

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

GJ CASE NO.: 2023/067833

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

In the matter between:-

LIBERTY GROUP LIMITED

First Applicant

PARETO LIMITED

Second Applicant

and

**THE VALUATION APPEAL BOARD FOR THE
CITY OF JOHANNESBURG**

First Respondent

**MR F P J ELOFF: THE MUNICIPAL VALUER
FOR THE CITY OF JOHANNESBURG**

Second Respondent

**MR H J P FOUCHE: THE ASSISTANT MUNICIPAL
VALUER FOR THE CITY OF JOHANNESBURG**

Third Respondent

THE CITY OF JOHANNESBURG

Fourth Respondent

Delivery: This judgment was handed down electronically by uploading judgment on the electronic platform, by circulation to the parties' legal representatives by e-mail and release to SAFLII. The date and time for hand-down is deemed to be 4 July 2025.

JUDGMENT

Farber AJ

A INTRODUCTION

[1]. Erven 242 and 247 in Sandhurst Extension 3 measuring in extent 58 and 129 665 square metres respectively, Erf 6[...] in Sandown Extension 4 measuring in extent 6 744 square metres, Erf 5[...] in Sandown Extension 3 measuring in extent 46 square metres, and Portion 724 of the Farm Zandfontein 42 IR measuring in extent 72 square metres, are contiguous and in effect form a composite single sloping piece of land ("the property" or "Sandton City").

[2]. The property is known as Sandton City and a shopping centre, office blocks and a hotel have been erected on it.

[3]. The property is rateable within the meaning of section 2 of the Municipal Property Rates Act, Act 6 of 2004 ("the MPRA") and for the period 1 July 2018 to 30 June 2022, which latter date was extended to 30 June 2023, the market value of the property for the purpose of the levying of rates thereon, was determined in the sum of R10 144 700,000.00. This value was initially ascribed to Portion 724 of the Farm Zandfontein 42 IR, with a nil value being ascribed to the remaining erven which comprised the property. A supplementary valuation roll was published by the fourth respondent ("the City") and under that roll the value of R10 144 700,000.00 was ascribed to Erf 2[...] of Sandhurst Extension 3, with the remaining stands which comprised the property carrying a nil value.

[4]. The co-owners of the property, being Liberty Group Limited and Pareto Limited, being the first and second applicants respectively (“the owners”), objected to the valuation in terms of section 50(1)(c) of the MPRA, which objection was considered by Mr F P J Eloff, the municipal valuer of the City. Mr Eloff was cited by the owners as the second respondent in the proceedings which form the subject matter of this judgment.

[5]. The objection was dismissed by Mr Eloff and the owners pursuant to section 54(1)(a) of the MPRA lodged an appeal with the first respondent, the Valuation Appeal Board for the City (“the Board”), which is cited as the first respondent in the proceedings.

[6]. On 14 February 2023 the Board dismissed the appeal, thereby determining that the market value which Mr Eloff had placed on the property for rating purposes held good and had done so from 1 July 2017. The determination of the Board was largely, if not exclusively, based on the evidence of Mr H J P Fouche, the City’s assistant municipal valuer. He was cited as the third respondent in the proceedings.¹

[7]. The joint owners seek to review and set aside the Board’s decision of 14 February 2023 with the avowed objective of having the matter adjudicated upon afresh by a differently constituted board. The costs of the application are sought by the owners against the Board, Mr Eloff and Mr Fouche, jointly and severally, the one paying the other to be absolved, which costs are to include those consequent upon their engagement of two counsel. The City has chosen to abide the judgment of the Court and costs have not been sought against it.

B THE GROUNDS OF REVIEW

[8]. It is common cause that the determination of the Board is reviewable under the Promotion of Administration of Justice Act of 2000 (“PAJA”).

¹ It may at this stage perhaps be noted that the Board’s determination, however, exceeded the value which Mr Fouche had placed on the property. The reason for it having so done was not explained.

[9]. The grounds of review relied upon by the owners may in broad terms be summarised thus:-

[a]. the Board's determination of the market value of the property was irrational and consequently of no force and effect, hit as it was by several of the grounds of review embodied in PAJA;

[b]. the Board, in making its determination, ignored the provisions of section 46(3)(c) of the MPRA;

[c]. the Board, in making its determination, valued the property as a group, placing as it did a single value on the erven which comprised it and not on each of its individual components, thereby acting in contravention of sections 7, 8, 23, 30, 31, 33, 34, 45 and 46 of the MPRA;

[d]. the Board betrayed a bias adverse to the owners, thereby vitiating its determination.

[10]. The owners abandoned the ground of review detailed in paragraph [9][c] hereof and I need say nothing further on that matter.

[11]. The remaining grounds of review will presently be addressed.

C. THE STATUTORY REGIME

[12]. The power of the Board to hear and determine appeals is derived from section 57 of the MPRA which provides that it is 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 the municipality in the area for which it was established.*"

[13]. The Board in the exercise of its power will need to value the property which forms the subject matter of the objection. The Board will, in this regard, be guided by expert valuers and other related witnesses.

[14]. The property in question must in terms of section 45 of the MPRA be valued in accordance with generally recognised valuation practices, methods and

standards, as also in accordance with the provisions of the MPRA. The Board will in this regard be concerned with market value which, in terms of section 46(1) of the MPRA, 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.

[15]. Section 46(3)(c) of the MPRA provides that in determining the market value of the property, any unregistered lease in relation to it must be disregarded.

D THE EXPERTS DEPLOYED IN THE PROCEEDINGS

[16]. For the purposes of the proceedings before the Board, the owners relied on the report and evidence of Mr Gaddy, an expert in retail property and a certified leasing expert. He was at the time Sandton City's manager. They also relied on the report and evidence of Mr Bokhorst, a professional valuer.

[17]. The City relied on the reports and evidence of Mr Fouche, a professional valuer.

[18]. As will presently emerge, the Board accepted the evidence of Mr Fouche in preference to that of Mr Bokhorst and Mr Gaddy and in substance the review is in the main grounded on the approach of the Board in so doing.

E THE REPORTS AND EVIDENCE OF MR BOKHORST AND MR GADDY AND MATTERS RELATED THERETO

[19]. Mr Bokhorst and Mr Fouche applied the income capitalisation method in determining the market value of the property. Mr Bokhorst, however, for the purpose of determining the income which fell to be attributed to the property, applied the profit method, sometimes described as the "*capitalisation method*", or what he at times phrased as the "*achievable turnover method*".² Mr Bokhorst's approach in this regard was much influenced by Professor Alan Millington, an internationally

² This differed from the approach of Mr Fouche who, for that purpose, adopted the comparable or profit method of computation.

recognised expert on the valuation of shopping centres.³ In applying the method which he did, Mr Bokhorst used empirical information which had been furnished to him by Mr Gaddy.⁴

[20]. Mr Bokhorst and Mr Gaddy were extensively cross-examined by counsel on behalf of the City who took issue with a wide array of matters which had been relied upon by them in arriving at the market value of the property.

[21]. Some of the more important matters with which issue was taken by the City may be summarised as follows:-

- [a]. the consistency of Mr Bokhorst in relation to the determination of the value of A-grade and P-grade offices;
- [b]. the propriety of the reliance by Mr Bokhorst on the inputs furnished to him by Mr Gaddy in relation to market rentals;
- [c]. the identification of shopping centres which might fairly be said to be comparable to Sandton City;
- [d]. the correctness of the capital expenditure which Mr Bokhorst took into the reckoning in relation to Sandton City for the 2016 year;
- [e]. the consequence of Mr Bokhorst's failure to include rates and taxes as an expense for the purpose of determining the gross rental of the numerous premises located in Sandton City;
- [f]. the question whether Mr Gaddy's method of valuation was consistent with recognized guidelines;
- [g]. the question whether Mr Gaddy, in ignoring actual income but in taking actual expenditure into account in relation to the property, had in his approach to the determination of market value engaged in double standards;

³ Prof Millington addresses the issue in an article titled "Shopping Centre Industry: Issues affecting property values" published in the Valuer and Land Economist 1996, commencing at page 327.

⁴ The Board was critical of Mr Gaddy's involvement in the matter, suggesting as it did that the owners ought to use a person other than a valuer to determine the information which he imparted to Mr Bokhorst. Mr Gaddy in this regard did no more than determine the rentable space on the property and the market related rental which that space would attract. This fell within the purview of Mr Gaddy's expertise for he knew how landlords and tenants approached the determination of market related rentals of premises of all kinds. It was quite wrong for the Board to seemingly exclude the findings of Mr Gaddy in relation to these matters. Moreover, Mr Bokhorst was clearly entitled to rely on the communications thus commuted to him.

- [h]. the question whether Mr Gaddy's approach in determining trading densities and turnover in amounts higher than that found to exist in other shopping centres, had the effect of rendering Mr Bokhorst's valuation suspect;
- [i]. the impact of the cost of occupation for tenants of premises located on the property and its effect on the affordability of rentals in the long term;
- [j]. the question whether Mr Gaddy's approach to rebasing was market related or not;
- [k]. the question whether the principles which were applied in determining the market value which fell to be ascribed to the areas on the property which had been set aside for parking purposes were sound and, if so, the question whether such values had been correctly computed;
- [l]. the question whether Mr Bokhorst had ignored the provisions of section 46(3)(c) of the MPRA in determining the market value of the property;
- [m]. the reliability of the information furnished by Mr Gaddy to Mr Bokhorst;
- [n]. the question whether rates and taxes had to be taken into account in determining the gross rentals of the premises located on the property, or whether they should only have been taken into account in determining the correct rate of capitalisation;
- [o]. the question whether for the purposes of determining market value Mr Gaddy was correct in treating the property as being untenanted as at the date of valuation, notwithstanding the fact that it was in reality tenanted;
- [p]. the question whether Mr Gaddy had manipulated the rental figures;
- [q]. the question whether Mr Gaddy acted independently and impartially or whether he had demonstrated a bias adverse to the City;
- [r]. the question whether Mr Gaddy, by virtue of his employment with Sandton City, was conflicted, and if so, the effect of such conflict on the reliability of the inputs which he had furnished to Mr Bokhorst.

[22]. This list is by no means exhaustive.

F THE REPORTS AND EVIDENCE OF MR FOUCHE AND MATTERS RELATED THERETO

[23]. Mr Fouche had some years prior to testifying been appointed as the City's assistant valuer, which position he at all material times thereafter occupied.⁵ He had, in that capacity, fundamentally assisted in determining the market value of Sandton City during the 2017 year.

[24]. The report of Mr Fouche which accompanied that valuation was used by him during the course of his examination in chief in the proceedings before the Board and for some part of the cross-examination which followed thereon.

[25]. As I have said, Mr Fouche applied the income capitalisation method in valuing Sandton City. He, in the determination of the income had, however, used a method quite different to that which had been deployed by Mr Bokhorst. The method used by Mr Fouche involved the determination of the market value of the property from an analysis of the income derived from properties comparable to it and then drawing the mean from that analysis. He described the method which he had deployed thus:-

"We use the provable method or the comparable method, meaning that we look at rentals that has been concluded and thus comparable to this property being valued and we use that market information to determine a rental range which we then apply to the property and obviously, this rental range was documented in the market report⁶ for the Municipality."

[26]. It became readily apparent during his evidence in chief that in purporting to do so, Mr Fouche did not provide any detail concerning either the nature of the source data or its application in determining the gross rental per square metre for the purposes of his valuation of the property. It was thus not possible to determine whether, in applying the comparable method of in determining income, the result achieved by Mr Fouche was reliable. It simply could not be adequately tested. Mr Fouche on this score conceded that the techniques of assessment which are used in the preparation of a valuation must be stated and fully motivated if it is to comply with internationally recognized standards. He moreover conceded that for recognition a valuer needed to furnish a detailed analysis of his or her adopted

⁵ Mr Fouche is seemingly no longer involved in doing work for the City.

⁶ The 'market report' was compiled by Mr Fouche.

approach. He also conceded that for recognition calculations had to be disclosed and the manner in which comparable data had been applied needed to be stated. Mr Fouche's first report did not deal with any of these matters and there was nothing in it which substantiated the comparables which he sought to rely on.

[27]. It thus came as no surprise that the attorneys of the owners felt constrained to address a letter to the attorneys of the City on 5 May 2021. Because of the importance of that letter, the response which it induced and the consequences which arose therefrom, it is perhaps desirable that I quote the letter of 5 May 2021 and the response thereto. The letter reads as follows:-

"1. We refer to the email from Nicky Laubscher to Mr Bokhorst dated 7 April 2021 wherein, amongst other information, she provided our expert with an extract from the City of Johannesburg's Market Report ("the extract").

2 We request that you urgently provide us with the following:

2.1 the complete Market Report;

2.2 any underlying reports or information relied upon for the centre classification in paragraph 4.3.2 of the extract;

2.3 the rental information obtained in respect of super regional shopping centres that informed paragraph 4.3.7 of the extract;

2.4 the rental information obtained in respect of exclusive super regional shopping centres that informed paragraph 4.3.7 of the extract;

2.5 the calculations that show how the inputs in each of the columns captured in paragraph 4.3.7 in respect of super regional shopping centres and exclusive super regional shopping centres were determined;

2.6 the reports, documents or information relied upon for the market expenditure analysis in respect of super regional shopping centres referred to in paragraph 4.3.10.2 of the extract;

2.7 the calculations that show how the inputs captured in paragraph 4.3.10.2 in respect of super regional shopping centres were determined;

2.8 the reports, documents or information relied upon for the market vacancy analysis in respect of super regional shopping centres referred to in paragraph 4.3.10.3 in respect of the extract;

2.9 the calculations that show how the inputs captured in paragraph 4.3.10.3 in respect of super regional shopping centres were determined;

2.10 the annexures referred to on page 4 of the extract that informed any of the information sought in paragraphs 2.2 to 2.9 above;

2.11 the leases concluded after 2016/01/01 that were utilised in the model referred to in the fifth paragraph on page 15 of the extract reflecting the lease terms that were taken into account in respect of each of the super regional centres and exclusive super regional centres.”

[28]. On 21 May 2021 the City's attorneys responded thereto in the following terms:-

“1. We refer to your letter dated 5 May 2021 wherein your client requested, *inter alia*, the complete City of Johannesburg Market Report (“Market Report”) and the information relied upon for purposes of the Market Report. We wish to reply to paragraphs 2.1 to 2.11 of your letter as follows:

1.1 AD PARAGRAPH 2.1

Our client's expert only relied on the extract of the Market Report which has already been provided to your client's expert, following the meeting on 7 April 2021. The remainder of the Market Report is irrelevant to the current proceedings and as such your client is not entitled to same. Our instructions are therefore not to provide you with the complete Market Report.

1.2 AD PARAGRAPH 2.2

The underlying information relied upon in respect of paragraph 4.3.2 of the extract of the Market Report is from the South African Council of Shopping Centre's classification report dated September 2016, a copy of which is attached hereto.

1.3 AD PARAGRAPH 2.3

1.3.1 The information relied upon in respect of paragraph 4.3.7 of the extract of the Market Report is confidential information obtained during personal investigations by our client's expert and information from Sandton City management, the latter already provided to your clients' expert following the meeting on 7 April 2021.

1.3.2 The confidential information referred to in paragraph 1.3.1 above forms part of the subject matter of non-disclosure agreements concluded between our client's expert and shopping center managers, owners and other valuers.

1.3.3 The names of the shopping centres approached by our client's expert include, inter alia, the following:

- 1.3.3.1 Westgate;*
- 1.3.3.2 V&A Waterfront;*
- 1.3.3.3 Canal Walk;*
- 1.3.3.4 Gateway Theatre of Shopping;*
- 1.3.3.5 Cresta;*
- 1.3.3.6 Fourways Mall;*
- 1.3.3.7 Southgate;*
- 1.3.3.8 Northgate;*
- 1.3.3.9 Woodmead Retail Park;*
- 1.3.3.10 Norwood Mall;*
- 1.3.3.11 Balfour Mall;*
- 1.3.3.12 Killarney Mall;*
- 1.3.3.13 Rosebank Mall;*
- 1.3.3.14 Greenstone;*
- 1.3.3.15 Forest Hill Mall;*
- 1.3.3.16 Baywest Mall;*
- 1.3.3.17 Hemingways Shopping Centre;*
- 1.3.3.18 BT Ngebs Shopping Centre.*

1.4 AD PARAGRAPH 2.4

Paragraph 1.3.1, paragraph 1.3.2 and paragraph 1.3.3 of this letter is to be as if incorporated herein.

1.5 AD PARAGRAPH 2.5

The calculations cannot be disclosed as, inherent in the calculations, is confidential information forming the subject matter of non-disclosure agreements concluded between our expert and shopping center managers and their respective valuers.

1.6 AD PARAGRAPH 2.6

1.6.1 The information relied upon in respect of paragraph 4.3.10.2 of the extract of the Market Report is confidential information obtained during personal investigations by our client's expert and information from Sandton City management, the latter already provided to your clients' expert following the meeting on 7 April 2021.

1.6.2 The confidential information referred to in paragraph 1.6.1 above forms part of the subject matter of non-disclosure agreements concluded between our client's expert and shopping centre managers, owners and other valuers.

1.6.3 Paragraph 1.3.3 is to be read as if incorporated herein.

1.7 AD PARAGRAPH 2.7

1.7.1 Paragraph 1.5.1 and paragraph 1.3.3 of this letter is to be read as if incorporated herein.

1.8 AD PARAGRAPH 2.8

1.8.1 The information relied upon in respect of paragraph 4.3.10.3 of the extract of the Market Report is confidential information obtained during personal investigations by our client's expert and information from Sandton City management, the latter already provided to your clients' expert following the meeting on 7 April 2021.

1.8.2 The confidential information referred to in paragraph 1.8.1 above forms part of the subject matter of non-disclosure agreements concluded between our client's expert and shopping center managers, owners and other valuers.

1.8.3 Paragraph 1.3.3 is to be read as if incorporated herein.

1.9 AD PARAGRAPH 2.9

Paragraph 1.5.1 and paragraph 1.3.3 of this letter is to be read as if incorporated herein.

1.10 AD PARAGRAPH 2.10

There are no such annexures that informed any information sought in paragraphs 2.2. to 2.9 of your letter.

1.11 AD PARAGRAPH 2.11

The reference to 'only leases concluded after 2016/01/01 were utilized in the model' at paragraph 15 of the extract of the Market Report, was intended as a reference to lease information supplied by owners and managers of various centres, which included but were not limited to Sandton City. Save for the information from Sandton City, which has already been provided by your clients' expert following the meeting on 7 April 2021, the remainder of the information is of a confidential nature as mentioned in this letter above."

[29]. Mr Fouche in many instances resisted the production of the documents sought on the basis that he had signed confidentiality agreements with the enterprises which had provided him with them. The matter was considered by the Board and on 10 September 2021 it handed down a ruling which required Mr Fouche to “*furnish the requested information*” to the owners and the Board, on the basis that the Board would not be able to make an informed decision “*on the entire matter, if it does not have the said minimum information requested; i.e. the Board is in the ‘dark’.*” This information related to all relevant documents in the possession of Mr Fouche “*to show as to how he arrived at an amount of market rental in respect of his valuation of Sandton City.*”

[30]. Pursuant to the Board’s direction, Mr Fouche, through the City, provided the documents sought through the expedient of what was described as a “*fully motivated report*” compiled by him.

[31]. It was moreover plain from Mr Fouche’s evidence in chief that he had used the comparable method in purporting to determine the market value of the property, a matter clearly borne out by his first report, his evidence in chief and part of his cross-examination. It is equally plain therefrom that Mr Fouche had not used information obtained from 19 shopping centres which he regarded as premier in order to construct what he described therein as a “*super exclusive regional shopping centre category*”. Mr Fouche’s earlier evidence to the contrary was at best suspect. It is equally plain that Mr Fouche used Sandton City’s rent roll for the purpose of determining the property’s market value, albeit that he adjusted the rentals referred to therein. He opined that the practice was perfectly permissible and was not hit by Sandton City as a pivot in determining its market value;

[32]. Mr Fouche was thoroughly cross-examined by counsel on behalf of the owners and his reports and oral evidence were attacked in literally every respect.

[33]. Such matters, *inter alia*, related to the following, namely whether:-

[a]. he, in determining the market value of the property, failed to heed section 46(3)(c) of the MPRA;

- [b]. his conduct in using the rent roll of Sandton City as a pivot in determining its market value;
- [c]. the criterion used by Professor Millington in relation to the methodology used by Mr Fouche in determining the income of the property was justified;
- [d]. the nineteen shopping centres which he had used as comparable shopping centres to the one located on the property, were in fact comparable;
- [e]. he had properly taken all matters into the reckoning for the purpose of his valuation of the property;
- [f]. his approach in valuing the property was at all times consistent;
- [g]. the assumptions and the specific market rental inputs upon which he relied in valuing the property had properly been identified;
- [h]. his approach in valuing the property was consonant with recognized principles of valuation;
- [i]. the shopping centres which he had initially suggested had been used for comparable purposes in determining the market value of the property had in fact so been used;
- [j]. his approach in valuing the property was at all times consistent;
- [k]. the assumption of specific market rental inputs relied upon by him in valuing the property had properly been identified;
- [l]. his approach adopted in valuing the property conformed with recognized principles of valuation;
- [m]. it was open to him to deploy the comparable method of computation in valuing the property;
- [n]. he in reality compared the property to itself in circumstances where the inputs from the other shopping centres which he suggests he had considered, were not comparable to the shopping centre located on the property;
- [o]. the omission in his supplementary so-called “fully motivated report” to show the calculations relating to the manner in which he had used his source information to calculate the retail income inputs upon which he had relied in determining the value of the property rendered that determination unreliable;
- [p]. the reliability of the inputs and methodology used by him in determining the market value of the property;
- [q]. the inputs had in all events been verified and the source thereof identified;

[r]. the methodology used by him had been used consistently;

[s]. his reports were deficient in terms of recognised standards, with the result that it was impossible to test the reliability of the seminal conclusions embodied therein;

[t]. his reports satisfied the material requirements of internationally recognised standards.

[34]. This list is by no means exhaustive.

G THE OVERVIEW

[35]. It is plain that Mr Bokhorst, on behalf of the owners, and Mr Fouche, on behalf of the City, sought to determine the market value of the property on the basis of the income capitalisation method of valuation.

[36]. There was, however, a sharp difference between them in relation to the application of that method. Mr Bokhorst on this score applied the profits method, while Mr Fouche applied the comparable method. The result spawned by these different applications was pronounced for Mr Fouche's valuation of the property exceeded that of Mr Bokhorst by some two billion rand. This was largely attributable to the vast differences between their respective determinations of income. This in turn was spawned by the different methodologies which had been deployed and their reliability. Mr Fouche in this regard conceded that the competing approach would give rise to disparate results;

[37]. It can be accepted that the income method of valuation adopted by both Mr Bokhorst and Mr Fouche was appropriate for the determination of the market value of the property. It is at this point that the commonality between them ceased for they thereafter applied different approaches when giving effect to the income compensation method of valuation.

[38]. One would in this regard have expected the Board in its determination to make a finding as to which one of these two divergent approaches was the more appropriate and to fully motivate its choice.

[39]. Having done so, it would then have been incumbent on the Board to analyse and determine the numerous disputes which have arisen between the parties in regard to the proper application of their respective divergent approaches.

[40]. This would have placed the Board in a position to make its own determination of value, thereby enabling it to resolve the impasse which had arisen between Mr Bokhorst and Mr Fouche.

[41]. Moreover, credibility issues had arisen in relation to both Mr Bokhorst and Mr Fouche. They needed to be resolved by the Board.

H THE DECISION OF THE BOARD

[42]. The Board in its decision of 14 February 2023 dismissing the appeal valued the property in the sum of R10 144 700 000.00. This exceeded the value which Mr Fouche had determined, albeit, and as will presently emerge, the Board accepted Mr Fouche's evidence without reservation and concomitantly rejected that of Mr Bokhorst and Mr Gaddy.

[43]. The Board, in relation to the evidence of Mr Bokhorst, made the following observations:-

[a]. he demonstrated much hesitation when testifying on the question whether the approach adopted by Mr Gaddy satisfied industry norms;

[b]. he should have established market rentals independently of Mr Gaddy but rather chose to rely on the latter's empirical figures;

[c]. his evidence did not disclose that he had taken into the reckoning the rentals charged in other shopping centres such as the Mall of Africa and Melrose Arch and consequently he had not demonstrated that he had tested the reliability and propriety of the approach which Mr Gaddy had adopted;

[d]. he had opted for a higher capital expenditure rate which ought to have had the effect of reducing the capitalisation rate, ostensibly because he considered that the actual capitalisation rate which had been provided to him in 2017 resulted in him ignoring the much lower one which had prevailed in 2016;

[e]. the gross rentals used by him did not include rates and taxes as an expense thereby evidencing an incorrect approach;

[f]. he has the necessary skill and experience to value the property.⁷

[44]. The Board in relation to the evidence of Mr Gaddy, had this to say:-

[a]. he was not a professional valuer but a professional in his own discipline and that in consequence the owners ought to have used an independent specialist who was not conflicted;

[b]. he was the “owner” of the property who, for all practical purposes, was to be considered as “the *pater familias* due to his position as the Centre Manager, a position which naturally brings impartiality⁸ and subjectivity.”

[45]. The Board, in relation to the evidence of Mr Fouche, made the following observations:-

[a]. there was no reason to believe that he had at any stage during the course of his evidence acted *mala fide*;

[b]. his experience in the valuation of commercial properties dated back to when he was still a manager of the Amalgamated Banks of South Africa Ltd and that his involvement in the valuation of specialised properties was clearly illustrated;

[c]. the methodology employed by him accorded with national valuation standards and thus the manner deployed by him in valuing the property was satisfactory to the Board in all respects.⁹

[46]. These observations in my judgment represent bald conclusions without any real factual support. Disturbingly, the Board made no effort whatsoever to deal with

⁷ Strikingly the second and third respondents did not during the course of the proceedings challenge the expertise of Mr Gaddy.

⁸ The Board clearly intended to use the word “partiality”.

⁹ The findings were conclusionary in nature. It was far from reasoned.

the copious criticism which had been levelled against the reports and testimony of Mr Fouche, some of which went to the root of whether he was to be regarded as a credible witness or not.

I THE DECISION IN THE MPUMALANGA DIVISION OF THE HIGH COURT IN THE MATTER BETWEEN LEOPARD CREEK SHAREBLOCK LTD v THE VALUATION APPEAL BOARD FOR THE DISTRICT OF EHLANZENI AND MR THEUNIS NEL (CASE NO. 3258/2020) [2023] ZAMPMBHC 23 (14 April 2023) AND ITS SEQUEL IN THE SUPREME COURT OF APPEAL SUB NOMINE NKOMAZI LOCAL MUNICIPALITY v THE VALUATION APPEAL BOARD FOR THE DISTRICT OF EHLANZENI, THE MUNICIPAL VALUER FOR THE NKOMAZI LOCAL MUNICIPALITY AND LEOPARD CREEK SHAREBLOCK LTD (CASE NO. 615/2023) [2024] ZASCA 155 (13 November 2024)

[47]. A dispute had arisen between the Nkomazi Local Municipality (“the municipality”) and Leopard Creek Shareblock Ltd (“Leopard Creek”) in relation to the market value for rating purposes of property belonging to the latter. On this score, the property had been valued in the General Valuation Roll for the period 1 July 2009 to 30 June 2013 at R33 236 726.00. This general valuation was replaced in a supplementary valuation roll for the period 1 July 2011 to 30 June 2012, which roll reflected the value of the property as R1 424 100 000.00. Leopard Creek objected to the value reflected in the supplementary valuation roll, which roll was amended so as to reflect a value of R1 064 880 000.00. This gave rise to a further objection in consequence whereof the municipality reduced the valuation to R904 700 000.00. Leopard Creek lodged an appeal to the valuation and following thereon a new valuation roll for the period 2014 to 2018 was advertised. It now reflected the value of the property in the amount of R906 000 000.00. The appeal was settled on the basis that the market value of the property was to be taken as R550 000 000.00 for the period 1 March 2012 to 30 June 2014 and R750 000 000.00 for the period 1 July 2014 to 30 June 2018.

[48]. During February 2018, the General Valuation Roll reflected that the property had been valued at R1 300 000 000.00. This attracted an objection from Leopard Creek. The objection was unsuccessful and Leopard Creek lodged an appeal to the

Valuation Appeal Board for the district of Ehlanzeni against the decision to dismiss its objection.

[49]. Leopard Creek led the evidence of Mr David Nagle, Mr Sam Hackner and Mr Norman Griffiths in support of its objection. The municipality relied on the evidence of one witness only, namely Mr Derrick Griffiths, a very experienced valuer, to support the value of R1 300 000 000.00.

[50]. The Appeal Board accepted the valuation method of Mr Derrick Griffiths. It did so without assessing and evaluating the evidence of the witnesses who had testified on behalf of Leopard Creek and without furnishing reasons for preferring the evidence of Mr Derrick Griffiths to that of Mr Norman Griffiths.

[51]. This resulted in the institution by Leopard Creek of review proceedings in the High Court, essentially to uphold the appeal, to secure a declaration that the valuation method of Mr Norman Griffiths was to be accepted and that the market value of the property was to be determined in the amount of R330 000 000.00.

[52]. The review succeeded, save that the High Court did not endeavour to substitute a finding of value for that which had been set aside.

[53]. The approach adopted by the High Court (per Mashile J), is set out in paragraphs [112], [113] and [117] of the judgment. They read as follows:-

'[112] . . . the assessment of the expert evidence remains critical so that the reasoning of the Court making the decision of selecting the evidence of the one expert against that of another is not left in doubt. A perusal of the judgment of the [VAB] reveals that the evidence of Messrs Nagle, Hackner, and Peak was summarised but there is no appraisal of why such evidence, on which Mr Norman Griffiths based his valuation, had to succumb to that of Mr [Derrick] Griffiths nor are there reasons for the unconditional acceptance of the latter's evidence.

[113] The [VAB] cannot evade the obligation of furnishing reasons for its decision on the basis of the case of Dormehl supra where it was held that it does not have to accept the evidence of any witness, even of the only

witness. Where a body such as the [VAB] does so, however, it must do it with justification. This is what I am unable to find in the judgment of the [VAB]. . . .

[117] How the [VAB] reconciled that approach and finally accepted [Mr Derrick Griffiths] testimony leaves me baffled. More extraordinary is [the VAB]'s claim that Mr Derrick Griffiths had used the comparable sale and cost methods to arrive at his valuation. Mr Derrick Griffiths himself stated in his evidence that the comparable sale method could not find favour with him because there has not been a similar transaction to which the subject property could be compared. To simply state that the evidence of the witnesses of [Leopard Creek] is not acceptable smacks of bias in the sense envisaged in Section 6(2)(a)(iii) of PAJA and therefore vulnerable to a review.'(Citation omitted.)

[54]. The Supreme Court of Appeal upheld the reasoning of Mashile J and dismissed the review of the municipality. Mokgohlola JA (with Nicholls and Weiner JJA and Coppin and Mjali AJA concurring) reasoned thus in paragraphs [21] to [27] of the judgment:-

[21] Counsel for the Municipality submits that the high court erred in concluding that the VAB's failure to comprehensively assess the evidence of Leopard Creek's expert witnesses, before rejecting it, amounted to bias and rendered its decision unreasonable. Counsel submits that courts, in carrying out their task of ensuring that administrative decisions fall within the bounds of reasonableness, must guard against usurping the function of administrative agencies.

[22] Counsel referred to the test, stated in *Carephone (Pty) Ltd v Marcus NO and Others*, namely whether there is 'a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?' He submits that the issues before the VAB have been exhaustively dealt with in two hearings, before two differently constituted VABs. The same expert witnesses ie Mr Norman Griffiths and Mr Derrick Griffiths, gave evidence in both hearings and the parties were represented by the same legal representatives. The evidence and the details of the information put before the VAB on both occasions, the submission continues, are known to both the

Municipality and Leopard Creek. Therefore, according to the Municipality, it cannot be said that the reasons of the VAB are not clear or adequate, and that either party did not have a clear understanding why their cases were successful or unsuccessful.

[23] The above submissions are ill-conceived for the following reasons. First, the VAB is an administrative decision-making body, tasked with an administrative duty to decide appeals brought before it. In doing so, it must assess and evaluate the evidence before it and give reasons for its decision. This is the core function of the decision-making body. It cannot be said that, because the facts of the appeal are known to the parties, the VAB can abdicate its duties and responsibilities including giving reasons for its decision.

[24] Second, the issue between the parties was that the Municipality was to determine the market value of the subject property, and to levy a rate on that property. To do so, the Municipality had to comply with the provisions of s 30(1) of the MPRA that requires it to carry out a general valuation of the subject property. This can only be done with the assistance of expert valuers. Therefore, the evidence of both Mr Norman Griffiths and Mr Derrick Griffiths was of considerable importance in deciding on the correct approach to the valuation, or the methods to be used, in determining the market value of the property. Their evidence was to be assessed, evaluated and analysed to determine its quality and cogency. This would have assisted the VAB to find and give reasons why the method testified to by one is preferred to that of another. This, the VAB failed to do.

[25] Leopard Creek contends that the VAB's failure to give reasons for its decision deprived it of its constitutional right to a fair administrative process. To this, the Municipality responds that the VABs are specialist tribunals, and their members have a unique understanding of the specialist valuation concept. They deal with appeals from several municipalities in the country. To expect the VABs to formulate reasons in the same manner as a court of law would cripple the very important administrative function of such boards. The Municipality submits further that it was not necessary for the VAB to give reasons for its decision because the parties who participated in the appeal

were well informed of the context and knew exactly what was sought to be conveyed in the findings of the VAB's decision.

[26] This submission is without merit. It does not matter how many cases the VAB deals with. It must assess every piece of evidence, analyse it and provide reasons for its decision. Its failure to do so rendered its decision irrational and unlawful. I find that the high court was correct to set the decision of the VAB aside."

[55]. The principles which emerge from Leopard Creek are readily discernible. The Board is an administrative decision-making body. As such it is required in making its decision to assess and evaluate the evidence adduced before it and in light thereof, to provide reasons for that decision. Inasmuch as the Board will inevitably be required to rely on the evidence of expert valuers who might be at odds with each other in relation to the most appropriate method of valuation and the application of that method, the need for the assessment and the evaluation of that body of evidence is of vital importance for it is only following thereon that the Board will be able to furnish reasons as to why it has chosen the evidence of a particular valuator in preference to that of another.

[56]. It need hardly be stated that the function of assessment and evaluation is of fundamental importance for it enables the decision of the Board to be scrutinised to determine whether that assessment and evaluation holds a rational connection to the reasons said to have been founded thereon. Bland assertions and conclusions without the required assessment and evaluation will not satisfy the threshold which the Board is required to meet. Similarly, the rejection by the Board of evidence on the basis of tenuous or ill-conceived grounds will in my judgment also not pass muster.

J ANALYSIS

[57]. The question which now arises is whether the Board in making the determinations which it did, complied with the principles embodied in the judgments just referred to. It is in this regard plain that if it did not, its determination will be treated as irrational and of no force and effect, hit as it is by several of the grounds of review embodied in PAJA.

[58]. At the forefront of it all, it needs to be observed that the Board did not seek to determine which of the divergent methods deployed by Mr Bokhorst and Mr Fouche in determining the income which was to ascribed to the property for the purpose of determining its market value. It was entirely silent on what may properly be described as a matter of critical importance. A proper analysis by the Board of the bases which underpinned these competing methodologies was needed.

[59]. The proper application of these competing methodologies also needed to be analysed. Much was in issue in regard thereto and the challenges directed by counsel on behalf of the City to the approach of Mr Bokhorst and Mr Gaddy needed to be identified, addressed and determined. A similar process was required by the Board in respect of Mr Fouche. The Board in its determination said very little about these matters, contenting itself with what may only be described as an uncritical acceptance of the credibility and expertise of Mr Fouche.

[60]. Some criticism was raised by the Board relating to the evidence of Mr Bokhorst and Mr Gaddy. It was certainly not sufficient to warrant the outright rejection of their evidence and at the end of the day it is impossible to discern the basis upon which the Board both on fact and credibility preferred the evidence of Mr Fouche to that of Mr Bokhorst and Mr Gaddy. There was moreover very little indication why the competing application of the income method of valuation was decided in favour of the City and not the owners, more especially as the methods of the latter were supported by Professor Millington's article, of which article the Board said nothing.

[61]. Counsel on behalf of the Board painstakingly sought to justify its decision. This was not for counsel to do.¹⁰ The rationality of the decision needed to be

¹⁰ On this score, Rogers J (as he then was), said the following in paragraph 80 in *De Zalze De Zalze Golf Club v Valuation Appeal Board for the Stellenbosch Municipality and Another* (3429/19) [2020] ZAWCHC 108; [2020] 4 All SA 754 (WCC): "The converse also applies. If an administrative body, in this case, a valuation appeal board, has acted irrationally and without good reason in arriving at a decision, the decision should not be allowed to stand just because the Court considers that the same result could be reached by a permissible or adequate line of reasoning. The appellant for review is entitled to have a proper decision from the body appointed by statute to make it. This is particularly important where one is dealing with a specialised subject such as property valuation. Quite possibly a pure-profits method such as I sketched in the preceding paragraph is unsound."

evidenced by the terms of the award itself and not by any *ex post facto* analysis by counsel in argument on its behalf. It is in this regard instructive that the Board made no attempt whatsoever in its answering affidavit in the review to justify its decision.

[62]. Applying the test of rationality pronounced in the two cases to which I have referred, it seems to me that the owners' contention that the determination was in fact irrational is unassailable. The review must on this ground alone succeed.

K SECTION 46(3)(c) OF THE MPRA

[63]. Section 46(3)(c) of the MPRA provides that in determining the market value¹¹ of a property¹² any unregistered lease in respect of that property must be disregarded.

[64]. The language in the context in which it is used and in light of the purpose of the provision, is in my judgment clear.¹³ It in the clearest of terms proscribes the use of "*any unregistered lease*" in respect of the property for the purpose of determining its market value.

[65]. Support for this approach is by way of analogy to be found in the decision in *Blue Circle Ltd v Valuation Appeal Board Lichtenburg* 1991 (2) SA 772 (AD). This case dealt with the construction to be placed on section 9 of the now repealed Local Authorities Rating Ordinance 11 of 1977, which section, *inter alia*, dealt with the duties of a valuer in determining the improved value of land, the site value of land and the value of improvements which had been made to the land. The Ordinance went on to provide that in determining those values, the valuer shall "*not take into account any value accruing to the land ... by reason of the presence ... on or under*

¹¹ Section 46(1) of the MPRA stipulates that the market value of a 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.

¹² "Property" is in relevant part defined in section 1 of the MPRA as meaning: "(a) *immovable property registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit 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) ...; (d) ...*".

¹³ This represents the unitary approach to statutory interpretation as illustrated in cases such as *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at para [18] and *Mbambisa SA and Others v Nelson Mandela Bay Metro* 2025(3) SA 112 (SCA) at para [40].

the land concerned of ... '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 for domestic purposes, or any other machinery which may be prescribed.'

[66]. The Appellate Division in dealing with the construction of section 9 said the following at 792 A - G:-

"But the controversy between the parties as to the true meaning of s9(2)(c)(ii) remains, and for the reasons mentioned, it is desirable that we should deal with it. The legislature would appear to have recognized 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. Section 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 s 9(1). The use of 'shall' makes it obligatory to leave out of account the value referred to in ss (c)(ii). This means that 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 v Minister of the Interior 1963(4) SA 559 (C) at 574 F; Metropolitan Board v 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 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 s 9(2), no material difference between saying 'exclude any

value accruing from (the presence of) the machinery’ and ‘exclude (the presence of) the machinery.’ (own emphasis).”¹⁴

[67]. The approach thus adopted conforms with the golden thread which runs through the MPRA. The market value as defined therein is what needs to be determined. It must in this regard be accepted that rentals derived from properties need not necessarily be market related. This may arise in consequence of a variety of circumstances. Leases, and thus the rentals thereunder, including any escalations thereof, may have been concluded long before the due date for the determination of the market value of the property burdened by them. The country may then have been experiencing economic distress with the result that rentals might well have been lower than those which might have been commanded had economic circumstances been better. In the event of an improvement in the economy during the duration of the leases, the rentals would lag behind those which might otherwise have been justified by the now more buoyant economy. Similar considerations will apply in circumstances where leases are concluded in good economic conditions, which conditions may, with time, slump. There might be other factors with similar consequences. It is for these reasons that the legislature in enacting the MPRA required that the market value of property was to be determined without reference to any unregistered lease over it. The interpretational approach which thus commends itself to me, is one which is consistent with the language of the legislature, as read both in context and in light of the purpose of the enactment.

[68]. There was some suggestion during argument that section 46(3)(c) would not be breached where, for the purposes of the market value determination, the valuer does not scrutinise the unregistered leases which burden the property under valuation but simply relies on other documents which reflect the matters contained therein. I do not accept the construction for, if upheld, the proscription embodied therein would become meaningless. It would on this score permit a valuer to cause the rentals under the unregistered leases to be reproduced on a piece of paper, which information he or she would then be at liberty to use without restraint for the purposes of determining the market value of the property burdened by those leases.

¹⁴ See in this regard *Lientjie Ackerman, Ben Espach & Antonie Viviers: Practical Guide on Municipal Property Rates* (2025) at p134.

This could never have been the intention of the legislature and it is significant that the argument was faintly raised and hardly pursued.

[69]. In short, the prohibition under section 46(3)(c) is absolute and reference may not be had to the rentals embodied in any unregistered leases burdening the property under valuation, even if those rentals are subsequently adjusted.

[70]. Counsel for the Board, and counsel for Mr Eloff and Mr Fourie, raised a further contention. They submitted that section 46(3)(c) will only be triggered in circumstances where the property being valued is burdened by a single unregistered lease. Reliance in this regard was placed by both of them on the wording of the section, more particularly the words *“any unregistered lease in respect of the property.”*¹⁵ Counsel submitted that these words unequivocally proclaim that what the legislature had in mind was a single unregistered lease which burdened the property as a whole.

[71]. I respectfully demur. The construction contended for will in my judgment lead to absurd consequences. The section will then not have an application where there are a number of unregistered leases in respect of the property. Office blocks and blocks of flats will not be subject to the stricture imposed by the section with the result that in respect of them, the valuer will be able to take the unregistered leases into the reckoning for the purposes of the determination of market value. This will only be possible in the case where the property under valuation is burdened by a single unregistered lease. There can be no rational basis for this distinction which will necessarily follow if heed be given to the construction contended for.

[72]. The better view, with respect, is to accord to the section a wide interpretation and in this context the word “any” as used therein must be construed as referring to one or more unregistered leases. The section in my judgment conveys the notion of a plurality of leases. I accordingly reject the construction contended for.

¹⁵ My underlining.

[73]. The fact that Mr Gaddy may also have breached section 43(6)(c) is of no moment for it cannot cure the breach thereof attributable to Mr Fouche whose evidence formed the very foundation of the Board's ultimate determination. It moreover does not help to suggest that the unregistered leases were not taken into the reckoning for the purposes of determining the market value of the property as the rental reflected in those leases, was adjusted and only then taken into account. The rental reflected in the leases in question was indispensable to that adjusted calculation and consequently must have been taken into consideration for the purposes of the determination of the property's market value.

[74]. It is beyond doubt that Mr Fouche, in order to arrive at the market value of the property, used information embodied in the unregistered leases which burdened the property. It is equally beyond doubt that the Board, in accepting the evidence of Mr Fouche in his determination of the value of the property, used the same information. It consequently ignored the proscription under the section. This rendered its determination null and void and of no force and effect.

[75]. The review must also succeed on the ground that the Board failed to comply with the provisions of section 43(6)(c) of the MPRA.

[76]. It was finally contended on behalf of the Board, Mr Eloff and Mr Fouche that Leopard Creek was distinguishable on the basis that the facts in that case differed from those under consideration in this case.

[77]. The points of distinction were summarised in paragraph 50 of the second and third respondents' supplementary heads of argument in the following terms:-

"50. The fundamental differences between this matter and the Leopard Creek matter includes inter alia the following:-

50.1 In the Leopard Creek SCA judgment, that VAB was held to have failed to justify its decision, whilst in the current matter, the VAB provided clear reasoning for its decision;

50.2 In the Leopard Creek SCA judgment, the LC VAB was held not to have considered and evaluated the experts' evidence, whilst in the current matter it

follows from the VAB ruling that the respective experts' evidence had indeed been properly considered and valued;

50.3 The main grounds of review relied upon in the two matters are vastly different;

50.4 Material concessions were made by Mr Bokhorst in this matter concerning the market rental (determined not by him, but by Mr Gaddy) utilised by him as income stream to derive at his market value, such material and critical concession being absent in the Leopard Creek matter;

50.5 In both this and the Leopard Creek matters, the respective applicants relied on averred contravention of the MPRA, however, they essentially relied upon contravention of different sections thereof;

50.6 The completeness of the Rule 53 Record in the Leopard Creek matter were heavily contested, whereas the VAB in this matter confirmed that there was no written record of deliberations;

50.7 The geographic locations, nature of the properties, valuation methods etc differed substantially;

50.8 The respective VAB's justifications for their respective decisions differ;

50.9 The Leopard Creek dispute involved different valuation methodologies, whereas this case involved refinements within an identical valuation methodology;

50.10 The independence of some of the witnesses in this matter is at issue, whereas this was not an issue in the Leopard Creek case;

50.11 Leopard Creek's property was unique and essentially undividable which made valuation difficult, whereas in the present case, despite the subject property (Sandton City) being unique, same consists of distinct commercial entities with clear revenue streams;

50.12 The valuation dispute in Leopard Creek had an extreme percentage difference, whereas in this case, the gap was significantly smaller; and

50.13 The VAB's outcome in Leopard Creek was arbitrary, in increasing the valuation unexpectedly, while the VAB in this case upheld a determined valuation."

[78]. The grounds raised in paragraphs 50.1, 50.2, 50.4 and 50.13 are in my judgment unsustainable on the facts. Those raised in paragraphs 50.3, 50.5, 50.6,

50.7, 50.8, 50.9, 50.10, 50.11 and 50.12 may well be factually correct. They, however, in my judgment do not impact upon the application of the principle in *Leopard Creek* and its applicability to the facts of the case now under consideration.

[79]. It is thus readily understandable that counsel did not support the contention with any degree of confidence. It was in fact hardly argued.

L BIAS

[80]. It is clear that the Board accepted the evidence of Mr Fouche without any proper analysis thereof. The need for analysis was patently clear for Mr Fouche's evidence was said by counsel on behalf of the owners to be false in material respects. It was in other respects said to be unreliable and clearly wrong.

[81]. The absence of a proper scrutiny by the Board of Mr Fouche's evidence, the concomitant rejection of the evidence of Mr Bokhorst and Mr Gaddy and the failure to furnish reasons why the evidence of Mr Fouche was to prevail over that of Mr Bokhorst and Mr Gaddy, are such that the owners would have formed a reasonable apprehension of bias on the part of the Board in favour of the City.¹⁶ This represents the traditional approach to determining the question whether a court or tribunal has adopted an unconscious bias.¹⁷ In short, Mr Fouche had been instrumental in valuing the property for the purpose of the marketing report. He was then, and at all material times thereafter, the assistant valuer of the City, albeit that by then he no longer actively worked for the City. The fact that the Board made no reference to these matters in the context of a potential bias is, given the approach that it adopted in relation to Mr Gaddy on that issue, quite inexplicable.

¹⁶ It is in this regard instructive that the Board found that Mr Gaddy, by virtue of the fact that he was the manager of the property was biased in his evidence in favour of the owners. A similar finding was not made against Mr Fouche whom it is common cause valued the property in his position as the assistant property valuer of the City and thereafter valued it under the MPRA for rating purposes. On an objective analysis, he may well have wished to support his earlier valuation. He might also have wished to protect his position as the assistant property valuer of the City. Whether he did or did not, is beside the point. What is relevant, is that having stigmatized Mr Gaddy as partial and biased, the Board ought, I daresay, to have applied its mind to the question whether Mr Fouche in his evidence displayed similar traits in favour of the City.

¹⁷ See in this regard *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 4 SA 147 (CC) at para 45; and *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para 30.

[82]. The Board has fallen far short of its obligations to determine the matter so as to bring about fair administrative justice. On any objective basis, the owners had every reason to suppose that its uncritical acceptance of the evidence of Mr Fouche and its rejection of the evidence of Mr Bokhorst and Mr Gaddy, on what at best for it can be described as tenuous grounds,¹⁸ the Board demonstrated a bias adverse to them. The test for bias has in my view been satisfied.¹⁹

[83]. The review falls to be upheld on this further ground.

M COSTS

[84]. Costs will follow the event. The second and third respondents actively opposed the relief sought by the owners. They in fact played the dominant role in seeking to uphold the decision of the Board. They were in this regard not merely participants who wished to assist the Court in arriving at the correct decision. There is in my view no reason why they should not be mulcted in costs. The order which I propose making on the issue of costs is, in my judgment, just and equitable as contemplated in section 70(1) of the MPRA.

N THE RESULT

[85]. The review falls to be upheld with costs, which costs are to include the costs consequent upon the engagement of two counsel. They are to be reckoned on Scale C of Uniform Rule of Court 67A. The costs are to be paid by the first, second and

¹⁸ The Board for example found that Mr Bokhorst lacked the expertise to value the property which it described as specialised in nature. Mr Bokhorst's expertise was not in dispute and had in fact been conceded by counsel on behalf of the City during the course of his cross-examination of Mr Bokhorst. Mr Bokhorst's expertise was thus not an issue which arose in the matter. The Board by way of further example made much of the fact that Mr Bokhorst's report contained a typing error. Mr Bokhorst, when cross-examined on this issue, conceded the typing error but stated that this had absolutely no impact on his conclusions in relation to the property's market value.

¹⁹ It is perhaps well that I mention that in the *Leopard Creek* case (both in first instance and on appeal) bias was raised as a ground of review in circumstances where the evidence of the municipality's valuer was simply accepted in preference to the evidence of the property owner's valuer without reasons being furnished for that preference. In both Courts the question of bias as a ground of review was raised but seemingly neither felt it necessary to conclusively deal therewith.

As to the test for bias, reference may be conveniently had to the decision in *President of the RSA v SARVU* 1999 4 SA 147 (CC) at para 45.

third respondents, jointly and severally, the one paying the others to be absolved. The appeal will be referred back to a differently constituted board for hearing afresh.

ORDER

The following order will consequently issue:-

1. The review is upheld and the determination of the first respondent is set aside.
2. The matter is remitted for hearing afresh to a differently constituted valuation appeal board of the City of Johannesburg.
3. The costs of the review proceedings are to be paid by the first, second and third respondents, jointly and severally, the one paying the other to be absolved.
4. Such costs are to include the costs consequent on the engagement of two counsel and are to be taxed on Scale C of Uniform Rule of Court 67A.

**G FARBER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

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