THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 3429/19

In the matter between

DE ZALZE GOLF CLUB **APPLICANT**

and

VALUATION APPEAL BOARD FOR THE STELLENBOSCH MUNICIPALITY **FIRST RESPONDENT**

STELLENBOSCH MUNICIPALITY **SECOND RESPONDENT**

Coram:	Rogers J
Heard:	13 August 2020
Delivered:	25 September 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

Introduction

[1] The applicant, De Zalze Golf Club ('Club'), seeks the review and setting aside of a decision made by the first respondent, the Valuation Appeal Board for the Stellenbosch Municipality ('VAB'), in the Club's appeal against a valuation of its golf course by the second respondent, the Stellenbosch Municipality ('Municipality'). The valuation (which is for purposes of municipal rates) and the appeal were regulated by the Local Government: Municipal Property Rates Act 6 of 2004 ('Rates Act'). The Municipality's valuation was R97,5 million while the VAB's valuation was R26,5 million.

[2] The Municipality opposes the application. The VAB abides the court's decision but has filed an explanatory affidavit. Although the proceedings of the VAB were mechanically recorded, a transcript has not been placed before me. Information as to what happened at the VAB's hearings is confined to what the parties have stated in their affidavits.

[3] The Club holds a 99-year lease of the golf course from the De Zalze Winelands Estate Home Owners Association ('HOA'). The golf course is located within a gated residential estate. The valuations discussed below were valuations of the Club's leasehold. At all material times the golf course was operated under contract by De Zalze Golf Club NPC ('NPC'), a non-profit company of which the Club is the sole member. All financial activities relating to the golf course are accounted for in NPC.

[4] In terms of the operating agreement, none of NPC's income may be used for any purpose other than ensuring that the golf course and golf club business are used, maintained and improved for the benefit of the Club and its members.

[5] The Club's constitution stipulates that it may not distribute profits or gains to any person and that it is required to use its funds solely for investment or for the objects for which the Club has been established. The constitution envisages that the Club will seek tax-exempt status. Whether this has happened does not appear from the record. If the Club is tax-exempt, then upon its dissolution any excess of assets over liabilities must be transferred to another tax-exempt club or association having similar objects. If it is not tax-exempt, on dissolution any such excess must be distributed to members in such proportions as the Club's committee may determine.

[6] The HOA's memorandum of association states that it cannot distribute its assets in any way. It may not pay dividends. Its income and property must be applied solely in the promotion of its main object.

[7] In terms of the 99-year lease, the annual rent payable by the Club to the HOA is R100. The Club may not use the leased area for any purpose other than a golf course and related activities without the HOA's consent which shall not be unreasonably withheld. The Club is entitled to all revenue and income earned from the leased area and is responsible for all operational and necessary capital expenditure and losses. The Club must at its own cost maintain the leased area and attend to all repairs, renewals and replacements that may reasonably be required. It is must pay all rates and taxes as well as charges for water, electricity and sewage imposed in respect of the leased area.

[8] Clause 12.6 of the lease requires the Club to accumulate all entrance fees in a capital reserve fund which will be used only to meet the golf course's capital

expenditure (‘capex’) requirements. These entrance fees are once-off fees payable by new members. There is no similar restriction imposed on the Club in respect of annual subscriptions, playing fees, green fees and the like.

[9] In terms of the lease, the Club may sub-contract to a third party its rights and obligations in respect of the maintenance, management, operation and control of the leased area, subject to the Club’s committee’s consent which may not be unreasonably withheld. (The operational agreement between the Club and NPC is such a sub-contract.) For the rest, the Club may not cede, delegate or encumber its rights and obligations under the lease, and may not sub-let, without the landlord’s prior consent which may not be unreasonably withheld.

[10] It is common cause that the VAB’s valuation decision is ‘administrative action’ for purposes of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).

The leased area

[11] The leased area comprises 14 erven, some of which belong to the HOA and over others of which it has secured servitudes. The total area of these erven is 63,17 ha. Naturally the fairways, greens and surrounding roughs cover the greater part of this area. The clubhouse (including the pro-shop) is located on Erf 296. It appears that the other improvements, such as offices, ablution facilities and workshops, are also on Erf 296, which is 9801 m² (ie just under one hectare).

[12] The valuation of R97,5 million against which the Club appealed to the VAB stated in its heading that it was a valuation in respect of Erf ‘296/A’, 9801 m² in extent. The meaning of ‘A’ in this reference is unexplained. In the substantive part of the valuation, there were columns headed ‘Entity’, ‘Category’, ‘Tariff’ and ‘Valuation’. ‘Entity’ refers to an identified piece of property. The value of R97,5 million appeared in the last column of the first row, preceded by

'Primary', 'Business' and 'BUS' in the Entity, Category and Tariff columns. Beneath this row, the 14 erven making up the leased area were listed in the Entity column, in each case with 'Business' in the Category column, 'PROS' in the Tariff column and R0 (Rand zero) in the Valuation column. There was an entry of this kind *inter alia* for Erf 296. From the Municipality's Property Rates Policy, which forms part of the record, one can see that 'BUS' signifies 'Business' while 'PROS' signifies 'Private Open Space'.

[13] The VAB's amended valuation followed exactly the same format, save for the revised figure of R26,5 million in the 'Valuation' column of the first ('Primary') row.

[14] Although in the event the Municipality's valuer and the VAB adopted a method of valuation which concentrated on the improvements located on Erf 296, it is clear that such valuations were intended to be the rateable value for the golf course as a whole. Since it would be difficult, and of no practical relevance, to apportion the value of the golf course as a whole between the individual erven, it made sense to attribute the value to a primary property and to give a zero value to everything else. It thus seems that 'Primary' and '296A' were intended to encompass the entire golf course and its improvements.

Factual background

[15] In 2014 the Municipality valued the golf course at R10 million. The Club objected. Following negotiation, the Club in November 2016 accepted a valuation of R9,705 million as a resolution of its 2014 objection, though it recorded its view that its leasehold did not have a market value and it reserved the right to base a future objection on that view.

[16] In March 2018 the Municipality issued a supplementary valuation of the golf course in the amount of R97,5 million. The Club objected, relying on the

report of a professional valuer, Mr J F du Toit. In its objection the Club advanced two main contentions in the alternative:

(a) The first was that the leasehold should, for two reasons, receive a purely nominal valuation. The first reason was that various restrictive documents had the effect that the leasehold had no value for a notional buyer. The second reason was that the presence of the golf course had caused a substantial enhancement in the value of the residential properties in the estate and that to assign a material value to the golf course would result in double taxation.

(b) The second contention, if the first was rejected, was based on two different methods of valuation, namely the net income ('NI') method and the depreciated replacement cost ('DRC') method. On the NI method, Mr du Toit arrived at a valuation of R2,831,940, which he regarded as an absolute maximum. His DRC method came to R6,950,274. The average of these outcomes yielded a rounded-up value of R4,9 million.

[17] The NI method (in later documents called the 'profits' method) requires the valuer to determine the annual net income which the owner or leaseholder can derive from the property. This net income (NI) is capitalised at a capitalisation rate ('CR'), set at a level reflecting the relative risks of the income-earning operation. The valuation formula is NI ×100/CR. The lower the risk, the lower the capitalisation rate and the higher the valuation. For example, a CR of 8% effectively means that the net income is multiplied by 12,5 while a CR of 20% means that the net income is multiplied by only 5.

[18] The Municipality dismissed the Club's objection. On 7 May 2018 its valuer, Mr H C Botha, provided his reasons. As to the Club's first contention, Mr Botha said that his market data did not substantiate the claim that properties in the De Zalze estate sold at a 20% premium due to the golf course. He rejected the restrictive documents as a basis for assigning a nominal value, stating that the

Club could conclude an operating agreement with an operator of its choice and recover a substantial rent. He adhered to his valuation of R97,5 million, though he did not explain how he reached it.

[19] The Club appealed to the VAB, relying substantially on Mr du Toit's earlier report and on additional evidence relating to the alleged premium conferred on the De Zalze residential properties by the presence of the golf course.

[20] The VAB began hearing the appeal on 18 June 2018. Mr du Toit and Mr Botha made representations. The VAB adjourned because it was apparent that the two valuers needed to exchange information. This led to further reports from Mr du Toit and Mr Botha dated 20 and 23 August 2018.

[21] In the intervening period, Mr Botha supplied Mr du Toit with information about how he had arrived at his valuation of R97,5 million, and it is convenient to explain Mr Botha's methodology, bearing in mind that he made this valuation at a time when he did not have access to NPC's annual financial statements:

(a) He took the view that the profits method (which I take to be the same as the NI method) would yield the most probable market value.

(b) He distinguished between profits generated by the golf course (green fees and cart fees) and by improvements such as the clubhouse (including the pro-shop), offices and workshops.

(c) In the case of the golf course, he assumed green fees and cart fees of R12,55 million and expenses of R6,875 million (at an assumed 55% of gross revenue). To the net figure of R5,675 million he added annual new members' fees of R125,000, thus arriving at R5,8 million which he capitalised at 10%, yielding a valuation for this component of R58 million.

(d) In the case of the improvements, he assumed that the owner/leaseholder could let out the clubhouse buildings (1634 m²) at R170/m² , and the office and outbuildings (184 m² each) at R200/m² and R80/m² respectively. These rates yielded a gross monthly rent of R329,300 and a gross annual rent of R3,951,600, from which he deducted expenses of R592,740 (at an assumed rate of 15% of gross rental revenue), giving net income of R3,358,860, which he capitalised at 8,5%, arriving at a rounded-down valuation for the improvements of R39,5 million.

(e) The sum of the golf course valuation of R58 million and the improvements valuation of R39,5 million produced his total valuation of R97,5 million.

[22] It is also convenient to elaborate here on how Mr du Toit, on the NI method, reached his valuation of R2,831,940:

(a) NPC's 2017 operating profit from all sources (the golf course and improvements) was R6,845,427.

(b) From this figure Mr du Toit deducted R3,352,880 as a cost for the rental of movable assets. This was based on the fact that an operator wishing to acquire the right to operate the golf course would not, by purchasing the leasehold, get access to the movable assets needed to conduct the business. He assumed that the notional operator would conclude rental agreements for the acquisition of the necessary equipment. His figure of R3,352,880 was calculated with reference to NPC's property, plant and equipment ('PPE') of R16,400,292, for which he assumed a weighted average useful life of 7,22 years and a financing cost equal to the prime interest rate of 10,5%.

(c) After deducting this allowance, the operating profit reduced to R3,492,547. Mr du Toit then reasoned that the notional operating company would need to be able to make a profit. His profit allowance for the operating company was

R2,811,568, based on a net profit margin of 8% as applied to NPC's 2017 turnover of R35,144,600.

(c) This would leave the notional operator with R680,979, which Mr du Toit capitalised at 10%, arriving at a capitalised value of R6,809,787.

(d) However, so reasoned Mr du Toit, a buyer of the leasehold would need to cover the next year's anticipated capex, which NPC estimated at R3,977,847, meaning that the purchaser would not be willing to pay more than R2,831,940.

[23] In his report of 20 August 2018, Mr du Toit continued to support the two main contentions previously advanced. In regard to the second contention (which assumed a rejection of the primary contention that the golf course should receive a nominal value), Mr du Toit referred to the valuations of other golf courses, including the Stellenbosch Golf Club ('SGC') which held a long lease from the Municipality. Based on these other valuations, Mr Du Toit said that one could infer an average value of R8,973,059.

[24] He continued to maintain that the NI method (which he now called the profits method) yielded a valuation of R6,809,878 prior to a deduction for anticipated capex. This was based on a CR of 10%. He also advanced an alternative methodology which looked at the profit from the golf course and a notional rent for the improvements. The former he capitalised at 25% and the latter at 10%, arriving at a rounded-up valuation of R7,4 million.

[25] He criticised Mr Botha's valuation of R97,5 million on various grounds. One was that Mr Botha had used a CR of 10% for De Zalze's golf course revenue (green and cart fees) whereas in the SGC valuation (for which Mr Botha was also responsible) he had used 25%, which Mr du Toit regarded as more appropriate in view of the inherent costs and risks. Mr du Toit did not agree with the way Mr Botha had separated the golf course revenue and notional rent for the

improvements, since the golf course revenue was dependent on all the facilities. Furthermore, the rentals Mr Botha had assumed for the improvements did not reflect what could be afforded, having regard to the actual operational performance of the clubhouse. Mr du Toit suggested that if one attempted to isolate the profit from the improvements, one would arrive at a figure of R1,658,115 as the maximum affordable rent. If one applied a standard turnover rent percentage of 5% to the revenue generated by the improvements, one would arrive at an annual rent of R656,536.

[26] Mr Botha and Mr du Toit expressed their assumed rentals at a monthly rate per square meter. However, where a rate per square meter is derived from a notional total affordable rent per annum, the rate depends on the square meterage assumed. In the improvements component of his initial valuation of R97,5 million, Mr Botha assumed a square meterage of 2002 m², so his assumed gross and net improvements rentals of R3,951,600 and R3,358,860 equated to average rates of R164,49/m² and R139,81/m². In his report of 20 August 2018, Mr du Toit assumed a total lettable area of 4836 m², so naturally his figures, expressed as a rate per square meter, were much lower than Mr Botha's. On Mr du Toit's total square meterage of 4836 m², his annual affordable rent of R1,658,115 equated to a rate of R28,57/m² while his 5% turnover rent of R656,536 equated to R11,31/m². In the event, the VAB confined itself to the square meterage of the clubhouse (excluding other improvements), and used Mr du Toit's figure of 2172 m². To ensure that one is comparing like with like, it is preferable in my view to deal with the annual amounts rather than rates per square meter.

[27] In Mr Botha's report of 23 August 2018, he maintained that the profits method was the most appropriate valuation method. He explained how he had arrived at the valuation of R97,5 million. He did not in terms disavow it, but at the VAB's next hearing he conceded that it had been based on assumptions which

were inconsistent with NPC's financial statements. The method he supported at the next hearing was the third of three methods described in his new report. The first method was the NI method, looking at the income generated by the golf course and by the improvements, and taking account of expenses incurred. The second method was to determine the cost of the golf course and its facilities as new and to apply an appropriate depreciation figure.

[28] The third method, which he supported, was one which the City of Cape Town had used in valuing the Steenberg Golf Course. This involved simply 'rentalising' the improvements (buildings) without regard to the separate income and expenses of the golf course. A building is 'rentalised' by applying an affordable rate per square meter to its area. Using this method, Mr Botha arrived at a revised valuation of R30,75 million as follows:

(a) Apparently relying on square meterages supplied by Mr du Toit, Mr Botha took the clubhouse and offices at 2030 m², the workshop at 1380 m², ablution facilities at 18 m² and the open workshop at 535 m².

(b) Mr Botha 'rentalised' these areas as follows: R110/m² for the clubhouse and offices, R20/m² for the workshop, R10/m² for the ablution facilities and R5/m² for the open workshop.

(c) This gave him an annual rental income of R2,588,301, which he capitalised at 9% to arrive at a rounded-down valuation of R28,75 million.

(d) To this he added R2 million for the manager's house (based on comparable sales rather than rentalisation), giving a grand total of R30,75 million.

[29] The VAB reconvened on 28 August 2018, and Mr du Toit and Mr Botha presented their further submissions. The VAB issued its decision on 5 September 2018, valuing the golf course at R26,5 million. The VAB used an amalgam of Botha's initial and subsequent methodologies and assumptions, save that it

confined its valuation to the square meterage of the clubhouse (which it took to be 2172 m²) and that it applied a capitalisation rate of 10% rather than 9%.

[30] In relevant part, the VAB's decision reads as follows:

> 'After considering the documents filed by the parties and their oral submissions, the Board unanimously placed a value of R26,500,000 on the property, using the income method of valuing by determining the rental a notional operator will pay a notional landlord. Using the profit figures released by the Golf Club and the areas stated by Mr du Toit in his 20 August 2018 submission … the value was determined as follows:
>
> Total of commercial usable/lettable area (Clubhouse) is 2172 square metres, at a rental of R110 per square meter, per month = R238,920 = R2,867,040 per annum, less 15% expenses, leaving a nett annual rental of R2,436,984. Capitalised at 10% = R24,369,840, plus manager's house at R2,000,000, total value = R26,369,840, say R26,500,000.
>
> Cognizance was taken of Mr du Toit's submission regarding the restrictive documents but it was taken into account that the Golf Club in its financial statements reflects a profit notwithstanding these documents.
>
> Mr du Toit's further argument that the golf course adds value to the properties in the estate, was also considered, but due to the absence of a fixed formula to ascertain the exact impact of the golf course to the estate properties, a definite ruling in this regard could not be made.'

The grounds of review

[31] The following six grounds of review can be distilled from the founding papers:

(a) The VAB was required to value the golf course as a whole, not the clubhouse buildings.

(b) The VAB disregarded the restrictions affecting the operation of the golf course and assumed that because NPC's financial statements reflected a profit, such profits were distributable. The VAB disregarded the fact that the applicable agreements made it impossible for the Club to dispose of its

leasehold rights to a third party in a way that would enable the latter to operate the golf course as a profit-making business.

(c) The VAB rejected the enhancement/double taxation contention without explaining why there had to be a fixed formula to quantify the enhancing impact of the golf course on residential properties. The evidence before the VAB showed that the enhancement was on any reckoning so substantial that the golf course could have no independent value.

(d) The VAB simply adopted Mr Botha's rental rate R110/m² for the clubhouse, without explaining why that rate was adopted and without addressing or giving reasons for rejecting the lower rates put up by Mr du Toit.

(e) The VAB did not explain its adoption of a 10% CR.

(f) The VAB failed to take into account comparable valuations addressed in Mr du Toit's report of 20 August 2018, in particular the R7,2 million valuation of the highly comparable SGC.

[32] In its supplementary founding papers, following the delivery of the rule 53 record, the Club advanced a further ground of review, namely that the VAB had seemingly placed reliance on a report by Mr Botha dated 7 November 2017 without the Club having been notified that this document existed and that it was to be taken into account. In the VAB's explanatory affidavit its chairman stated that the Municipality had sent the report to the VAB an error and that the VAB had not considered or been influenced by the report. This ground of review was not pressed.

[33] In his explanatory affidavit on behalf of the VAB, its chairperson responded in summary to the six grounds of review as follows:

(a) As to the complaint that the VAB only valued the buildings, the valuation was a valuation of Erf 296, which contained the golf course's buildings. The VAB did not value the golf course as a whole.

(b) Regarding the effect of the restrictive documents on the leasehold's value, the VAB was not bound to take cognizance of restrictions contained in documents which were not registered against the title deeds. As to the restrictions in the lease, which was indeed registered, the Municipality and the VAB were not bound by those terms; if it were otherwise, 'all private owners could evade paying rates and taxes on property'. In any event, in terms of clause 28 of the lease and clause 9.6 of the operating agreement, those agreements could be consensually cancelled, and the operating agreement could also be unilaterally terminated in terms of clause 3 on 90 days' notice.

(c) Regarding enhancement and double taxation, the VAB had considered but not accepted Mr du Toit's submissions.

(d) The VAB's adoption of Mr Botha's rental rate of R110/m² did not mean that the lower rates put up by Mr du Toit were not considered. In the light of its knowledge of commercial rents in the Stellenbosch area, the VAB regarded Mr du Toit's rates as unreasonably low. Valuation is not an exact science, and valuers, including the members of the VAB, have to bring their professional expertise to bear.

(e) As to the CR of 10%, the VAB noted that the average CR for rental properties in Stellenbosch was 8%. A higher rate of 10% was applied to Erf 296 'to allow for contingent risks'. A rate of 20% - 25%, as contended for by the Club, would have been wholly inappropriate.

(f) As to the alleged failure to take account of comparable valuations, such failure is not a ground of review, because it is not obligatory for the VAB to value a property with reference to the value of comparable properties. In any

event, the SGC was not comparable because it is not privately owned and is not within a gated community.

First ground – valuation of buildings only

[34] I have already explained how I understand the valuation statements issued by the Municipality and the VAB. I do not accept the VAB's explanation that it confined its attention to the clubhouse because it was only valuing Erf 296. I can only think that that this was a lawyer's point which the VAB unwisely adopted. The Municipality in its answering affidavit followed the same course.

[35] It is perfectly clear that the 14 erven (or 13, if one excludes Erf 296) do not have a zero value. The very fact that they are listed on the valuation statements shows that they were viewed as part of a unitary exercise.

[36] The VAB was dealing with an appeal against the Municipality's valuation (through Mr Botha) of R97,5 million. It was the Municipality's valuation which demarcated the scope of the appeal. Mr Botha arrived at his valuation of R97,5 million by taking into account, *inter alia*, the revenue earned from the golf course (green and cart fees). In his initial reasons of 7 May 2018, Mr Botha stated that the profits method was the preferred valuation method 'to determine the open market value of the golf course and all applicable buildings'. In his report of 23 August 2018, he stated that his object had been to determine 'the market value of … Erf 296 that includes the golf course as well as the clubhouse, workshop, manager's house, ablutions and workshop shed'. The Municipality's valuation, in other words, related to all 14 erven.

[37] It is in this same report that Mr Botha suggested an alternative methodology which involved disregarding income from the golf course and simply 'rentalising' the buildings. Whether one regards this as logical or not, it was put up by Mr Botha as an alternative method of valuing that which had been

the subject of the valuation against which the Club was appealing. There is nothing to suggest that during the VAB's hearings the board stated that the parties had misapprehended the subject-matter of the valuation and that the board intended focusing only on Erf 296 as a stand-alone entity. The VAB's amended valuation is inconsistent with this having been its view; its valuation decision listed all 14 erven, assigning them a zero value after the 'Primary' valuation of R97,5 million. Moreover, and as the Club pointed out in its replying affidavit, the VAB, like Mr Botha, included in its valuation R2 million for the manager's house, even though the house is on Erf 4 (which formally received a zero valuation), not on Erf 296.

[38] The Municipality's counsel, in written argument, referred me to the reasons given for the valuation of R9,705 million in November 2016.[1] However, that valuation form only mentioned Erf 296. It differs from the valuation form used in the valuation of R97,5 million, which is the valuation against which the Club appealed[2] and which lists all 14 erven. In oral argument, I understood the Municipality's counsel to accept that the other erven making up the leased land received a zero valuation because the entire leasehold was valued under the aegis of Erf 296.

[39] A valuation of Erf 296 in isolation, without regard to the lease as a whole, would be fundamentally wrong and irrational. The Club did not have a separate lease in respect of Erf 296. It had a single lease covering 14 erven. The terms of the lease did not entitle it to deal separately with each erf. The entirety of the leased land had to be conducted as a golf course.

[40] Accordingly, if the VAB in truth treated Erf 296 as a separate entity for purposes of valuation, it would have gone fundamentally awry. But as I have said,

[1] Record 37.
[2] Record 39.

I do not think that this is what the VAB did. The VAB recognised, in my view, that it was valuing all 14 erven, but it accepted a methodology which focused on the buildings, most (but not all) of which were located on Erf 296.

[41] The Club's ground of review is that, in valuing the golf course as a whole, the VAB could not rationally confine itself to the buildings. In principle, and for the reasons stated above, I agree. A valuation which confines itself to the buildings (or here, just the clubhouse) is a valuation which disregards relevant considerations (namely the impact, on the valuation, of the composite leasehold in respect of the land in its entirety). Such an approach strikes me also as capricious and as being not rationally connected to the purpose of the empowering provision, which called for a valuation of the leasehold in its entirety (see ss 6(2)(*e*)(iii) and (vi) and s 6(2)(*f*)(ii)(*aa*) of PAJA).

[42] The question is, however, whether this warrants intervention on review at the Club's instance. If the VAB's valuation of the clubhouse and the manager's house were rationally a component of what should have been a larger exercise, the Club would only be prejudiced by the irregularity if a valuation of the balance of the properties (focusing on the other buildings and on the golf course itself) would have been negative, so that the overall valuation would have been reduced. If the valuation of the residual operations of the golf course would merely have increased a legitimate valuation of the clubhouse and manager's dwelling, the irregularity would be one from which the Club benefited.

[43] It is thus desirable to defer a decision on the first ground of review, pending a consideration of other matters.

Second ground – restrictive documents

[44] I have already summarised the most important restrictive terms of the constitutional documents of the HOA and Club and of the lease and operating

agreements. It is clear from these documents that the profit generated by NPC must be invested or used to maintain and improve the golf course and its facilities. No part of this profit may be distributed to members.

[45] The VAB's reasoning on this aspect in its decision of 5 September 2018 is skeletal, but it expanded upon its reasons in the explanatory affidavit. Its chairman referred to s 46(3)(*c*) of the Rates Act which states that in determining the market value of a property, any unregistered lease in respect of the property must be disregarded. This is not directly in point, because the Club was not objecting to the valuation on the strength of an unregistered lease. The Club did argue, however, that the valuer should have regard not only to the terms of the registered lease but also to the constitutional documents and operating agreement.

[46] In my view, the VAB was not wrong to adopt the attitude that the terms of the constitutional documents and the operating agreement did not directly govern the valuation. Aspects of those documents might be indirectly relevant to the extent that reference is made to them in the registered lease. For example, clause 16.1.4 of the lease provides that the HOA and its members' use and enjoyment of the golf course and club is subject *inter alia* to the Club's constitution. Clause 12.4 of the lease recorded certain terms contained in the Club's constitution as to the Club's maximum number of members and the categories of and qualifications for membership. However, the effects of these matters, and of other similar terms contained in the lease, would be felt and reflected in NPC's financial results.

[47] In terms of clause 20.1 the Club may not cede or delegate any of its rights and obligations, and may not sub-let, without the HOA's prior consent which may not be unreasonably withheld. Self-evidently this is a contractual restriction on the Club's ability to sell its leasehold. Although the restriction takes the form of a consent which may not be unreasonably withheld, I am prepared to assume that

the HOA could reasonably refuse consent to the Club's place being taken by an entity which intended to operate the course on a commercial basis with a view to distributing profits.

[48] However, this does not justify a conclusion that because the Club is practically incapable of selling the leasehold in the market, the leasehold does not have a market value. 'Property' is defined in the Rates Act as including a right registered against immovable property. The lease in the present case is such a right. In relation to such a registered right, 'owner' is defined as meaning the person in whose name the right is registered, here the Club. A registered leasehold thus constitutes rateable property on which, in terms of s 7(1), rates may be levied, though in terms of s 7(2)(*a*)(iii) a municipality is not obliged to levy rates on leasehold rights.

[49] If, as the Municipality has in the present case decided, rates are to be levied on leasehold rights, s 11(1) requires such rates to be levied as an amount in the Rand on the 'market value of the property'. Section 45(1) requires that the property (here, the leasehold) be valued in accordance with generally recognised valuation practices, methods and standards, and the provisions of the Act. Section 46(1) stipulates that, subject to any other applicable provisions of the Act, the market value of the property is 'the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer'.

[50] This must mean that, notwithstanding the terms of the registered right, a market comprising willing buyers and sellers must be assumed, ie restrictions on disposal in an open market must be disregarded (cf *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 881H-882A).

[51] This leaves the restriction against distribution of profit. Although the operating agreement limits NPC in what it can do with its net income, this is not a restriction inherent in the Club's leasehold. Assuming for the moment that NPC were able to distribute its profit, the Club is its sole member and thus the only potential recipient of distributed profit. The Club itself is constitutionally prohibited from distributing profit, but that is a limitation contained in its constitution, not in the lease. The notional buyer of the leasehold would not be subject to the same limitation.

[52] In any event, and even if one simply looks at valuing the leasehold in the Club's own hands, the fact that it cannot distribute profit does not mean that it does not own a valuable leasehold. It means only that it has chosen to subject itself to a restriction which requires it either to invest its profit or to apply the profit to the enhancement of the leasehold property.

[53] In argument the Municipality's counsel referred me to the judgment of Vally J in *Atholl Development (Pty) Ltd v Valuation Appeal Board, Johannesburg, & another* 2014 (5) SA 485 (GJ). Counsel placed particular reliance on what the learned judge said in para 50. The learned judge stated that where a municipality elects not to value a registered lease, it is entitled to value the land in the hands of the owner without regard to the burden imposed by the registered lease. He observed that if a 'private treaty' were allowed to reduce the value of property on the basis that ownership of the burdened property would have limited commercial appeal to buyers, the purpose and objects of the Rates Act would be defeated. The correctness of that view does not arise in the present matter, because the Municipality, as it was entitled to do, chose to value the leasehold. Where it does so, the Municipality must naturally value the leasehold warts and all, save in the respects I have identified.

[54] Accordingly, I do not think that this ground of review has been made out.

Third ground – enhancement and double taxation

[55] Once again, the VAB's treatment of the extensive material and submissions placed before it on this subject is unsatisfactorily terse. In its decision of 5 September 2018 the VAB stated that it had 'considered' this aspect but had not felt able to make a 'definite ruling' because of the 'absence of a fixed formula to ascertain the exact impact' which the golf course had on the value of the residential properties in the estate. If the premise of Mr du Toit's contention was right, the absence of a 'fixed formula' to determine an 'exact impact' was germane only if it was a marginal case. On the figures put up by Mr du Toit, the enhancement in the rateable value of the residential properties was so great that it would dwarf any plausible valuation of the leasehold.

[56] The VAB's explanatory affidavit does not add much on this aspect. The board's chairperson observed that the VAB had not said, in its decision of 5 September 2018, that Mr du Toit's argument had been accepted, only that it had been considered. He immediately added that s 45(1) of the Rates Act required property to be valued in accordance with generally recognised practices, methods and standards, and he stated that the income method applied by the VAB had been compliant. Although he did not expand on this, I take him to mean that if the income method yielded a particular valuation, the VAB was not required to reduce or disregard it just because the presence of the golf course created an equal or greater enhancement in the value of the residential properties in the estate.

[57] Although I would have preferred the VAB to state its reasoning on this more fully, I think its view of the legal position is correct. It is a *non sequitur* to postulate that the value of property X is reduced by any enhancement which its presence causes to the value of property Y.

[58] Mr du Toit relied on an international publication by KPMG in support of an argument that the presence of the golf course might be expected to add 20% to the value of residential properties in the estate. The KPMG document is not powerful evidence in support of this proposition, given the relative smallness of the sample and the fact that only 46% of the participants in the survey considered that the enhancement was above 20%.[3] Be that as it may, there is nothing in this report to indicate that the participants thought that the values of the golf courses were reduced by the enhanced values of surrounding real estate. The same is true of Mr du Toit's evidence about the sales values of vacant and developed residential properties in De Zalze in comparison with vacant and developed residential properties in other Stellenbosch estates.

[59] The argument of double taxation has no traction if the enhancement in the value of surrounding properties is not matched by a reduction in the true value of the subject property. The true value of the subject property is determined by one or other acceptable method of valuation. If a proper valuation is arrived at, it is irrelevant that the subject property's presence has also enhanced the value of surrounding properties. It is not uncommon for properties to have this sort of effect on each other.

[60] Depending on the facts, one might find that leasehold restrictions in respect of a golfing property are so severe as to result in the leasehold having only a negligible market value. Although one must assume an ability by the leaseholder to sell the lease, the leasehold is for the rest made up of the combination of rights and obligations actually embodied in the lease. The burdens imposed on the leaseholder might be such as to yield only a negligible value for the leasehold. One would only expect this to be the case if the restrictions existed for the benefit of surrounding properties, yielding an enhanced value for them. If this causal

[3] Record 274-275. The total number of respondents was about 100 (see record 258), of whom about 54 were developers of golf courses connected to tourist resorts or real estate communities.

connection existed, it would be inequitable for the rating authority to take advantage of the enhanced values of the surrounding properties and yet to value the golfing property without regard to the restrictions forming part of the leasehold. In such a case one might truly speak of double taxation.

[61] However, this type of error can only occur if the valuer ignores the presence of restrictions which should be taken into account in the valuation. If these restrictions truly result in a negligible value for the leasehold, one would not need to quantify the extent of the enhancement they confer on surrounding properties, but the likelihood of such enhancement may give one comfort that, on a swings and roundabouts basis, the local authority is not losing rateable value.

[62] In the present case, the Club did not advance its case before the Municipality and the VAB on the basis that the enhanced values of the De Zalze residential properties were a consequence of particular restrictive terms contained in any of the constitutional and contractual documents. Its case was that the mere presence of a fine golf course enhanced the values of the residential properties. (And quite possibly, I may add, the presence of luxurious homes in the estate may symbiotically add value to the golf course.) Moreover, the VAB did not wrongly ignore any restrictions which should have been taken into account.

Fourth ground – rental rate of R110/m^2

[63] Once again, the VAB's reasons for its decision are unsatisfactory. I would have expected the board to address the details of Mr du Toit's contentions regarding the rental rate. Although an adjudicative administrative body does not have to state its reasons as fully as a court of law, it is still important for the losing party to know why its principal contentions were rejected.

[64] The VAB stated in its decision that it used the 'income method of valuing by determining the rental a notional operator will pay a notional landlord'. It went

on to say that it used the Club's profit figures and the floor areas stated by Mr du Toit. However, there is nothing in its decision or in its explanatory affidavit to show in what way it used the Club's financial results to reach the conclusion that a rental rate of R110/m² as applied to an area of 2172 m² was an appropriate notional rent.

[65] It is unclear whether the VAB had in mind a notional rent which the owner (HOA) could earn from a tenant, or a notional rent which the tenant (the Club) could earn from a sub-tenant. Since the Club's leasehold, rather than the HOA's ownership, was the subject of the valuation, one is concerned with the way in which the Club, not the HOA, could turn its rights in respect of the property to account. Accordingly, if one is assessing the value of the leasehold with reference to notional rental income, one would be concerned with the notional rent at which the Club could sub-let the lease property to an operator. The Club's peppercorn rent of R100 payable annually to the HOA is a given – it is part and parcel of the Club's leasehold.

[66] If the Club's financial results (or more accurately the results of its subsidiary, NPC) were driving the exercise, one would have expected the VAB to use the financial statements to arrive at a total amount of annual rent which the notional sub-tenant could afford to pay the Club, the supposition being that the sub-tenant would conduct the business generating the results seen in NPC's financial statements. For reasons I have explained, the square meterage to which this is applied, and the way one expresses the end-result as a rate per square meter, are somewhat arbitrary. The important thing is the gross amount of the affordable annual rent.

[67] The VAB's decision of 5 September 2018 and its explanatory affidavit indicate that it went about things the other way round. Based on its experience of

Stellenbosch commercial property, it concluded that R110/m² was a fair rental rate for the clubhouse building. It took Mr du Toit's version of the clubhouse's square meterage and in that way arrived at a gross annual rent of R2,867,040. There is nothing in the VAB's decision or explanatory affidavit to say in what way the NPC's financial statements entered the equation. The VAB does not even say that, having determined a fair rental in the abstract without regard to the financial statements, it examined the financial statements to ensure that such rental was actually affordable. (I assume in the VAB's favour, though even this is unclear, that it appreciated that the notional sub-tenant could not use the clubhouse area except for the purpose of providing clubhouse facilities for members of the Club. This is a limitation flowing from the leasehold which the VAB was valuing.)

[68] Can one assume, without more, that the VAB must have checked the financial statements to see that the gross rent of R2,867,040 would have been an affordable rent for the notional operator? I think not. There are too many matters on which it would have needed to form an opinion. We simply do not know whether it applied its mind to them. This is all the more so when one bears in mind that Mr Botha's report would not have provided the VAB with an answer. I asked the Municipality's counsel how Mr Botha arrived at his rental rate of R110/m². Counsel acknowledged that there was no explanation in the record.

[69] I have already summarised how Mr du Toit arrived at a capitalised value of R6,809,787, from which he deducted anticipated capex of R3,977,847 to arrive at a final valuation (on the NI method) of R2,831,940. Mr du Toit, like the VAB, was concerned with the rent which a notional operator could afford to pay for the leased property. But his starting point, unlike the VAB's, was NPC's actual financial results. Because he used these results, he took income from all sources into account, not only income from the clubhouse. This would be likely to lead to

a higher valuation than an approach which confined itself to income from the clubhouse, because although the golf course is not as profitable as the clubhouse, it is not loss-making.

[70] NPC's 2017 operating profit was R6,845,427. If this was the profit after all expenses other than notional rent, the VAB's notional annual rent of R2,867,040 would clearly be affordable by a sub-tenant achieving the same profits as NPC. However, Mr du Toit in his report pointed out that R6,845,427 would not be the notional operator's profit after all expenses other than notional rent.

[71] In the first place, the operator would need to have movable assets (PPE) in order to conduct the business. The leasehold and its sub-tenancy would only give the operator access to the land and buildings. Mr du Toit assumed that the notional operator would obtain its PPE by way of rental agreements at an annual cost of R3,352,880. Another possibility, not mentioned by Mr du Toit, would be for the notional operator to buy the PPE, but in that event there would need to be an allowance for annual depreciation. (NPC's bottom-line results are stated as EBITDAR,[4] ie results prior to provisions *inter alia* for depreciation.) The annual rental cost of PPE may be a fair proxy for an annual depreciation allowance.

[72] *Prima facie*, Mr du Toit is right that the notional operator would have to incur PPE costs. The VAB has not told us whether it took such costs into account and if so at what amount. Mr du Toit's assumptions in calculating the annual cost of R3,352,880 have not been alleged to be unreasonable. If these costs are deducted, the operating profit available to the notional operator reduces to R3,492,547.

[4] EBITDAR = earnings before interest, taxes, depreciation, amortisation and rent and restructuring costs.

[73] That, too, would be enough to cover the VAB's gross annual rent of R2,867,040. But, as Mr du Toit pointed out, no operator is going to sub-hire the leased land and conduct the business without making a profit. Accordingly, and on Mr du Toit's figures, both the notional rent and the operator's profit have to come out of the amount of R3,492,547. Mr du Toit assumed that an acceptable pre-tax profit would be 8% of turnover. Since NPC's 2017 turnover was R35,144,600, the pre-tax profit allowance was R2,811,568. (NPC's operating income in 2017 was much higher – 19,5% of turnover, though one should bear in mind that this does not include an allowance for depreciation.) Once this profit for the operator is deducted, one is left with Mr du Toit's annual rental figure of R680,979.

[74] *Prima facie*, Mr du Toit is correct that in determining the rent which the notional operator could afford to pay, some allowance has to be made for the operator to earn a profit. Once again, there is silence from the VAB as to whether it made any assumptions regarding the notional operator's profit. Mr du Toit's use of 8% of turnover has not been alleged to be unreasonable.

[75] Accordingly, and on Mr du Toit's approach, R680,979, rather than the VAB's R2,867,040, is the rent which the notional operator could afford to pay. I do not say that Mr du Toit's assumptions are in all respects right, but they are of sufficient substance that the VAB could not dismiss them without some process of reasoning. On the material available to me, it is not apparent how the VAB could have thought away the deductions which Mr du Toit says should have been made.

[76] Mr du Toit also considered that, after capitalising the notional rent at 10% to arrive at R6,809,787, there should be a deduction of R3,977,847 for anticipated 2018 capex. It is less obvious to me that this should simply be deducted as a capital amount in arriving at the leasehold's value. To the extent that the capex

entails further expenditure on PPE, one might account for it by way of an additional assumed annual PPE rental cost or additional depreciation allowance. Once again, however, we do not know what the VAB thought about this aspect of the matter.

[77] Another consideration is that the affordable rent needed to take into account the additional rates which would become payable if the property received a higher valuation. The VAB's valuation suggests that the Club's rates would go up threefold.

[78] All of this presupposes that one is assessing value by determining the rent which a notional operator (a sub-tenant of the Club) could afford to pay the Club for the right to occupy the leased land and conduct the golf business. The approach which Mr Botha originally took in his valuation of R97,5 million was simply to take the Club/NPC's profits and capitalise them at an appropriate rate. This is the pure profits approach. The hypothesis is that if someone stepped into the Club/NPC's shoes, such person could make all the profits which the Club/NPC makes. It is effectively a valuation of the business which can be conducted on the leased land.

[79] On this simple profits method, one would not need to externalise a notional profit for a sub-tenant. Since all profit remain 'in-house', one could avoid Mr du Toit's deduction of a notional profit for the operator of R2,811,568. There would simply be a business profit of R3,492,547, which would be capitalised at a suitable rate to arrive at a value which the purchaser of the business would be willing to pay. If it were capitalised at 10%, this would yield R34,905,070.

[80] However, this was not the VAB's methodology or line of reasoning. A court must bear in mind the distinction between review and appeal (see *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA

407 (SCA) para 52; *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 18). A court is not entitled to set aside an administrative decision just because on the merits it would have reached a different conclusion. The converse must also apply; if an administrative body has acted irrationally or 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 applicant 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.

[81] In my view, therefore, this ground of review has been made out. The VAB's valuation is not rationally related to the reasons it has given for its decision (s 6(2)(*f*)(ii)(*dd*) of PAJA). Relevant considerations were not considered (s 6(2)(*e*)(iii)). The decision was in any event unconstitutional and unlawful (s 6(2)(*i*)) because the VAB failed to apply its mind properly to the issues raised by the appeal (cf *Pharmaceutical Manufacturers Association of SA & another; In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 82-83).

Fifth ground – 10% CR

[82] I cannot find that the VAB's use of a 10% CR in respect of the clubhouse revenue suffers from a reviewable irregularity. In his valuation of R97,5 million Mr Botha capitalised the improvements revenue at 8,5%, and in his report of 23 August 2018 he capitalised it at 9%. The VAB's 10% was more favourable to the Club. In Mr du Toit's report in support of the Club's objection he arrived at the capitalised figure of R6,809,787 by using a CR of 10% (this related to the combined adjusted net income from the golf course and the improvements). In his

report of 20 August 2018, his alternative methodology, which arrived at a valuation of R7,4 million, likewise capitalised the notional rent on the improvements at 10%.

[83] Since the VAB did not include income from the golf course as a component of its valuation, it is unnecessary to consider what CR might have been appropriate for such income.

[84] I have mentioned Mr du Toit's criticism of the different CRs used by Mr Botha in the valuations of the SGC and De Zalze golf course. It is not altogether clear how the SGC valuation of R7,2 million was arrived at. After the first sitting of the VAB adjourned, Mr Botha supplied Mr du Toit with his view of the SGC's value, namely R21,54 million, based on a CR of 20% for golf course income and 8,5% for improvements income. As Mr du Toit pointed out,[5] Mr Botha had in fact capitalised the SGC improvements income at 20%, even though he specified the appropriate rate as being 8,5%. This is likely to have been a calculation error by Mr Botha, since 8.5% was also the CR which Mr Botha used in capitalising the De Zalze improvements income. If one adjusts Mr Botha's SGC calculations to eliminate this error, his total valuation of the SGC leasehold would be R32,125,176.

[85] Mr Botha was clearly of the view that the SGC valuation of R7,2 million was incorrect. He told Mr du Toit[6] that the valuation of R7,2 million could not be relied on because only the buildings had been valued; that even the buildings valuation needed to be amended because their extent had been understated by more than 2000 m²; and that the valuation of the entirety of the land would be revisited once the De Zalze case was finalised.

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[5] Record 288.
[6] See record 289.

[86] Accordingly, there does not seem to be any material inconsistency between Mr Botha's view regarding the appropriate CR for calculating the values of the SGC and De Zalze improvements income. It is also necessary to emphasise that the CRs used by Mr Botha in expressing his opinion to Mr du Toit of the SGC's true value have not resulted in any issued valuation. The CR (if any) used in the current SGC valuation of R7,2 million does not appear from the record.

Sixth ground – failure to consider comparable valuations

[87] The VAB contends that the Rates Act does not oblige it to have regard to comparable valuations. If it adopted a recognised valuation method, the fact that a different method might have yielded a different result does not make its valuation irregular. The VAB in any event considered that there were material differences between the De Zalze golf course and the closest alleged comparator, the SGC.

[88] The VAB offered three reasons why the SGC was not comparable to the De Zalze golf course. The first was that the SGC land is not privately owned. I do not see the relevance of this. The subject of the SGC valuation, as I understand it, was the SGC's leasehold rights, not the Municipality's ownership of the land.

[89] The second distinguishing feature, according to the VAB, was that SGC does not lie within a gated estate. The Club's counsel tried to deploy this distinction as a sword by arguing that this would make the SGC more, not less, valuable than the De Zalze course, because the SGC's value would not be deflated in value by virtue of the enhancement of surrounding residential properties. I have already explained why the evidence in this case does not show that an enhancement in the value of De Zalze residential properties is accompanied by a decrease in the value of the De Zalze golf course. So this ground of distinction may well be sound.

[90] The VAB's third reason was that in the SGC's case the entire golf course was valued whereas the VAB was only concerned with the valuation of De Zalze's Erf 296. It will be apparent by now that this is not a sound distinction. Furthermore, Mr Botha told Mr du Toit that the SGC valuation of R7,2 million was a valuation of the buildings alone, so one might expect it to be comparable with the VAB's valuation.

[91] Notwithstanding the questionable nature of two of the three grounds on which the VAB distinguished the SGC, in my view the VAB did not fall into reviewable error by declining to be guided by comparable valuations. Valuing a subject property with reference to arms-length sales of comparable properties is a well-known valuation methodology. There is no evidence, however, that comparable municipal valuations is an accepted method of valuing property.

[92] The Club's counsel placed reliance on the references in ss 45(2)(*b*) and (3) to 'comparative, analytical and other systems or techniques', 'mass appraisal systems', and to the valuation of property 'in accordance with any mass valuation system or technique'. I do not regard these provisions as mandating a system by which a single property's valuation is used as the basis for valuing another single property. The provisions are aimed at facilitating or simplifying the valuation of large numbers of properties.

[93] The Club's counsel in argument referred to the guiding principles in the Municipality's Property Rates Policy, among which are that the rating of property will be implemented fairly and equitably, and that all ratepayers within a specific category will be treated equally and reasonably. Section 3(1)(*a*) of the Rates Act requires a municipality's rates policy to treat persons liable for rates equitably. It was submitted that, at least in relation to the SGC, which falls within the

Municipality's area, the principle of fairness and equity required the De Zalze golf course to be valued along similar lines to the SGC.

[94] However, and even assuming the two golf courses to be closely comparable in all relevant features pertaining to valuation, acceptance of the Club's submission might require the Municipality to perpetuate a wrong valuation approach. The legislative requirement is for property to be valued in accordance with generally recognised valuation practices, methods and standards (s 45(1)), and a local authority may not depart from this in order to achieve fairness. Depending on the outcome of the present matter, the Municipality may decide that it is the SGC valuation, rather than the De Zalze valuation, that requires adjustment in order to ensure broadly equal treatment. It is apparent from the record that the valuation of golf courses has presented challenges for municipalities around the country, and that the last word has not been spoken on the SGC valuation.

Conclusion

[95] My conclusion is that the first and fourth grounds of review have been established. Since the fourth ground warrants intervention by the court, it is unnecessary to decide whether the same would have been true if only the first ground had been made out.

[96] Although the Club's notice of motion sought a substituted decision, its counsel recognised in argument that this exceptional course would not be appropriate and that the matter should be remitted to the VAB. The Club was anxious that my remittal order should contain binding directions regarding the VAB's fresh decision. I do not think that this is desirable, though the reasoning in this judgment will no doubt be taken into account by the VAB to ensure that its fresh decision will withstand scrutiny.

[97] The Municipality, which opposed the application, must pay the Club's costs. Both sides employed two counsel, a precaution which was justified.

[98] I make the following order:

(a) The application succeeds.

(b) The first respondent's decision of 5 September 2018, by which it placed a value of R26,5 million on the applicant's leasehold rights in respect of Remainder Erf 296 De Zalze, is reviewed and set aside.

(c) The matter is remitted to the first respondent for consideration and decision afresh. The first respondent will be entitled in its discretion to receive further evidence and submissions before reaching its decision.

(d) The second respondent must pay the applicant's costs, including the costs of two counsel.

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O L Rogers
Judge of the High Court
Western Cape Division

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