ierdie appèl het in die besonder gegaan oor die interpretasie en toepassing van gemelde artikel 9(2)(c)", its meaning is not dealt with. Nor, save to the extent indicated (see para (i)(b)), does it feature in the valuation appeal board's reasons. Can an interpretation adverse to Blue Circle be inferred? I do not think so. It is true that the rejection of Penny's opinion as to value is prima facie indicative of this. It would seem, however, that this was simply a decision arrived at on the facts, namely, that despite leaving out of account whatever value accrued

to the land by reason of the presence of the machinery, the buildings and structures had not been shown to be a valueless "empty shell". On this basis there can be no quarrel on review with this part of the decision. The factual finding, even if wrong, is not reviewable.

But the controversy between the parties as to the true meaning of sec 9(2)(c)(ii) remains and, for the reasons mentioned, it is desirable that we should deal with it. The legislature would appear to have recognised that the presence of (immovable) machinery on land may enhance the improved value thereof. It did not wish rates to be paid either on the value of the machinery itself or on what may be called the indirect influence of the machinery on the value of the property. Sec 9(2)(c)(ii) gives effect to this. The enjoiner contained in the section relates to the determination of the improved value of land in terms of sec 9(1). The use of "shall" makes

it obligatory to leave out of account the value referred to in sub-sec (c)(ii). This means it must be disregarded; no consideration or notice can be taken of it; no attention is to be paid to it. (See the meaning of "take account of" in the Oxford English Dictionary, 2nd ed, sv "account"; Harnaker vs Minister of the Interior 1963(4) SA 559(C) at 574 F; Metropolitan Water Board vs Assessment Committee of the Metropolitan Borough of St Marylebone [1923] 1 KB 86 at 99.) The phrase "any value accruing to the land... by reason of the presence ... on or under the land ... of machinery" is of wide import. "Any" clearly is. So is "accruing" ("toeval"). In the sense used, it means "arising by way of increase or augmentation" (Black's Law Dictionary, 5th ed, sv "accruing"). "Presence" is clear enough, viz "being there" (OED, op cit). It is the opposite of "absence". It appears therefore that, as submitted on behalf of

Blue Circle (and contrary to what the court a quo held), in valuing the land and improvements, a fictional state of affairs must be imagined or assumed, namely, that there is no (immovable) machinery on the site. Only in this way can the value accruing to the land by reason of the presence of machinery be ignored (as the section requires). There is, in other words, in the context of section 9(2), no material difference between saying "exclude any value accruing from (the presence of) the machinery" and "exclude (the presence of) the machinery". It will depend on the facts of each case what the consequences of doing this are. The greater the quantity of machinery and the more integral a part of the buildings and structures it is, the more effect will it have in reducing the improved value of the land. In a given case, it may be that an "empty shell" (having a nil value) remains after the intellectual exercise (of assuming the absence of the

machinery) has been performed. But usually a property having some improved value would, despite the notional removal of the machinery, remain. The extent of such value will depend on the use to which the land and rateable improvements can be put (Kleinfontein Estate & Township Co v. Benoni Municipality, 1918 TPD 193 at 201-3; Victoria Falls and Transvaal Power Co Ltd v. Boksburg Municipality 1930 TPD 307 at 316-7).

To sum up so far, I am of the opinion that Blue Circle has failed to establish any grounds for reviewing the valuation appeal board's decision and that the court a quo correctly dismissed Blue Circle's application. It follows that its appeal against such order must fail.

This brings me to the appeal against the court a quo's grant of the Town Council's application. The submission on behalf of Blue Circle was that it should have been dismissed. Here too a number of issues arise.

The first is whether the valuation appeal board was correct in rejecting Griffiths' summation method of valuing the buildings and structures and in finding that, in any event, it was not permissible to value the improvements separately from the land. The court a quo held that the valuation appeal board was not correct (and that this constituted a reviewable irregularity). I am unable to agree. I think the valuation appeal board was quite right. There are inherent objections to Griffiths' method of valuation. He was constrained to admit that his depreciated replacement cost method "ignored most if not all" of a number of "market factors" which it was common cause were operating at the time. These included what was referred to as supply and demand, investor confidence, interest rates, availability of loan finance and political factors. Besides, as one knows, not every improvement results in the value of the land being increased. There is amongst the others the factor of over-capitalisation.

But more importantly, sec 9(1), unlike the corresponding sections of the rating ordinances of the other provinces, simply does not provide for the cost method of valuing rateable improvements (see LAWSA, Vol 23, "Rating" by J Meyer, para 105). Indeed, in terms of sec 9(1) they are not to be valued separately at all. Only two valuations are to be made. The one (in terms of sec 9(1)(a)) is of the land as improved. This means that land and improvements are valued as an entity. The other (in terms of sec 9(1)(b)) is of the site. The value of improvements is then (in terms of sec 9(1)(c)) arithmetically calculated by subtracting the latter from the former. The wording of the section is plain and admits of no other method being adopted. What Griffiths, and the other valuers who gave evidence for the Town Council, did was wholly at variance with what the section requires. And the absence of comparable sales, though it made the valuers' task difficult, was no justification for acting

in this way.

Another attack against the grant by the court a quo of the Town Council's application concerned Griffiths' "going concern" approach. DE VILLIERS AJ held the following in this regard:

"Soos aangedui, het die Appèlraad ook bevind dat Griffiths se waardering gebaseer is op die verkoop en koop van h 'going concern' as synde van h besigheid of maatskappy of aandele in h maatskappy. Ek meen dat hierdie benadering foutief is. Op h korrekte uitleg van Griffiths se getuienis het hy die uitdrukking 'going concern' gebruik as teenstelling met die leë dop benadering van Dr Penny. In pleks daarvan om h lewelose aantal geboue en strukture te waardeer waaruit die masjinerie verwyder is, het Griffiths die sementfabriek met insluiting van die masjinerie waardeer ... Na my oordeel het die Appèlraad as gevolg van sy foutiewe benadering dat Griffiths se metode van waardering strydig is met art 9(1)(a) tot (c) en dat hy met 'going concern' iets anders bedoel het as wat werklik die geval is, nie behoorlik sy aandag aan die saak bestee nie."

I agree that in the way the evidence was presented the two concepts probably related to the application of sec 9(2)(c)(ii) and that they represented opposing views.

Indeed, it is difficult to understand how the valuation appeal board could (as it did) have rejected both. I disagree, however, that the court a quo was entitled to find that the valuation appeal board failed to properly apply its mind to Griffiths' evidence. As I have said, it correctly held that his method of valuation was in conflict with sec 9(1). And, on the facts, I do not want to say more than that Griffiths' valuation could well have included extraneous factors bearing on the value of Blue Circles' business rather than just the improved value of the land. So here too Blue Circle has established good grounds for attacking the grant of the Town Council's application.

The remaining issue raised by Blue Circle's appeal against the order allowing the Town Council's review, concerns the valuation appeal board's reliance on the presumption that the valuation board's valuation (of

R17 150 000) was correct. The Town Council in its application had raised this as a ground of review. The presumption, as was said earlier, is created by sec 15(12) read with 19(4). The valuation of the valuation board is thereby deemed to be correct until the contrary is proved. That the valuation appeal board regarded the presumption as operating is clear. Indeed it is a recurring theme which runs throughout its reasons. Consider the following quotations from such reasons:

"So ook is daar 'n vermoede dat die Waarderingsraad se beslissing korrek is en tensy dit verkeerd bewys word, soos voormeld, sal hierdie Waarderingsappèlraad nie net inmeng nie... Soos reeds vermeld, berus daar op elke Appellant 'n bewyslas om op 'n oorwig van waarskynlikhede vir hierdie Waarderingsappèlraad te oortuig en te bewys dat die beslissing van die Waarderingsraad nie korrek is nie. Dit is nie bewys nie en Blue Circle se appèl word dus van die hand gewys... So ook is die appèl streng gesproke 'n herverhoor, maar weens die voormelde vermoede dat die Waarderingsraad se inskrywing korrek is tot tyd en wyl dit verkeerd bewys word, moet hierdie Appèlraad eers bevind dat 'n Appellant op 'n oorwig van waarskynlikhede die

bevinding van die Waarderingsraad verkeerd bewys het, voor ons geregtig is om met die Waarderingsraad se bevinding in te meng... Die Stadsraad het vir hierdie redes ook nie op h oorwig van waarskynlikhede bewys dat die beslissing van die Waarderingsraad nie korrek is nie en die appèl word dus ook van die hand gewys."

The court a quo held that the valuation appeal board was not entitled to rely on the presumption and that having done so, it failed to properly apply its mind to the matter before it and that this constituted a (further) ground of review. The question that arises is whether this finding was justified. If it was, the Town Council's application would have been correctly granted and this part of Blue Circle's appeal would also have to fail.

To answer the question it is necessary to revert to the proceedings before the valuation board. During the hearing and at the instance of the chairman, the valuer and the representative of Blue Circle reached an agreement the effect whereof was to narrow the issue

that the valuation board had to decide. They agreed that the value of the property was not more than R19 500 000 and not less than R10 400 000. The valuer thereby conceded that his initial valuation of R25 150 000 was to be reduced. It was further agreed that the valuation board had merely to determine whether five specific improvements (each of which was given a value) were machinery or not. The valuation board decided that two of them were. Their value was therefore deducted from the figure of R19 500 000. It was in this way that a valuation of R17 000 000 for the improvements was arrived at. At some stage in the course of the valuation appeal board hearing, however, the agreement (which was alleged to be irregular or unauthorised) was in effect abandoned. This does not appear from the record of the hearing. On the contrary during what appears to be the opening address of counsel for the Town Council, it was said that "up to

the present time both parties are bound by the presumption created by the Ordinance that the valuer's valuation is correct until it is proved wrong on balance of probability by any party. That presumption stands up to the present time". But in its application the Town Council alleged the following:

"Applikant en Tweede Respondent was dit egter eensgesind, en het die Waarderingsappèlraad aldus meegedeel, dat nie een van die partye of die Raad gebonde is aan die ooreenkoms wat die waardeerder met Tweede Respondent se regsverteenvoordiger op appèl voor die Waarderingsraad aangegaan het nie..."

I suppose the valuation appeal board was so informed during argument (which was not recorded). Blue Circle did not deny the allegation. It therefore stands. The consequence of this, so it seems to me, is that the substratum to the operation of the presumption fell away. The valuation board's finding was based on the agreement. Once the agreement was regarded as of no

force, the efficacy of the valuation board's valuation inevitably also ceased. The re-hearing of the matter by the valuation appeal board was then freed from the constraints of the presumption. There could be no objection to the parties thus in effect renouncing their respective rights to rely on it. The purpose of the presumption is to give the respondent in an appeal against the valuation of the valuation board a procedural advantage, namely, that the appellant bears the onus of proving that the valuation should be disturbed. The presumption must therefore be taken to have been purely for such party's benefit. There is ample authority that in these circumstances it can be waived (AA Mutual Insurance Association Ltd vs Century Insurance Co Ltd 1986(4) SA 93(A) at 101 B; Neugarten and Others vs Standard Bank of South Africa Ltd 1989(1) SA 797(A) at 809 C; see too S A Eagle Insurance Co Ltd

vs Bavuma 1985(3) SA 42(A) at 50 C).

How then does the valuation appeal board's erroneous assumption that the presumption applied and that the parties in consequence bore an onus, affect its decision? Though a mistake as to onus may not per se be a reviewable irregularity (Enslin vs Colonial Trust Corporation Ltd (In liquidation) 1923 CPD 358 at 366), here the position is different. The valuation appeal board's misconception of the position was a misdirection which resulted in a failure to properly exercise its function of affording the parties an unhampered re-hearing. Instead of being truly at large and starting off with a clean slate, so to speak, it circumscribed its powers by wrongly allowing the presumption to operate. In short, it failed to properly apply its mind to the matter. Put differently, the parties were not afforded a fair

hearing. This constituted a reviewable irregularity.

The result of all this is that both Blue Circle's appeals fail. The matter will stand remitted to the valuation appeal board as ordered by the court a quo.

This brings me to the question of costs. There are certain singular features of the proceedings in the court a quo. The Town Council would not seem to have filed any notice to oppose Blue Circle's application. It is therefore not clear what its locus standi was to do this. Nor am I sure that the Town Council was justified in bringing its own separate application claiming the same relief as Blue Circle. Nevertheless there is no warrant for interfering with the costs order made by DE VILLIERS AJ. That leaves for decision the order that should be made in respect of the costs of the appeals. Both must be treated as

one. In accordance with the general rule that costs follow the event, Blue Circle would normally have been directed to pay the costs. But the circumstances here are unusual. Though the Town Council has, at first blush, been the successful party, in substance this is not so. Perhaps I should rather say that Blue Circle has also had a fair measure of success. To begin with, the order remitting the matter was one sought by it as well. Such remittal will to a large extent be on Blue Circle's terms. I refer to what has been said concerning (i) whether there can be a nil valuation of the improvements; (ii) the interpretation of sec 9(2)(c)(ii); and (iii) the proper method of valuing the improvements in terms of sec 9(1) (including Griffiths' summation method). These were matters raised by both parties in their respective applications. Indeed the Town Council had also in terms of sec 43 (which empowers the court to decide

certain questions of law) sought an order declaring that its interpretation of sec 9(1) and sec 9(2)(c)(ii) was correct. In the event, the issues referred to have been decided in Blue Circle's favour. So it can justly claim that the effect of the appeal has been to correct a number of adverse findings which the court a quo made. (There are others that I have not dealt with. This is not to be taken as an approval of them.) In fact, the only basis on which the Town Council has been held entitled to have succeeded in its application (the presumption point) was equally open to Blue Circle (who however did not take it). In all the circumstances and in the exercise of our wide discretion (Mouton vs Die Mynwerkersunie 1977(1) SA 119(A) at 149 A), I have come to the conclusion that the dictates of fairness require that no order should be made as to the costs of appeal (cf Fluxman vs Brittain 1941 AD 273 at 301).

The following order is made:

- (1) The appeals in both matters are dismissed.
- (2) No order as to the costs of the appeals is made.

NESTADT, JA

JOUBERT, JA)
MILNE, JA) CONCUR
KUMLEBEN, JA)
PREISS, AJA)