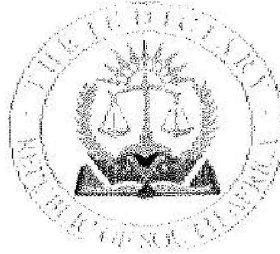
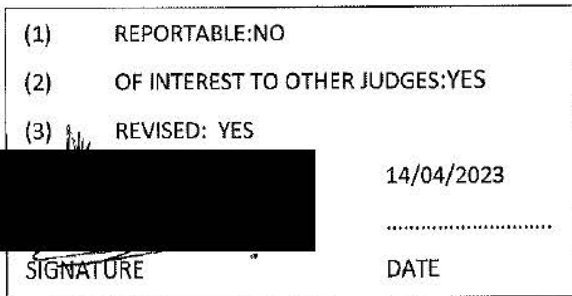
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)


(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES
14/04/2023
SIGNATURE DATE

CASE NO: 3258/2020

In the matter between:

LEOPARD CREEK SHARE BLOCK LTD Applicant

and

THE VALUATION APPEAL BOARD FOR THE DISTRICT OF EHLANZENI First Respondent

MR THINUS NEL: THE MUNICIPAL VALUER FORNKOMAZI LOCAL MUNICIPALITY Second Respondent

NKOMAZI LOCAL MUNICIPALITY Third Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] On an immovable property known as Portion 20 of the Farm Riverside 173, JU, in extent 335.724 hectares, registered in the name of the Applicant as an undivided piece of land ("the subject property"), is situated Leopard Creek residential Golf Resort ("Leopard Creek"). Leopard Creek and the subject property may in some instances in this judgment be used interchangeably. On 15 July 2020, the First Respondent determined the value of the subject property, as on 1 July 2017, at **R1 564 500 000.00**. The Applicant now seeks, in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), to review and set aside the decision of the First Respondent. Of the three Respondents, only the third opposes the application.

[2] The review of the decision of the First Respondent is premised on sections 6(2)(a)(iii), 6(2)(b), 6(2)(d), 6(2)(e) and 6(2)(f) of PAJA. These provisions of PAJA are the vehicle through which the expressions of Section 33 of the Constitution are manifested. Section 33 of the Constitution lays down in Subsection 3 that *National legislation must be enacted to give effect to these rights and must firstly, provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Secondly, impose a duty on the State to give effect to the rights in so (1) and (2. Lastly, promote an efficient administration.*

[3] The Applicant is a Share Block Company established in terms of the provisions of the Share Blocks Control Act, 59 of 1980 authorised to issue 112,505 shares apportioned

between 262 residential Share Blocks and a Country Club Share Block. It is a single farm portion with 111 houses. As a farm, the subject property has not been subdivided and does not comprise distinct stands that can be independently valued and sold. The parties are *ad idem* that the subject property has inimitable features making it difficult to meaningfully compare it to any other similar property in South Africa. Each of the 262 residential share blocks mentioned under Paragraph 2 *supra* consists of a varying number of shares. The Country Club Share Block comprises 20 100 shares.

[4] The subject property comprises:

4.1 335,745 hectares of undivided land;

4.2 251 residential sites divided between 80 residential riverfront sites bordering the Crocodile River overlooking the Kruger National Park and 171 bush or golf course sites;

4.3 Of the 251 residential sites, 113 have been fully developed with 112 houses;

4.4 Approximately 97 of the 251 residential sites, almost **38.8%** remain in the form of unsold share blocks being retained by the Developer;

4.5 A Hotel site that formerly housed the Malelane Hotel, which was destroyed by fire;

4.6 An 18-hole Gary Player design golf course;

4.7 A clubhouse complex, measuring approximately 3 600m;

4.8 A recreational centre, measuring approximately 785m developed on the Crocodile River Bank overlooking the Kruger National Park and similarly of high standard, complementing the quality of the development. The facilities include tennis and squash courts, a swimming pool and a gym;

4.9 2 maintenance workshops, in excess of 2 000m for support services;

4.10 An internal tarred road system with good stormwater management design forming part thereof;

4.11 A bulk Eskom electricity supply facility to which an internal electricity network is connected;

4.12 Water services, including a water extraction plant, purification works, internal water distribution networks and a sewer treatment plant;

4.13 Waste disposal facilities;

4.14 2 houses for management accommodation;

4.15 27 units for staff accommodation; and

4.16 Six 4-bedroom units providing casual overnight accommodation to guests.

TERSE BACKGROUND

[5] The Third Respondent ("the Municipality"), acting in terms of Section 2 of the Local Government Municipal Property Rates Act, 6 of 2004 ("MPRA"), intended to levy a rate on the subject property, which is located within its area of jurisdiction. To do so, however, meant that it had to comply with the provisions of Section 30(1) of the MPRA that requires it to carry out a general valuation of the subject property. In an endeavour to do this, the Municipality engaged the services of the First Respondent, which valued the subject property as on 1 July 2017 at **R1 300 000 000.00**.

[6] Alleging that the market value of the property as on 1 July 2017 was **R450 000 000.00**, the Applicant demurred against the valuation and on 26 March 2018

followed up by lodging a formal objection. On 13 July 2018, the First Respondent, appointed in terms of Section 33 of the MPRA, dismissed the objection raised on behalf of the Applicant. The First Respondent persisted that the value of the property as on 1 July 2017, was **R1 300 000 000.00**. Disillusioned with the decision upholding the previous valuation amount, the Applicant appealed to the First Respondent contending that the valuation be set aside and substituted for **R330 000 000.00**. On 15 July 2020, the First Respondent dismissed the appeal and set the value at **R1 564 000 000.00**.

[7] The Applicant now wants the decision of the First Respondent, which it is common cause is administrative as contemplated in Section 1 of PAJA, of determining the market value for rates purposes of the subject property on which it is situated Leopard Creek, a Golf Course Resort, reviewed and set aside. The decision of the First Respondent includes:

7.1 Dismissing the appeal of the Applicant against the decision of the Second Respondent, dated 29 June 2018 by which the Second Respondent refused to entertain the objection of the Applicant to the market value of the subject property being set at **R1 300 000 000.00** as published in the general valuation roll of the Municipality for the period 1 July 2018 to 30 June 2022;

7.2 Accepting that the valuation method applied by the valuer of the Municipality, Mr Derrick Griffiths, is realistic and suitable;

7.3 Determining the market value of the property to be **R1 564 500 000.00** as at 1 July 2017.

[8] In justification of the review, the Applicant alleges that the First Respondent is said to have gone off course, acted irrationally, failed to comply with a mandatory condition, made errors of law, refused or failed to consider relevant considerations, had regard to irrelevant considerations, acted arbitrarily and/or capriciously, acted unreasonably. All these, asserts the Applicant, could reasonably give rise to a suspicion

of bias. The situation is exacerbated by the explanatory affidavit delivered during December 2021 by the First Respondent in an attempt to give details of its decision.

[9] This, says the Applicant, happened in circumstances where no reasons justifying the decision were given in the judgment or when the First Respondent was obliged to do so in the notice of motion. The First Respondent selectively addressed the allegations made by the Applicant. When the Applicant detected that certain answers were not furnished, its Attorneys wrote to the First Respondent remarking that the following documents formed part of the record of decision:

9.1 All correspondence between members of the appeal board with the dates on which they met to deliberate and any emails wherein they expressed their views on the merits of the matter for purposes of coming to the decision;

9.2 All drafts of the decision and the correspondence under cover of which such drafts were circulated as well as all correspondence wherein members of the First Respondent commented thereon;

9.3 All correspondence between members of the First Respondent when the final draft decision was circulated for approval;

9.4 The documents or correspondence wherein each of the members of the First Respondent approved the decision and / or the reasons therefor.

[10] On 18 May 2021, the chairperson of the First Respondent alerted the Applicant's Attorneys that the record of decision had been delivered. The chairperson proceeded to state that *the Board Members did not have any further documents, like personal notes, other than the judgment delivered on 15 July 2022.* Hereafter subsequently and in its supplementary founding affidavit, the Applicant slated Mr Singwane for contriving the impugned decision in bad faith to the exclusion of the other members of the First Respondent without conducting a vote and with a clandestine motive.

[11] The Applicant then called upon the First Respondent to explain the absence of any record of deliberation and to dispel the inferred allegation with credible evidence. In response, Messrs Singwane and Nkosi, without presentation of evidence by the other board members, stated that Ms Serfontein and Mr Jacobs submitted a memorandum to Mr Singwane on 10 December 2019, wherein comments were made on the valuations undertaken by Messers Norman Griffiths and Derrick Griffiths. The memorandum does not address the evidence by Messrs Hackner, Piek and Nagle. This suggests that their evidence was not considered when the decision was made notwithstanding that the First Respondent had met on 22 June 2020 albeit that there exists no record of any form of the meeting.

[12] The Applicant states that Mr Singwane prepared a draft judgment which he circulated to the members of the First Respondent on 14 July 2020. The judgment was approved unanimously and published on 15 July 2022. The following evidence in support of these submissions was not produced:

12.1 Any email in which the views of the "*legal personnel of the Board*" were espoused;

12.2 Any email wherein the draft judgment was circulated; and

12.3 Any email wherein the draft judgment was approved by members of the First Respondent;

12.4 Mr Singwane did not furnish any evidence of application of the mind on the part of the First Respondent.

[13] The most conspicuous from the judgment of Mr Singwane, says the Applicant, is his total lack of response to the allegation of bias raised by the Applicant. Furthermore, it would seem from the affidavit that the only reason for the rejection of Mr Norman Griffiths'

evidence was that he regarded township establishment as the most appropriate development model whereas he should have used the sectional title model as the most suitable. The Applicant disagrees strongly with that approach because it was not even put to Mr Norman Griffiths that sectional title should be the preferred development model. In any event, it was neither the choice of Mr Derrick Griffiths nor the Third Respondent.

[14] For the reasons aforesaid, the Applicant asserts that it was completely irrational to thrust aside all of the evidence of Mr Norman Griffiths on this basis. The uncontested evidence of Mr Norman Griffiths was that the property could be converted into either free-hold title or sectional title units. A further complaint is that there is no explanation by Mr Singwane of the inconsistency between the belated memorandum and Paragraph 28 of the judgment where it was clearly stated that Mr Norman Griffiths wanted to establish a township. The difference between the memorandum and the judgment penned by Mr Singwane is incomprehensible. This, concludes the Applicant, suggests that the First Respondent has failed to properly apply its mind, to act reasonably in exercising its power and performing its functions.

EVIDENCE

[15] The evidence of all the witnesses is well summarized in the heads of the Applicant's Counsel. For that reason, I will be borrowing extensively therefrom. The first witness of the Applicant was Mr Hackner whose credentials and experience were not contested. That said, the Municipality nonetheless challenges his qualification to give expert evidence in property valuation matters such as in *casu.* Mr Hackner has personal knowledge of the sport of golf, in particular the falling number of Golf players worldwide and the fact that there are no new Golf Courses being built in South Africa. Since 2017 property market has been under pressure. Property prices in South Africa have declined over the preceding four years, 2015 to 2019. Business confidence is at an all-time low.

[16] Mr Hackner stated that in 2007 and 2008, banks and developers regarded Golf Courses as a brilliant way of making money based on spreadsheet projections which

assumed sales on a linear basis over a determinate period of time. This did not happen in practice. He said that in 2008, there was an over-supply of Golf Course Estates in South Africa. Since 2009, no new Golf Course developments have taken place. The Golf Estate market is a very small market and has been dwindling since 2007 especially with disposable income on the decline. In 2017, it took 15 years, as a developer, to get out of a golf estate development. At present, however, developers just cannot get out.

[17] Mr Hackner testified that the financial crisis in 2008 and 2009 had a disastrous impact on secondary residence developments. He further testified that any Golf Course development selling secondary homes in the current market with the current conditions is doomed to failure. In this regard Mr Hackner made reference to Golf Course estates such as Nondela, Highland Gate, Pinnacle Point, Clarence, Blair Atholl and Copper Leaf which Investec had to repossess due to their failure. His further evidence was that there are no buyers in this market for Golf Course developments because the holding costs are exorbitant. This is precisely what Investec experienced when it took over various Golf Courses specially second home estates. At one point, he said, Investec did not have a single sale across all developments in a month.

[18] Mr Hackner stated that the game of golf has become under extreme pressure both in South Africa and elsewhere in the world. The popularity of the sport has declined and continues to do so worldwide on an annual basis. The number of golfers has radically diminished and, as though that was not enough, one Golf Course per month was closing down in the United States. The cost of a round of golf has become prohibitive compared to other sports. Mr Hackner said that there are simply no international buyers for Golf Course developments.

[19] There is general understanding that there is no finance available for second homes except for the wealthy who do not require it. Investec has made it its policy not to fund secondary homes on Golf Courses. Mr Hackner thought that finance for secondary homes deteriorated since he gave evidence in 2017. He was adamant that there is no single secondary Golf Estate in South Africa that can make money. No developer would buy into

a Golf Course again. He would never advise Investec to buy into a Golf Course development ever. Mr Hackner thought that the subject property is not a valuable asset. On the contrary, he thinks that it is more of a liability than it is an asset.

[20] Mr Hackner testified further that if there was a chance to do anything at Leopard Creek, one would want to increase the number of units but that would require going through an environment impact assessment. There is no capacity to provide additional housing, for multiple flats, if there was a demand. The subject property is not designed as a primary residential property. Moreover, it is far from the major hubs of economic activities. The Share Block would act as an inhibition for any party that might become interested. Subdivision, rezoning, and electricity is problematic. The property is too far away, in a Malaria area and a Hotel is not feasible at the subject property.

[21] Mr Hackner added that Eexpropriation without compensation is a very real threat which places an obvious damper on high end and even lower end property. The Eskom crisis has impacted negatively on business sentiment and the economy. the lack of finance and bonds for second homes is a valid concern which is now worse than it was in 2017. The value of the subject property would not have appreciated since 2013 in value, on the contrary, it would have taken a significant dive. He pointed out that the **R750 000 000.00** valuation as at 1 July 2013 was far higher than what he thinks the market value of the subject property is.

[22] Mr Hackner stated that *the willing buyer for the subject property does not exist.* The location of the subject property would make it more desirable than a development such as Millvale Retreat but this does not make it desirable *per se.* Even if one were to apply a factor of five to Millvale's value as recognition of the superior location of the subject property, its value would still only be around **R400 000 000.00**. Furthermore, every golf course has some feature that renders it desirable, such as Pinnacle Point being by the beach, Cotswold Downs being close to the mountains, Highland Gates' access to fly fishing and birding. He conceded that none of these features is as special as being

alongside the Kruger National Park, but that none of that something different has proven to be any good.

[23] Mr Hackner conceded that Leopard Creek is a unique place. Its exclusive nature derives from its benevolent dictator; without whom it is nothing special. R Hackner testified that there is no healthy buying market of shares at the subject property especially seen in the light of the number of properties up for sale that had not been sold.

[24] The Applicant also led the evidence of Mr David Nagle ("Mr Nagle"), a property developer. His credentials as an entrepreneur in the property development market were not contested consequently I deem it superfluous to repeat them in this judgment. That said, it is nonetheless necessary to mention that since his arrival in this country in 1997 he has been involved in property development especially failed Golf Course development where he has gained broad experience. He testified that he has purchased and redeveloped Houghton Golf Estate, Eye of Africa Golf Estate and Serengeti Golf Estate. He is aware of the history of failed Golf Course developments. Among these, he mentioned Blair Athol, Highland Gate, Copper Leaf, Euphoria, Elements, Legends, Pinnacle Point and Nondela. Nagle said that he is known as a potential purchaser of Golf Course developments.

[25] Mr Nagle said that the Golf Course market was saturated. The natural consequence flowing therefrom was that Golf Course developments were being offered and purchased at a substantial discount. Furthermore, notwithstanding acquiring them at a considerable discount, there are still a number of risk factors that need to be taken into account in order for such a purchase to make commercial sense. Mr Nagle stated that he has experience in the Golf Course development property market. He was involved in the following golf course developments in South Africa:

25.1 Houghton Golf Club, which according to the Applicant, would probably have closed down had it not been for his investment of developing the Golf Club and adding a Hotel;

25.2 He purchased Eye of Africa development in the Midvaal District for **R115 000 000.00** from an Australian bank which had lost **R497 000 000.00** on the development. Eye of Africa has permission to develop about 4 500 houses. The infrastructure within the development, such as water treatment plants, power plants and the like, all had to be put in and paid for by the investors. His further testimony was that he had spent **R120 000 000.00** on infrastructure in Eye of Africa and a further **R600 000 000.00** in building new properties. At the time of giving evidence, he had not recouped the spend as yet;

25.3 He acquired Serengeti Golf Estate in the Ekurhuleni district for **247 000 000.00**. When he did so, the Bank had accumulated losses on the development estimated at **R846 000 000.00**. He invested **R2 500 000.00** into the development per month to keep it running. The Estate now has approximately 1 000 homeowners 500 of which were houses developed by Nagle. He hopes to make a profit and ought to if the development of the Estate continues on its current trajectory; and

25.4 Royal Johannesburg, which notwithstanding its 2 500 members, it still was not able to cover its expenses month to month.

[26] Mr Nagle stated that Golf Estates are not profitable in and of themselves but that the Golf Course assists in selling real Estate within the Estate. He was also offered the opportunity of investing in distressed Golf Courses such as Blair Atholl in Johannesburg and Highland Gate in Dullstroom. Mr Nagle testified that the aforementioned developments in which he had invested were all primary residence Golf Estates. He insisted that he would never get involved in a second or third home market as it is very susceptible to changes in the market. It is the first asset that people try to get rid of in tough economic times.

[27] Mr Nagle listed the factors that he, as a purchaser of Golf Course developments in the market, would consider, when taking a decision on purchasing a Golf Course development and in deciding on the price that would make the development financially viable:

27.1 The general economy of South Africa with a specific consideration being the low point at which the Golf Course development market found itself with little prospect of recovery in the short term;

27.2 The political uncertainty in South Africa at the time which has a direct influence on business confidence in South Africa and the economic outlook in the country;

27.3 The negative impact of state capture on the economy with a particular impact on the business confidence of high-end participants and a lack of desire to "*tie up*" funds in illiquid assets;

27.4 Threats of expropriation without compensation having caused a decline in business confidence and an unwillingness to invest in the market and the property market in particular;

27.5 The Eskom crisis' effect on the economy and the property market in particular with increasing concerns relating to the sustainability of property developments in light of the increased pressure that this places on the grid;

27.6 There is a decline in the number of golfers in the South African market, which increases the risk of it taking longer for an asset such as a Golf Course development to realise value;

27.7 For a Golf Course development to be successful, there needs to be an accessibility to finance on the part of the would be residents. Banks are not

willing to finance or grant large bonds in the second home market. This is particularly true of a non-residential Golf Estate. Furthermore, a Share Block structure makes accessibility to finance difficult, and would not be an attractive option for a developer;

27.8 Disposable income per household has diminished which results in slower sales rate, loss of turnover to cover expenses and the potential inability of purchasers to meet monthly levy expenses;

27.9 An acceptable based upon which to spread the risk in a Golf Course Estate would be through the development of at least 1,000 saleable units;

27.10 A developer would want to be in a position to realise a profit as soon as possible. The longer it takes to sell the units, the greater the risk to the developer;

27.11 The cost of maintaining a golf course is in the region of **R30 million** per year. These costs need to be recovered by a developer in some shape or form, and it is seldom through the amounts paid by players of Golf, but rather through levies collected from residents;

27.12 In South Africa, the average price per round of Golf is much cheaper than internationally. This means that a heavier burden is placed on the owners to help to carry the cost of maintaining the Golf Course;

27.13 A Golf Course Estate developer would mainly look for opportunities where there are many saleable units, for primary residential use, in a price range that is affordable to a large segment of the market, with easy access to finance; and

27.14 The purchase price to be offered on a particular development would be calculated on the basis of a discounted cash flow taking into account the best estimates of expected input values. Nagle is of the view that the prospects of making a profit on the purchase, redevelopment and sale of the property were extremely slim and that the risk taken would not be worth his while. As such, he would only be prepared to purchase the property as it stands at less than a discount of approximately **60%** to **70%**.

[28] Mr Nagle confirmed that he is a member and Share Block owner. He is familiar with its specific features. His opinion was that it will be an extremely high risk development for the following reasons:

28.1 It is a single farm portion with no units available for immediate sale. The notional sale that takes place for purposes of ascertaining value in terms of the MPRA is one that simply contemplates the sale of the property – not Leopard Creek Share Block Limited as a going concern. What this means is that the development would be a start up with no members and no contributions from existing Share Block owners. It is only the land and the improvements that would be sold;

28.2 The property, as at 1 July 2017, was only **50%** developed;

28.3 Leopard Creek is a public resort and permanent residence is not permitted thereon;

28.4 To develop the property and sell the individual erven, a formal township establishment procedure is required which can take 4 to 5 years to complete at an inordinate expense once all of the relevant professionals have been consulted;

28.5 The Spatial Development Framework, which identifies Leopard Creek as a site for tourism purposes, may need to be amended in the township establishment procedure;

28.6 The Minister of Agriculture's consent would be required for sub-division of the property;

28.7 Leopard Creek provides its own water and sanitation and the infrastructure would require a significant cash injection to upgrade the facilities and to extend services to additional stands, if the number of saleable units is to be increased in the subdivision;

28.8 Leopard Creek is not a primary residence estate and falls into the "*second home*" market. This, together with the fact that bond finance would not be readily available for such a purchaser and the fact that the houses that have been developed are upmarket, shrinks market participants. This increases risk for a developer significantly;

28.9 The houses that have been built are over capitalised;

28.10 A developer would start out with little to no members in the Golf Club. This, together with the known failure of most Golf Course developments, would significantly impact on a potential purchaser's decision to buy within this sort of development and would pose as a major risk to their investment until critical mass is reached;

28.11 In order for the development to be viable, it would need to be subdivided into 1000 erven, which will substantially diminish the exclusivity currently associated with Leopard Creek. Moreover, it is unlikely that the residential market of Malelane would be able to handle 1,000 homes coming into the market immediately. As such, a developer would in all likelihood need to

make do with the stands and houses already in existence once subdivision has taken place;

28.12 A second home Golf Course development has an incredibly low sales rate, which would drive the price of stands down making the project impracticable;

28.13 Leopard Creek is far away from any of the large cities in South Africa, making it an unreasonable destination to frequent. It is of limited practical use to a purchaser;

28.14 Leopard Creek is located in a malaria area;

28.15 The levy that will need to be charged to the 111 houses and 140 saleable erven once subdivided will be astronomical, which places an incredible financial burden on each of the owners from the outset;

28.16 The rates that would be applied to this property are also very high, which is a significant risk factor to any developer who would have to carry these costs pending the creation of saleable units and the actual sales of those units; and

28.17 In order to mitigate against all of these factors (including the factors dealt within Mr Norman Griffiths' report), the property would need to be purchased at the right price.

[29] It is not in dispute that no developer would buy at the price of **R1 300 000 000.00** as it would be impossible to realise a profit. He said that the traditional values and Golf ethic applied at the subject property are attractive to him and other like-minded exclusive members. the exclusivity of Leopard Creek is maintained through the strict rules relating to ownership of Share Blocks. Share Blocks cannot be marketed on the open market or

through independent agents. Share Block owners who wish to sell are compelled to market the relevant Share Block through the Leopard Creek portal. Access to the sales information is restricted to present Share Block owners.

[30] When a potential purchaser is found, he must be nominated by existing owners, a background check is conducted, the potential purchaser must undergo a series of interviews and ultimately be accepted by the committee before the sale can be concluded. The sales are therefore not open market transactions, but in effect an entry into an exclusive club of likeminded individuals who share a passion for Golf. The Share Block sales therefore function in a closed market. Given this, it is not uncommon for a share block to remain unsold for several years.

[31] The membership to the Leopard Creek Golf Club is limited and controlled through the number of stands that are available to the market, in that Mr Rupert indirectly owns most of the Share Blocks, which enhances exclusivity and adds value. The exclusivity is directly attached to Mr Rupert because he controls what can be available to the market at the subject property. levies, water, electricity at Leopard Creek is in the region of **R15 000.00** per month, in addition to the annual cost of Golf membership at **R40 000.00** per year. A very small percentage of the market can afford this on top of the capital outlay for a share block and development thereon.

[32] Mr Nagle testified that the cost of owning a Share Block with so little practical use, only a couple of weeks per annum, is prohibitive. It costs him about **R500 000.00** per annum to be part of Leopard Creek. Effectively, it costs him **R30 000.00** per night spent there. For that amount, he said, he could stay at some of the best Hotels in the world and play Golf at the best Golf Courses around the world. Leopard Creek is not an investment and is not attractive to buyers – even those buyers with sufficient disposable income to meet the excessive expenses. The network of people surrounding Rupert creates significant value that will disappear if the system is removed. The value is associated with the owner and not the land. He said that he would have to be talked up to an amount

between **R250 000 000.00** and **R300 000 000.00** to purchase the property. He regards himself as an able buyer and he is also, at the right price, a willing buyer.

[33] The next witness to testify on behalf of the Applicant was Mr Piek, the Club Director of Leopard Creek Country Club, which is the business arm of Leopard Creek. His duties include all golf operations, catering and looking after the membership. Specifically incorporated within those duties is the sales component. He explained the procedure that members would follow if they wished to sell their Share Blocks.

[34] In essence, he would collect relevant information of the Share Block that is to be sold and advertise it through the membership portal on the website by placing the Share Block in the sales section. Access to the portal is gained through a password. A sale can only go ahead if the potential buyer is approved for membership in the Country Club. There is an elaborate application for becoming a member of the Leopard Creek Country Club. It requires getting a sponsor, a seconder and five additional members to support the nomination. The conclusion of that process would see the application form being taken to a committee member of the Country Club to conduct an interview. If the member approves, the application will go through to the chairperson's office for final signature. Membership of the Country Club is the key to any possible sale transaction of a member's Share Block.

[35] He said that it is not possible to become a member of the Country Club without becoming a shareholder in the Share Block Company or being nominated by a shareholder and successfully passing the application process not including some exceptions. Leopard Creek Country Club Limited holds the Golf Course and a prospective member must also purchase shares in the Country Club Company at a price of **R40 000** per share which is built into the purchase price. Additionally, there is an annual additional membership subscription fee for the Country Club of **R41 000.00**. The Leopard Creek Country Club membership is a gateway to the club house, recreation centre and the Golf Course.

[36] Adjacent to Leopard Creek is a world class practice facility held by a separate entity known as the National Junior Development Centre established by Mr Rupert in his capacity as the patron of golf development in South Africa at a cost of approximately **R55 000 000.00**. The facility is not available to the public at large but members of the Country Club and their families are entitled to apply for membership at the National Junior Development Centre. Mr Rupert has, since 2017, spent an estimated amount of **R48 000 000.00** in upgrading the Leopard Creek Golf Course, which he is not looking at recouping from the Share Block Company or the Country Club.

[37] Mr Peak corroborated the evidence of the other witnesses that Mr Rupert's role at Leopard Creek is that of a developer. He designed it in such a manner that it became an exclusive Estate open only to a few. He invited the initial founder members, he is the patriarch, the chairman of the committee and also a director of the Leopard Creek companies. If Mr Rupert were to cease his involvement with Leopard Creek, the present business model would no doubt change in that Leopard Creek would be less exclusive. Principally, it would destroy its initial and existing character. Persons in the employ of Leopard Creek are estimated at 130 even though it indirectly employs many more through cleaning services and domestic services.

[38] Mr Peak stated that Leopard Creek buys electricity directly from Eskom and distributes it itself. It provides its own water, waste removal and deals with sewerage internally. It maintains its vehicles, plant and equipment which is done on the estate by people employed by it. The motor vehicles and the equipment on the Golf Course belong to the Leopard Creek Country Club entity. Leopard Creek Share Block has its own movable assets list which has a depreciated value of **R1 500 .00**. The Leopard Creek Country Club Ltd's asset value comprises predominantly the lodges or dormies, which were built for **R16 000 000.00** about four years ago. There are also twelve golf carts at the dormies. A members' share in the limited company also gives an interest in the assets. The Leopard Creek Country Club's nett asset value was sitting at **R12 500 000.00** at the time, which was its depreciated (book) value.

[39] Mr Peak said that the assets that are in the Share Block are used to maintain the estate itself whereas those in the Country Club Company are used for the Golf Course and the operational side of the Golf Course. The Leopard Creek Club House contains a number of trophies on the walls, equipment and furniture, the majority of which belong to Mr and Mrs Rupert, who would, if they were to leave the area, leave a void and another wealthy benefactor would need to be found. The Leopard Creek Country Club has a fully stocked bar and the turnover on catering and liquor sales on an annual basis is **R45 000 000.00**.

[40] The club runs as a break-even entity and the objective is not to make a profit but essentially to stabilize the subscription paid by members. The Share Block Company also does not seem to make a profit. Mr Peak also testified that there were about 23 Share Blocks for sale which are advertised on the list, some of which, he explained, are fractional interests. Piek referred to a number of properties, which have been for sale for in excess of five years. These properties have been on the market for a long time and some of them have decreased substantially in their asking price. As far as the properties that are not on the river are concerned, Mr Piek said that approximately two are sold per annum at prices between **R1 500 000.00** and **R2 000 000.00** with a recent sale being at **R1 575 000.00** for an open erf.

[41] His testimony was also that there is a number of individual houses that have been in the market for a long time. Since very little interest has been shown in those houses, the owners have dropped their asking price. The impact of increased levies, rates and taxes has been very negative and the comments from members at Leopard Creek have been that it has become very expensive to live there. Mr Peak said that he observed that the asking prices for Share Blocks had over the last few years, in some cases, dropped substantially in order to get the sales through and inland properties are not saleable at the moment.

[42] Mr Peak stated that a person may buy a Share Block with the right to four memberships. That person may then nominate his friends or colleagues or business

people to take up the other three memberships. They would then be classified as nominated occupants. They will not have ownership in the Share Block but would have Country Club rights and pay annual subscription. Some members of Leopard Creek, he testified, mentioned to him that it was becoming expensive to be a member. They expressed doubts whether it was still worth being there because of limited use.

[43] Mr Rupert directly or indirectly owns 50 stands and Leopard Creek Investments owns 47 stands which are not for sale. The 50 stands owned by Mr Rupert affords him 4 memberships per stand and he pays for two and a half memberships per stand. The full annual membership subscription is **R41 000.00** per member which generates revenue for the Country Club of approximately **R18 000 000.00** per annum. This is estimated to constitute **40%** of its total revenue. The majority of the balance of the turn-over, **R49 million**, comprised green fees paid by guests. About **7%** of the 17,500 rounds of Golf played per annum are made up of lodge rounds. A visitor to a lodge with whom Leopard Creek is associated pays green fees of **R4 500** to play at Leopard Creek.

[44] Every year, the Share Block Company determines how much money is necessary on a break-even basis to cover the costs and that that amount is divided by 201. If the sold Share Blocks are more than 201. then by that number. Leopard Creek Country Club Limited is the holder of the Golf Course Share Block and owner of the dormies. The Country Club leases the Golf Course from Leopard Creek Country Club Limited. The rental income from the dormies yields an income for Leopard Creek Country Club Limited of approximately **R2 000 000.00** per year.

[45] Leopard Creek Country Club Limited also holds the dormie houses. The money building the dormies was provided by way of a loan from Leopard Creek Investment Limited. Income generated by the dormies is used to repay the loan. The Share Block needs to maintain the Estate and it requires certain vehicles and equipment to maintain the Estate and the majority of the equipment. The money to buy the equipment is derived from the levies paid to the Share Block every month. The Share Block charges levies of

R8 800.00 per month. The levy charges are not uniform on all properties. More is charged for stands on the river and less for inland stands and even less for vacant stands.

[46] The Estate pumps water from the Crocodile River, which then goes through a water purification plant within the Estate prior to distribution. Water usage is metered and the cost is recovered as a separate water levy. Electricity is also metered and recovered. Utilities such as sewerage and refuse are also built into the levy. The Country Club does not make money out of the Dunhill Championship as it is expensive to host. The Dunhill Championship is paid by the sponsor. The Country Club has a budget and aims to break even by recovering its costs.

[47] between November 2017 and April 2018, Mr Rupert paid **R48 000 000.00** for the replanting of the grass on the fairways. This would not have been achieved without the financial assistance of Rupert. As a result of the limited amount of water, the grass on the course was taking strain. Houses on the river are prime sites. The houses are similar to inland houses. Houses that are not on the river take long to sell, if they are sold at all.

[48] The last witness for the Applicant was Mr Norman Griffiths whose qualifications were not placed in dispute by the Municipality. He testified that he has been a valuer for 51 years. He is a fellow of the Royal Institution of Chartered Surveyors and a fellow of the South African Institute of Valuers. He has been active as a valuer throughout Southern Africa since 1968 and operated since 1990 as an independent property valuer and consultant under the name and style of Norman Griffiths and Associates based in Rivonia Gauteng Province.

[49] Prior to that he held various positions including shareholder, director, and chairman at a multidiscipline International Real Estate consultancy with offices in Cape Town, Johannesburg, Harare, and Pretoria. He has extensive experience in valuation of property of all types, including land developed as Golf Estates. Norman Griffiths and Associates provided valuations and prices to a broad spectrum client base, including Township Developers, Property Investors and Owners, the Legal Profession, the Hotel and Leisure

Industry, the Game Industry, Institutional Property Unit Trusts and Loan Stock Companies, Major Industrialists, Central and Local Government, Mining, and Industrial Companies.

[50] Mr Norman Griffiths stated that he frequently appears as an expert witness valuer in litigation matters, particularly in respect of rating, expropriation, and land restitution. From time to time he lectures the profession, students, and property industry. Since 2000 he has been a valuation lecturer in the SAPOA/UCT graduate school of business annual property development program in Cape Town where he lectures on valuations. He is retained by the state as an expert in the determination of compensation for land expropriation for the Gautrain.

[51] His evidence was that the starting point is to decipher exactly what it is that one is valuing. In this case, he said, it is a single farm portion of 335 hectares and not individual residential units that is being valued. This comes head to head with the Municipality's approach of adding all improvements erected on the subject property. In this context, he explained that at the time of the valuation, 1 July 2017, debates on the Land Restitution Amendment Bill was under way with submissions thereto closing on 31 May 2017 and its introduction into the national assembly on 18 August 2017. In consequence, land restitution was very much on people's minds at the time.

[52] He indicated that there was previously a Hotel on the property situated on the banks of the river, which burnt down and what was left had been demolished. The rights to develop a Hotel have not been exercised subsequently. As such, they still apply within the basket of rights. He testified that the IVS Royal Institute of Chartered Surveyors provide guidance for valuation practice and methodologies. He pointed out that market value is required under the MPRA. He agreed that the valuation standards of IVS and RICS represent the generally recognised valuation practices, methods and standards set out in section 45 of the MPRA.

[53] He testified that there are various techniques that may be employed to arrive at market value, the first of which is comparable sales. It is generally accepted that sales of comparable property should be the best indication of value levels. A test of comparability can be applied such as location, size, town planning rights, physical features, arm's length value of the transaction, relative date, and legal constraints. He testified that there are no true comparable sales that can be directly applied to value Leopard Creek. Nowhere in South Africa has a 325-hectare farm, with 111 buildings and a Golf Course been sold.

[54] The second valuation technique is the investment approach, which is where one buys a property as an investment. This entails that one will raise profit out of it in the future. Property ownership is an investment where direct income cash flows arise either by way of rental income or sales revenue. In that case, the property can be determined on its ability to produce revenue. He said that it is an economic model where an investor would ask what to do with the property to achieve the required returns. An investment approach to valuation requires the assessment of future income flows arising from township development or other forms of development and involves the identification and estimation of cash flows, including revenue and expenditure and timeframes with the application of a commensurate discount rate to bring the calculation to a present value.

[55] Mr Norman Griffiths testified that this method is frequently used by property developers in assessing viability and return from a project. It is in fact widely used in business as a whole and the credibility of calculations that are produced is dependent upon the veracity of the inputs. Anyone looking at property as an investment will produce cash of the inputs. One will determine what price one is prepared to pay or what attitude one takes with the negotiations, depending on how it is viewed as an investment.

[56] The third method is the replacement cost approach. Here he testified that The whole process of what things cost upfront have a bearing on what one may be prepared to pay. There may be circumstances where a seller or a buyer may have some regard to the cost of replacing certain improvements. The formula where replacement cost is depreciated on the remaining life over total life has been widespread in the determination

of value where no market evidence is apparent. This method may in appropriate circumstances be employed as a test measure with other valuation methodologies to see if the valuation arrived at by employing other recognised valuation techniques is supported by the valuation arrived at with the replacement cost methodology. There may be instances where this is the only meaningful approach.

[57] As a valuer, he testified, there is never expressively one approach. One looks at the bigger picture. One tries to think outside the box and consider what are the overriding factors which will influence buyers and sellers of property. He also said that there is also the overriding considerations approach. Where utilization of the above stated methods does not provide total answers, it is the role of the valuer to apply as much logic as possible and exercise all skills and identify the features, which a buyer and seller will identify. It is not a thumb suck exercise; it must be a motivated answer. In applying these principles, he noted that the subject property is a single cadastral unit, being a farm measuring 335 hectares and, as such, a sale of the total un-subdivided property held in the name of a single owner is to be envisaged.

[58] His further testimony was that it is impossible to sell any of the individual units, because they are not registered land units and are not saleable in their own right as real estate. While this much is common cause between the parties, Mr Norman Griffiths' contention is that it may be so that the notional buyer is acquiring an existing development, he is nonetheless unable to sell the un-proclaimed vacant sites without formally proclaiming a township or alternatively creating sectional title units. Conversely, the Municipality asserts that it was never necessary in the postulation of a notional transaction for the subject property to be subdivided or sectionalised if the Applicant, or a Share Bock Company, or a lookalike, forms part of the market as a potential purchaser in the notional transaction.

[59] The owner historically traded through a Share Block, which entails sales to third parties of shares in a company and not registered cadastral property units. The purchaser of shares holds a personal interest in the company and not a right in the property. A Share

Block gives them a right to use a particular piece of the property, but they do not have any register-able property rights and they are not saleable as registered property rights. It is further common cause that Leopard Creek is a prestigious development, which has attracted wealthy occupants, not least because of the existence and controls exercised by the Share Block. The buyer of a Share Block buys into an exclusive company, not open to the public at large, which is a going concern, largely funded by the majority shareholder, Mr Rupert.

[60] Mr Norman Griffiths explained that a township proclamation or a sectional title process is a time and cost exercise for a purchaser to realise his investment in this particular property. He assumed the process of formally converting the subject property into a township could take 2 years but it has been suggested by certain town planners it could be four years. There is no guarantee that on acquisition of this property that one would with 'a drop of a hat' obtain other rights to allow subdivision and to sell it. Such proclamation of a township and the opening up of a non-controlled ownership could have a negative impact on the appeal of Leopard Creek.

[61] According to Mr Norman Griffiths, the Golf Course is only sustainable as a result of the captured Share Block owners and members. A Golf Course is expensive to set up to try and enhance the value of the rest of the properties. It's an accepted valuation principle that no or minimal value can normally be attached to Golf Courses, irrespective of their cost to create. There is certainly no financial or investment value to be attributed to a Golf Course. Any reduction in the Golf Course will have a commensurate impact on the value of the surrounding properties. The cost of maintaining it is about **R20 million** a year and if it is not, the course will die within weeks.

[62] To a very large extent Mr Norman Griffiths's testimony at this stage validated that of Messrs Hackner and Nagle especially that July 2017 was in the middle of the last year of the Zuma mal-administration with low business confidence and an exceptionally weak property market, with a perception at the time that matters were more likely to get worse than better. Golf Estates exhibited distress symptoms from 2006 to date. No one has

actually started building a new Golf Course in this period and financial institutions do not seem to be prepared to fund ownership or development in a second home environment. Thus, all who have second home are affected by the attitude of the financial institutions. He mentioned all those financially depressed Golf Course developments referred to by Messrs Hackner and Nagle.

[63] He stated that the evidence of Messrs Hackner and Nagle makes sense to him. Quite apart from financial and cash flow assessments, the advice that is required of a valuer is to stand back and say what would be the thought process of a prospective purchaser of Leopard Creek in 2017. In his opinion, the property would be of a minimal value in the eyes of a developer investor. He has to identify a prospective purchaser. It is not a fiction. This person needs to be a real market player and one should ask, who will come, what will this person do, how will he treat it and what will he pay for it?

[64] Mr Norman Griffiths said that in preparation of his valuation of the subject property, he compared Leopard Creek to developments such as, Mjejane Wildlife Estate, Elephant Point located 10km before the Kruger Park Gate, Simola, a quality urban Golf Estate in Knysna, Pezula, also in Knysna, Erinvale and Pearl Valley in the Western Cape and Fancourt in George. He stated that certain residential saleable portions of urban Golf Estates have traded in the open market in South Africa. He testified that when Mr Nagle considered Houghton, Serengeti and Eye of Africa, their purchase price was determined based on a net realisable income achievable from the resale of saleable units. Mr Nagle relied on cash flows. The questions that would have run through his head would have been: *"For what amount can one sell these? How long will it take to sell? What will it cost to get the town planning in place?*

[65] Mr Norman Griffiths testified that from evidence obtained the most likely purchaser of Leopard Creek would be a property developer who would purchase the property based on the market related return on investment he could reasonably expect to achieve over time on the resale of realisable saleable units within Leopard Creek. Individual units within residential Golf Estates are normally registered by way of freehold title in a township or

by way of sectional title. These are the methods preferred in the market for the creation of saleable units. Leopard Creek has not been sub-divided, which has resulted in distinct disadvantage to a potential developer who will first have to sub-divide the single farm portion to create saleable units and this time factor will have a detrimental effect on market value.

[66] The willing buyer would be guided by the market in his choice and although free-hold or sectional title would entail a more time costly exercise, the view is held that it would be preferable. The willing buyer operates in the actual market, not an imaginary market, he said. The opinion that the willing buyer would prefer free-hold or sectional title is backed by clear market evidence with no other known Share Block type offerings existing in the residential Golf Estate market in the South African market. There's no other Share Block comparable in the country.

[67] He stated that, in his opinion, the highest and best use for Leopard Creek is to continue the current use as a Golf Course development. The market evidence is that the method of valuation to be applied is a discounted cash flow calculation based on the net estimated realisable income that can be achieved from the sale of realisable saleable units after making allowance for the time and costs expected to be incurred in creating such saleable units and the risks involved. Given the state of Leopard Creek, it's his opinion that for valuation purposes, the property should be converted to free-hold title or sectional title units and these could become saleable units within the development.

[68] He assumed that the willing buyer would create a sub-division of the land in accordance with existing improvements and rights and that vacant saleable sites will be established where there is already existing service infrastructure. Given the expected slow rate of sales, selling 252 individual property units is daunting. Establishing additional serviced saleable sites is probably not commercially viable since to sell the current serviced sites will take more than 15 years. The potential purchase of saleable sites will be frustrated by the need to pay heavy levies, Golf Membership and rates and taxes with no service provision or maintenance by the Municipality.

[69] The cost to a Share Block owner of owning a stand at Leopard Creek includes a Golf levy per unit that is **R160 000.00** per annum. The stand levy, in addition to the Golf levy, is **R105 600.00** per annum. The level of municipal taxes as currently determined is **R43 200.00** per owner for which one gets nothing because in addition to the levy, there must still be payment for all the services, which the developer provides. The water and electricity bill are in the region of **R60 000.00** per annum and maintenance allowance is **R6 000.00** per annum. So, the total levies that an owner for any of these properties at Leopard Creek pays is **R428 800.00** per annum, which is **R35 000.00** per month.

[70] The holding cost to anybody buying this property whilst he converts it to some sort of vehicle from which he can then realise his investment is going to be huge. The willing buyer will be faced with the harsh reality that there would be a substantial delay before he's able to create saleable sites and to generate cash flow. Even then, he will be marketing properties for sale with a start-up Golf Club with limited or no members in a market where almost every other second home Golf Course development in the country has failed. In his opinion, the initial buyers of saleable sites will perceive an investment in such a development as a high-risk investment, at least until critical mass in respect of sales has been reached.

[71] That will depress the prices, not only for vacant sites, but even more for established houses that would require a very substantial capital investment at a high risk. He calculated the potential total gross income in the amount of **R1 239 700 000.00**. For this purpose, he attributed potential values of **R969 900 000.00** to the 111 houses and **R269 800 000.00** to the vacant sites. He arrived at the gross potential income of **R1 239 700 000.00**. He criticised Mr Derrick Griffiths' depreciated replacement approach because it does not take into account any market factors at all. Mr Norman Griffiths does not believe that the values paid for the Share Blocks is market value. He thinks it's a little closed club, it's a closed economy, there's no external influences whatsoever. Those transactions are influenced by all sorts of fantasies, all sorts of egos, all sorts of restrictions.

[72] His approach was to ask himself: in a free market, what do I believe these products would sell for? He testified that he arrived at the figures by standing back, and placing a price on it building by building. He then fed those figures into his discounted cash flow, which, according to him, is a fairly simple calculation. Having regard to the various cost inputs and an overall discount rate of **20%** it worked out at **R318 000 000.00**. He then explained that, compared to where he started, one may think that is a huge drop, but that is what the cost of holding developments does and that is what the time value of money does.

[73] He referred to Mr Derrick Griffiths' model which says that each one of these stands is saleable. Once sold, they are all added up and the value amounts in all to **R1 600 000 000.00**. He says it is just impossible under the circumstances and that was the evidence of both Messrs Nagle and Hackner. He stated that he was the first person to admit that one can pull cash flows apart. One can change input figures and can do a number of scenarios. His scenarios got anywhere from **R250 000 000.00** to **R500 000 000.00** on this particular calculation. Somewhere in that range the true value has to lie on this particular property. It cannot be a summation of all the individual bits.

[74] He believes as the valuer, one should always stand back and say: does it make sense? Taking into account all of the stated facts, including unique physical attributes at Leopard Creek, the state of the market at the applicable date, the values indicated by the discounted cash flow and depreciated replacement cost methodologies, the comments received and evidence given by Messrs Hackner and Nagle and other operators in the market and utilising the experience which he had gained, the market value for municipal valuation purposes at this farm is **R330 000 000.00**.

[75] The first witness of the Municipality was Mr Derrick Griffiths ("Mr Griffiths"). He confirmed the contents of his report. Mr Griffiths stated that he is a registered professional valuer with more than 30 years' valuation experience. His qualifications and credentials were not called into question by the Applicant. He prepared a valuation on behalf of the

Municipality. He provided evidence as to the purpose of valuation and referred to relevant sections of the MPRA and also confirmed that IVS 2017 applies. Mr Griffiths gave a description of the subject property in the same terms as did the witnesses of the Applicant. He explained that what he refers to as sites in his report are not stands or erven proclaimed in a township.

[76] Mr Griffiths testified that in terms of the Memorandum of Incorporation of the Share Block Company, a purchaser of a Share Block in essence acquires the exclusive right to a residential site for exclusive occupation, use and enjoyment of the purchaser; the right to the shared use of the common property; the right to membership and the right to use the Country Club and Golf Course. He further stated that in terms of the Memorandum of Incorporation a Share Block developer is any person controlling more than **50%** of the shares of a Share Block Company. He testified that Mr Rupert holds more than **50%** of the shares in the Share Block Company.

[77] As at 1 July 2017, he said, there were 113 developed sites, 59 undeveloped sites and 90 unsold undeveloped sites. No expense is spared in maintaining the Golf Course. In this regard, he corroborated the evidence of Mr Piek that the upgrade of the grass during October 2017 cost **R48 000 000.00**. He also stated that the Alfred Dunhill Cup is staged at Leopard Creek annually. The sites are owned by some of the wealthiest individuals in the country and that the world class Golf Course hosts local and international events. The Golf Club Membership is controlled by invitation.

[78] According to him, a valuer must determine the highest and best use of the property being valued. In *casu*, the highest and best use of the property is that of an exclusive residential Golf Estate. He further stated that Leopard Creek could have been developed either as a Share Block, sectional title or a residential township. The option that would produce the highest value will be the obvious choice which would "*only be a share block*". He explained that the rights of Share Block owners are extensive but personal in nature and limited by the particular use agreement.

[79] He testified that a Share Block scheme is often compared to sectional title where the rights are real in nature. This, he said, might create the impression that rights conferred under the Share Block Scheme are weaker or not as secure as those a purchaser would acquire in the context of a sectional title. The Share Block Scheme Act gives protection to owners of these shareholders. He testified that as a bundle of rights, just one thing is missing namely title or ownership.

[80] He observed that arguments concentrate on the difficulty in obtaining development funds and loans against security of immovable property. In bringing this closer to home - Leopard Creek, he stated that *it would have been a problem had Leopard Creek been an ordinary development*. He resolved that a Share Block Scheme would provide the best vehicle for producing the highest value for the property. The market fact that a successful Share Block Development exists on the property confirms the viability of this option. It is accordingly unnecessary to postulate a sectional title development or residential township development - no further development steps need to be undertaken in order to achieve this use.

[81] He said that the purchaser will be a person who buys the property with all the improvements in order to continue with the existing use, which is that of an exclusive residential golf estate operated as a Share Block Scheme. Mr Griffiths then went on to describe valuation approaches. He noted the three generally accepted approaches, being sales comparison, income capitalisation and cost approaches, and the reasonability test, as put by Mr Norman Griffiths, being "*does this make sense?*"

[82] It is the duty of the valuer, he explained, when determining market value to place himself in the shoes of the willing buyer and willing seller and to take into account all factors that would influence their minds in determining a purchase price. This will include all market information that can influence their decision. He describes the valuation method that he has adopted as a combination of the 'sales comparison' and 'cost' methods. He stated that it is an indirect approach where the depreciated replacement cost is derived from "*the market*".

[83] He testified that the sales comparison method is based on the principle of comparability and substitution and that the assumption is that if similar assets in a similar market place have been sold at a particular value, then the comparable asset will also sell at a similar value. Prices of transactions of identical or similar assets that have occurred recently in the market are considered. He reiterated what has been stated by the witnesses of the Applicant that it is common cause that there is no comparable transaction with the same features worldwide and that a direct comparison method is not possible.

[84] His method, he stated, does not exclude an indirect comparison method. In support of his method he placed reliance on a book by Radcliffe as an authority and quoted: "*Market simulation involves the construction of a real estate market model consisting of factors, which will affect transactions, which might occur within the market*". According to him, an appraiser can on the basis of his understanding of how the market works, predict the price outcome of a transaction within the simulated market when the subject property is exposed for hypothetical sale.

[85] A less formal description of the process would be to say that the appraiser makes his prediction by taking into account all of the factors, which might affect the selling price. According to Mr Griffiths the value of Share Blocks, conferring exclusive right of occupation and enjoyment of both vacant residential sites and improved residential sites on the property itself, provide a basis for determining market value of the property itself and the price that it would fetch in an open market.

[86] He describe the application of his valuation approach to the subject property. He stated that sales of Share Blocks and linked claims relating to vacant sites were analysed in terms of price, date, location, aesthetics, etc. to use as comparable transactions for the valuation of vacant sites on the subject property. He furthered that these would indicate the open market value of the exclusive right to occupy, enjoy, construct dwellings on, and ultimately to sell these rights.

[87] He testified that a list of sales of share blocks were provided to him by the Share Block Company which included full and fractional sales. He testified that the list reflects the price paid for a Share Block and the linked claim. He said that he could not confirm without having spoken to the purchasers and sellers whether or not the transactions on the sales list constituted market value. That necessarily meant that several assumptions had to be made. He testified that several transactions were eliminated on the basis of improbability and that the sales selected for comparison purposes are contained in vacant sales and improved sales being "DG11" and "DG12".

[88] He testified that *this so-called closed market is the market in which these buyers and sellers operate, and it is therefore an open market to them even though it may exclude others but there is definitely an open market for those that can participate.* He testified that he prepared the valuation table of all sold non developer sites. With reference to one of the sale agreements Mr Griffiths testified that the terms are that the purchaser purchases the residential Share Block and the linked claim as one indivisible transaction.

[89] In describing the notional sale, as extracted from IVS, he said that the willing seller is not the actual owner - it is the notional seller who is neither an over eager nor a forced seller prepared to sell at any price, nor one prepared to hold out for a price not considered reasonable in the current market. The willing seller is motivated to sell the asset at market terms for the best price attainable in the open market after proper marketing, whatever that price may be. The factual circumstances of the actual owner are not a part of the consideration because the willing seller is a hypothetical owner.

[90] The willing buyer is one who is motivated, but not compelled to buy. The buyer is neither over eager nor determined to buy at any price. This buyer is also one who purchases in accordance with the realities of the current market and with current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher price

than the market requires. The present owner is included among those who constitute "*the market*".

[91] Mr Griffiths agreed that the purchaser comes from the open market and that the open market is a real market and not an imaginary market. The depressed economy, he said, would affect the market of a Golf Course state as a general proposition. **90%** of all Golf Estates have gone insolvent, but stated that they are not in the same market and cannot be compared to Leopard Creek. Mr Derrick Griffiths conceded that the South African economy is at the bottom and was even more so in 2017.

[92] Mr Griffiths accepted that there is no real person in South Africa that will buy Leopard Creek at the moment apart from Mr Nagle but said that he has to hypothesise a sale. He did not know whether or not IVS has ever been accepted by our Courts but doubted it. He refused to accept the proposition that if the present owner is in fact not able to buy, he is then in the market but he is not a buyer. He stated that in the hypothetical situation the present owner will be able to buy. He testified that one must "*objectivise*" the present Leopard Creek by stripping it of its personal circumstances. In this context he confirmed that an insolvent becomes rich to enable him to buy the property.

[93] Mr Griffiths testified that upon the purchase of the subject property, he envisions the hypothetical seller vacating and the hypothetical buyer taking occupation. The buyer will get the property with improvements and nothing else. The seller will take his people, tractors and everything while the buyer will bring his own people, security, tractors and whatever is necessary. The houses will have to be vacant and unfurnished when the new buyer takes occupation. The Club House, the restaurant and the kitchen will all be empty with no equipment.

[94] He said that the highest and best use is the potential for which the property can be used. The highest and best use for the property is as an exclusive residential Golf Estate. He conceded that to the extent that one cannot live at the subject property permanently, it is not a residential Estate but only an Estate with temporary residence. Mr Griffiths

confirmed that the highest and best use of the subject property does not depend on the structure used to execute its purpose. If it is kept as an exclusive Resort, the buyer can decide to develop the property as a township, share block or sectional title.

[95] Mr Griffiths stated that the transaction that he postulates is a hypothetical one but that market conditions that are real are taken into account. In further explaining the market he stated that Leopard Creek is not part of the Malelane property market. It is part of its own specific market where rich people come and buy Share Blocks. Mr Griffiths agreed that it is irrelevant for purposes of determining the value that the existing owner is a Share Block Company or that certain shares conferring certain occupation rights between the Share Block Company and its shareholders exist. *When talking about the willing seller, he said, the factual circumstances surrounding the current owner and the shareholders are irrelevant. One considers the land and the improvements alone.*

[96] Mr Griffiths testified that it would be irrelevant that the willing seller and buyer would know that as at 1 July 2017 the municipal valuation of the property was **R750 million** and whether that would weigh with them. Mr Griffiths stated that he accounted for the linked claim as part of the purchase price. He said that he did not take the linked claim out of the purchase price of the Share Block. His explanation was that the Share Block and linked claim are sold as one indivisible transaction according to the Share Block company's memorandum of incorporation.

[97] It was Mr Griffiths's opinion that a linked claim bought for face value is part of the land value. He conceded that if he is wrong in including the linked claims in the land value, the value of the linked claims will have to be deducted from his valuation. It was indicated to Mr Griffiths that the financial statements for February 2017 reflected the total value of the linked claims as **R115 798 214** and that as such, he actually valued the company and not the property by equating the prices paid for Share Blocks and linked claims to the value of the land.

[98] He disagreed that the Share Block prices are really the market value of the share price. According to him, *one would not be buying them as one would buy in a company for dividends. The objective in buying in this case would be for purposes of occupation. In consequence, it would not equate to shares in a normal company. Mr Griffiths' argument in essence revolved around the creation of the lookalike share block company or some other entity such as a company that could purchase the subject property and then convert it into a share block company. Insofar as the open market is concerned, he regarded the market amongst share block owners as open amongst the owners notwithstanding that in reality it remains closed to the general public.*

ISSUES

[99] The parties have distilled the issues to the following:

99.1 Whether the decision of the First Respondent falls to be reviewed and set aside; if so

99.2 Whether the Court should substitute its own decision for the First Respondent's decision; or

99.3 Whether the matter should be remitted back to the First Respondent, with or without directions by the Court and to the First Respondent as differently constituted or constituted as before.

LEGAL FRAMEWORK

LEGISLATIVE PROVISIONS

[100] The Sections of PAJA that have been brought under scrutiny as a result of this review require to be set out in full. The first of these Sections is 6(2)(a)(iii), which provides that:

(2) A Court or tribunal has the power to judicially review an administrative action *if-*

(a) *the administrator who took it-*

(i) ...

(ii) ...

(iii) *was biased or reasonably suspected of bias;*

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

(c) ...

(d) *the action was materially influenced by an error of law;*

(e) *the action was taken-*

(i) *for a reason not authorised by the empowering provision;*

(ii) *for an ulterior purpose or motive;*

(iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*

(iv) *because of the unauthorised or unwarranted dictates of another person or body;*

(v) *in bad faith; or*

(vi) *arbitrarily or capriciously;*

(vii) *the action itself-*

(i) *contravenes a law or is not authorised by the empowering provision; or*

(ii) *is not rationally connected to-*

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

(bb) *the purpose of the empowering provision;*

(cc) *the information before the administrator; or*

(dd) *the reasons given for it by the administrator."*

[101] Of particular relevance in this matter are also the provisions of the MPRA. To start with, Section 2 is headed, Power to Levy Rates, and it provides that:

"(1) A metropolitan or local municipality may levy a rate on property in its area.

(2) ...

(3) A municipality must exercise its power to levy a rate on property subject to-

(a) section 229 and any other applicable provisions of the Constitution;

(b) the provisions of this Act; and

(c) the rates policy it must adopt in terms of section 3."

[102] Section 30(1) prescribes that:

Dealing with ggeneral valuation and preparation of valuation rolls, Section 30 provides at Subsection 1 that:

"A municipality intending to levy a rate on property must in accordance with this Act cause-

(a) a general valuation to be made of all properties in the municipality determined in terms of subsection (2) ; and(b) a valuation roll to be prepared of all properties determined in terms of subsection (3)."

[103] Section 45(1) of the MPRA stipulates that a property must be valued in accordance with generally recognised practices, methods and standards and the provisions of the MPRA. The practices, methods and standards refer to those enshrined in the International Valuation Standards ("IVS") and the Royal Institute of Chartered Surveyors ("RICS"). Section 46(1) and (2) stipulate that:

"Subject to any other applicable provisions of this Act, 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.

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

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

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

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

CASE LAW

[104] There is a plethora of case authority on the subject of an open market. As such the provisions of Section 46 of MPRA should be read against the backdrop of the reported judgments on this topic. In *Kim Investments (Pty) Ltd v Durban Valuation Appeal Board and Others*[1], the Court, using the words in Section 46, stated that: *"the accepted definition of "market value" in relation to rateable property is the price which it would realise if brought to a voluntary sale between a willing seller and a willing buyer."*

[105] In *Sher and Others N.N.O v Administrator Transvaal*[2], the Court said that: *"the 'willing seller' and the "willing purchaser" are not the person expropriated and the expropriator, but a notional willing seller and a notional willing buyer negotiating with each other on an equal footing, both of whom are fully informed about the ground at the date of the expropriation – its advantages and disadvantages and its potentialities and everything which effects it."*

[106] Again, *in Pienaar v Minister van Landbou*[3], it was held in the case where the owner of a property also owned the adjoining property and supplied water for irrigation purposes to the expropriated property, that no regard could be had to the supply of water for irrigation purposes from the adjoining property and that it had to be valued as non-irrigated land, the *ratio* behind this judgment being that the property had to be valued as is and without regard to benefits flowing from the ownership thereof. In *Hirschman v Minister of Agriculture*[4], the Court held that: *"The owner of expropriated property, in a case like the present, is regarded as a willing seller so that, strictly speaking, ex-hypothesy, he cannot at the same time be regarded as a willing buyer."*

---

[1] 1979 (4) SA 504 (NPD) at 508F-H
[2] 1990 (4) SA 545 (A) at 547H-I
[3] 1972 (1) SA 14 (AD)
[4] 1972 (2) SA 887 (AD) at 891

[107] Hirschman *supra* was followed in *Mooikloof Estates (Edms) Bpk v Premier, Gauteng*[5] where the Court added that: *"if the present owner could feature as a willing purchaser, he would in any event not pay more than any other purchaser because then the property would have more than one market value and that is not possible."*

[108] It is generally accepted that not anyone of the valuation methods can be guaranteed to deliver an incontestable result. Thus, it is incumbent upon the valuer to handpick the most appropriate technique or techniques of valuation pertinent to the specific circumstances of the case. This is even more so where the parties agree that the comparable sale method cannot find application in this case because of its uniqueness. The inimitability of the subject property is an appeal to a valuer to be open to the employment of different techniques to resolve its valuation. Among these, are the guidelines found in IVS and RICS. It was in this context that the Court in *Pietermaritzburg Corporation v South African Breweries Ltd*, [6]said:

> *"It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser, the present cost of erecting the property, the uses to which it is capable of being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way he would to the best of his ability be fixing the exchange value of the property."*

[109] In *Dormehl v Gemeenskapsontwikkelingsraad*, [7]it was held that the Court or the First Respondent herein, is not bound to accept the evidence of any witness, even the only witness. It is open to the Court, or the VAB *in casu*, to follow the evidence of a valuer

[5]2000 (3) SA 463 (TPD) at 473
[6] 1911 AD 501 at 516
[7] 1979 (1) SA 900 (TPA)

partially and to make adjustments which are, in the VAB's view justifiable. In *The City of Johannesburg v Chairman Valuation Appeal Board*[8], it was held with regard to the function of a municipal valuer that:

> "[22] ...*the function of the municipal valuer is of considerable importance. In order to determine the market value of property, valuers should have regard to various factors in order to determine what a notional willing buyer would probably pay to a willing seller in the open market. These include comparable sales of similar properties in the open market; the extent to which the parties to previous transactions acted voluntarily and negotiated on equal terms or acted under compulsion; the motivation of the respective in previous transactions to buy and sell; restrictions on the use of the property and the possibility of their removal; the improvements on the land and the depreciation of those improvements; the potential uses to which the land may be put; and the income that may be derived from the property (this list is not meant to be exhaustive).*" and in paragraph 24"*Valuation is accordingly not an exact science. The market value of a property can only be estimated and not precisely determined, and a valuer is called on to exercise professional skill and expertise in a specialised field by expressing an opinion on the market value in monetary terms.*"

EVALUATION

REASONABLE APPREHENSION OF BIAS

[110] One of the basis on which the Applicant asserts that the judgment of the First Respondent is susceptible to review and to being set aside is the existence of reasonable apprehension of bias. This is as contemplated in Section 6(2)(a)(iii) of PAJA whose provisions I have fully described *supra*. The excuse for the rejection of the Applicant's version is that Counsel for the Applicant himself has characterized the respective versions of the parties as being mutually exclusive. It is trite that when a court is confronted with such a situation, it ought to assess the expert evidence on the record before it and to

[8] 2014 (4) SA 10(SCA) at 17, para 22

decide which of the two opposing opinions is to be favoured. See, *Jacobs and Another v Transnet Ltd t/a Metrorail and Another*[9].

[111] Similarly and referring to what was held in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[10], the Court in *Medi-Clinic Ltd v Vermeulen*[11], stated that:

> *"[5]...the court held that what is required in the evaluation of the experts' evidence is to determine whether and to what extent their opinions are founded on logical reasoning. It is only on that basis that a court is able to determine whether one of two conflicting opinions should be preferred. An opinion expressed without logical foundation can be rejected. ... Experts may legitimately hold diametrically opposed views and be able to support them by logical reasoning. ..."*

[112] The Municipality relies on the Jacobs, Michael and the Medi-Clinic cases *supra* to contend that the First Respondent did nothing wrong by preferring the one method against the other that was in direct conflict. Well, that might indeed be so, but 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 First Respondent 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 Griffiths nor are there reasons for the unconditional acceptance of the latter's evidence.

[113] The First Respondent 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 First Respondent does so, however, it must do it with justification. This is what I am unable to find in the judgment of the First Respondent. The conclusion that their existed

---

[9] 2015 (1) SA 139 (SCA)
[10] 2001 (3) SA 1188 (SCA), paras. [37] – [39]
[11] 2015 (1) SA 241 (SCA), par. [5]

bias or reasonable apprehension of it on the side of the First Respondent becomes hard to shake-off especially in circumstances where the testimony of Mr Griffiths was extensively discredited and with the concessions that he made in the process.

[114] Mr Griffiths's concession that upon the purchase of the subject property, he envisions the hypothetical seller vacating and the hypothetical buyer taking occupation of a property with improvements and nothing else is astonishing. If the open market is 'reality and not a fiction', where will the Municipality obtain people to takeover upon vacation of the property by the current owner? To hypothesise an entity such as the Applicant or its look alike taking over can only happen in an imaginary world and this is why it is completely impracticable.

[115] In fact Mr Griffiths goes even further by imagining purchasers on the day of the takeover of the subject property. If, as he stated, the highest and best use for the property is as an exclusive residential Golf Estate, the subject property does not fit that mould because it is not utilised by its members as a permanent residential exclusive Golf Estate. If it is kept as an exclusive resort, the buyer can decide to develop the property as a township, Share Block or sectional title. There will be difficulties in keeping it as a share block development because it is a single undivided land whose value cannot be unlocked. The concession pertaining to township or sectional title scheme development, however, is an acknowledgment that there are numerous hurdles if the subject property were to be inherited as is and that the current model may have to be changed to realise value.

[116] Of significance is Derrick Griffiths's admission that the transaction that he postulates is a hypothetical one but that market conditions that are real are taken into account. Mr Griffiths agreed that it is irrelevant for purposes of determining the value that the existing owner is a Share Block Company or that certain shares conferring certain occupation rights between the Share Block Company and its shareholders exist. The factual circumstances surrounding the current owner and the shareholders are irrelevant. One considers the land and the improvements alone. This is in line with the decision in

Pienaar *supra* yet his method of valuation does not detach the current owner and the shareholders from the subject property.

[117] How the First Respondent reconciled that approach and finally accepted his testimony leaves me baffled. More extraordinary is the First Respondent's claim that Mr Griffiths had used the comparable sale and cost methods to arrive at his valuation. Mr 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 the Applicant is not acceptable smacks of bias in the sense envisaged in Section 6(2)(a)(iii) of PAJA and therefore vulnerable to a review.

FAILURE TO COMPLY WITH A MANDATORY AND MATERIAL PROCEDURE OR CONDITION PRESCRIBED BY AN EMPOWERING PROVISION

[118] Here the argument of the Applicant is that in terms of Section 45(1) of the MPRA, the municipal valuer is required to carry out the valuation of ratable property in accordance with generally recognised valuation practices, methods and standards. Section 46 prescribes that the First Respondent ought to determine the market value of the subject property by defining what it would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer. The First Respondent, asserts the Applicant, has failed to comply with these provisions and the result is that its decision is reviewable.

[119] The task of the First Respondent was to conduct an investigation as a valuer and to determine the value of the subject property having had due regard to all the information placed before it. In the Dormehl case *supra,* it was held that the First Respondent had to come to a decision on the information that was presented to it, no matter how meagre, to the best of its ability, even though the result would amount to an informed guess. A pertinent question is therefore, did the First Respondent do as it was expected?

[120] The Municipality is adamant that the sale of Share Blocks can be utilised in order to determine the market value of the subject property. The Applicant says that share transactions cannot be utilised to determine the value of the subject property because, for example, between 2016 and 2018, there were approximately six, **100%** sales out of a total of 252. Insofar as the Applicant was concerned, there was therefore insufficient evidence from sales to crystallise a view on the value of the subject property. Similarly, with regard to the use of fractional sales to arrive at a value of the subject property, the Applicant's approach was that there had not been many compared to the number of units available. As an example with 650 potential fractional sales there has been less than **10%** sold.

[121] Mr Norman Griffiths, testifying on behalf of the Applicant, stated that fractional sales are a totally different market and did not determine the market value of the whole. Even if it were to be accepted that a market for fractional sales existed, the Applicant denied that fractions were a true indication of a full value. On Share Block sales of shares transactions, the evidence of Mr Norman Griffiths was valuable. He said that he crossed out every transaction that was not in 2016, 2017 and 2018, which he regarded as irrelevant. The amount of property transactions in the period either side of the valuation date is about 6 on **100%** transactions. Even if Mr Norman Griffiths is incorrect with the numbers, it will be wrong to utilize sales of Share Blocks to shareholders because they occur in a close market, if they do. Based on this evidence, I have to accept that the Share Block transaction cannot be utilized for purposes of arriving at the value of the subject property.

[122] Another related question is whether or not the market at Leopard Creek is open as envisaged in Section 46 of MPRA. The Municipality submitted that the market at Leopard Creek, its exclusivity notwithstanding, is open as intended in Section 46 of MPRA. In this regard, it referred this court to IVS 2017 where the concept of open market is described in the following terms:

> *"30.3 The concept of Market Value presumes a price negotiated in an open and competitive market where the participants are acting freely. The market for an asset could be an international market or a local market. The market could consist of numerous buyers and sellers, or could be one characterised by a limited number of market participants. The market in which the asset is presumed exposed for sale is the one in which the asset notionally being exchanged is normally exchanged."*

[123] The key word in all the instruments that refer to 'open market' is 'open'. Whether a market is open or not cannot be determined without reference to its size. Theoretically or notionally, the Municipality is right that a family, depending on its size, can constitute an open market. But that is of course nonsensical because it is not realistic to have a family so large whose members can compete against one another. This is different from, for example, the *apartheid* laws that compartmentalized South Africans into racial or ethnic groups. Those groups, simply on their sizes, were sufficiently enormous to be regarded as an open market even though they were closed in the sense that they were either open to a certain ethnic or racial groups. For that reason, it will be difficult to argue that a markets in the former homelands were closed because their magnitude stands in direct opposition of such proposition. When contrasting Leopard Creek with the example described above, it becomes immediately manifest that the scales are not in favour of Leopard Creek being regarded as an open market.

[124] Leopard Creek has designed rigorous and elaborate procedures as a mechanism to limit and control access. Its extent and limited number of members exclude it from the jurisdiction of open market in the sense contemplated in IVS 2017 or the MPRA. If size were irrelevant, it might even mean that a market comprising as minimal as a number of ten or even twenty individuals, might be considered consistent with the notion of an open market. On size alone, I would disqualify Leopard Creek as an open market. In the circumstances, the First Respondent failed to comply with the mandatory procedure as prescribed in Section 46 of MPRA making its decision prone to review.

[125] The Municipality submitted that the owners of shares in the Leopard Creek market constitute the market. The question that the Municipality poses is, why should the First

Respondent disregard the prices paid by extremely wealthy persons and captains of industry for Share Blocks? They see value in the sites and the improvements erected thereupon. Why should the First Respondent disregard the prices the rich and famous pay to secure their anonymity and security? Furthermore, why must the First Respondent overlook any premium such participants are prepared to pay in order to be associated with such an exclusive development?

[126] Perhaps the answer to all these questions is that it is only possible not to close one's eyes to all these, if the market and the players are fictionalised, which goes against case authority and MPRA. It is therefore a misapplication to postulate a hypothetical purchaser in a fictional market where market pragmatisms are deliberately rendered in vain. The proposition by the Applicant as described affronts both the principles of approved international valuation standards and MPRA.

[127] On whether or not the current owner is a potential purchaser or is a look-alike, it is anticipated that he will and should fit into the norms and traditions of that market. His set of circumstances are and should not be peculiar. After all, he will be purchasing back into this market, taking into account the state of the market. If not, he cannot be a purchaser.

ERRORS OF LAW

[128] The Applicant asserted that the administrative action taken by the First Respondent was materially influenced by errors of law. This happened when the First Respondent failed to apply the correct test and not following the prescripts contained in the MPRA and generally recognised valuation practices. In doing so, the First Respondent committed an error of law rendering its action sensitive to review. In this respect the First Respondent's starting point was that the Applicant itself or its imaginary look-alike, could be regarded as the willing buyer for purpose of the valuation. This is conspicuously misguided if regard is had to the cases of Hirschman and Mookloof Estates *supra.*

[129] It was also a misdirection that the First Respondent did not only value the property as a whole with its improvements but included in its valuation the Share Blocks in the Applicant company and ascribing those values to non-existing stands. Thereafter, it added the values of non-existing and unsaleable stands together to arrive at a value for the subject property. This fails to take into consideration that the potential purchaser of the subject property will be acquiring it as a single farm and not as divided erven ready to be put into the market.

THE FIRST RESPONDENT DID NOT CONSIDER RELEVANT CONSIDERATIONS

[130] Here the Applicant argued that the First Respondent failed to take into account relevant considerations. The First Respondent refused to consider the evidence of Messrs Nagle, Hackner and Griffiths in circumstances where the recognised valuation practices required it to have regard to it especially where the comparable sales method did not find application. Case authority encourages valuers to have regard to various relevant methods in these situations. This is what the Court stated in Pietermaritzburg Corporation *supra*. Accordingly, by the First Respondent ignoring the evidence of Messrs Hackner, Nagle and Griffiths, it disregarded relevant evidence, which should have assisted it to come to a balanced decision, either for the one party or the other. See, *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board*,[12].

[131] This is not to say that ingenuity is discouraged or condemned. On the contrary, Mr Griffiths' method of creating an imaginary purchaser, market and non-existent salable erven should have been subjected to extensive assessment and compared and contrasted with that of the witnesses of the Applicant. It was unreasonable to simply dismiss the other on the ground that it is different from what the First Respondent preferred. The new method presented should objectively be satisfactory to any person involved in the industry. Failure to do so leads to an inevitable conclusion that the First Respondent indeed failed to take into account relevant information in arriving at its answer.

---

[12] 1985 (2) SA 234 (SE)

DECISION WAS TAKEN ARBITRARILY AND CAPRICIOUSLY

[132] The Applicant asserts that the First Respondent's decision is reviewable in terms of section 6(2)(e)(vi) of PAJA because it was taken arbitrarily and capriciously. The effect of the First Respondent not considering that the subject property is one single property with improvements, with no readily saleable erven and creating a notional look alike purchaser, which will in turn buy the subject property and adopt the current model cannot be in accordance with generally recognised valuation practices and applicable law.

[133] The ignorance and/or rejection of the evidence of Messrs Nagle, Hackner, Piek and, by necessary implication Mr Norman Griffiths in circumstances where the latter had based his opinion on the three and where their evidence was a matter of common cause with all the Respondents was arbitrary. By doing this, the First Respondent overlooked relevant evidence and allowed itself to act capriciously and its decision unavoidably became irrational.

THE FIRST RESPONDENT'S DECISION-MAKING WAS NOT RATIONALLY CONNECTTED EITHER TO THE PURPOSE FOR WHICH IT WAS TAKEN OR THE REASONS GIVEN

[134] The MPRA seeks to value property at the current market value. That is the amount the property would have fetched if sold on the date of valuation in the open market by a willing seller to a willing buyer. Accordingly, the spirit of the MPRA is to duplicate a real and actual value as closely as possible. The First Respondent's choice of method of valuation preferred by Mr Griffiths bears no connection to the genuine market value as it is and has been admitted by Mr Griffiths to be fictitious. For that reason, it is not in line with the objective intended by MPRA and the reasons do not justify the decision.

IRRELEVANT CONSIDERATIONS CONSIDERED

[135] Although Mr Griffiths specifically stated during his testimony that the characteristics of the present owner of the subject property are irrelevant, the method he chose when valuing it is inimical to his evidence as it forced him to consider those personal attributes. It should logically be a matter of course that if the First Respondent accepted Mr Griffiths's method, it has indeed taken irrelevant considerations into account. Such a decision is consequently in violation of Section 6(2)(e)(iii). Mr Griffiths' reliance on the supposed subjective wishes of the existing Share Block Owners to create a conjectural demand is there to exacerbate the situation. Again, the First Respondent's acceptance of that approach without question was bound to produce unreasonable and objectionable consequences.

UNREASONABLENESS

[136] The Applicant also challenges the decision of the First Respondent on the ground that no reasonable decision-maker could have taken. Section 6(2)(h) of PAJA allows a Court to review an administrative action if "*the exercise of the power or the* performance *of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.*"

[137] The Applicant asserted that it is manifest from the facts in this application that the decision of the First Respondent is not reasonable and it is one that no reasonable decision-maker would have made. The factual background has been outlined above but it is worth reiterating that the most irrational is the theory of Mr Griffiths that seeks to fictionalize market to produce the current value of the subject property. While it is common cause that the property on the market is a single undivided farm land with certain improvements, Derrick Griffiths was set on imagining a divided land with salable erven which will be sold and value immediately realised.

[138] So unreasonable was the rejection of the evidence of the witnesses of the Applicant simply on the basis that it is trite that where one is confronted with two versions that are radically different, one of them ought to prevail over the other. This is indeed so

but it is impermissible to do so without a comprehensive assessment of the versions and reasons why the one is preferred to the other. This is precisely what the Applicant is complaining about. It feels aggrieved because it levied evidence before the First Respondent, which it thought was relevant and useful only to be rejected without reason. That decision if left unchallenged would have serious financial repercussions for the Applicant and the Share Block Owners as their rates will almost double.

CORRECTION OR SUBSTITUTION

[139] The Applicant argued that in the event that this Court agrees with it on reviewing and setting aside the decision of the First Respondent, it should then proceed to substitute the decision for its own. Conversely, the Municipality has contended for a dismissal of the review but in the event that the Court grants the review then it should remit the matter to the First Respondent. Section 8(1)(c) of PAJA provides that:

> *"(1) The Court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) setting aside the administrative action and-*
>
> *(i) remitting the matter for reconsideration by the administrator, with or without directions; or*
>
> *(ii) in exceptional cases-*
>
> *(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;"*

[140] Section 8(1)(c)(ii) (aa) is unequivocal that the correction or substitution is to be done when there exist exceptional circumstances. The issue then becomes, how are courts to determine whether or not a case deserves to be characterised as exceptional demanding substitution. Guidance was given in *Trencon Construction (Pty) Ltd v*

Industrial Development Corporation of SA Ltd[13]. The Court simplified the test for exceptional circumstances where an order for substitution is sought by enumerating 5 common law factors that have to be considered when deciding whether substitution or remittal would be appropriate. These are:

140.1 Where the end result is a foregone conclusion and it would be a waste of time and expense to remit the decision to the decision-maker;

140.2 Whether further delay would cause unjustifiable prejudice to the Applicant;

140.3 Where the original decision-maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again;

140.4 Where the Court is in as good a position as the original authority to make the decision; and

140.5 A consideration of fairness to all implicated parties.

The Court explained that since these factors are related, they ought to be considered collectively. I now turn to consider each of the five factors listed above.

IS THIS COURT IN AS GOOD A POSITION AS THE FIRST RESPONDENT

[141] I am mindful that a considerable amount of material was provided to this Court to enable it to come to terms with the intricacies of the subject of valuation. That said, this court can never compare favourably with the First Respondent, which in *Gauteng Gambling Board v Silver Star Development Ltd*[14], paragraph 12 was said to be "... *generally best equipped by the variety of its composition, by experience, and its access to sources*

[13] 2015 (5) SA 245 (CC) at paragraph 32
[14] 2005 (4) SA 67 (SCA)

of relevant information and expertise to make the right decision. The Court typically has none of these advantages and is required to recognise its own limitations." For this reason, it is my view that despite the decision of the First respondent, it remains well-suited to determine the valuation than this Court.

IS THE END RESULT A FOREGONE CONCLUSION

[142] The outcome of the valuation can never, especially in this instance, be a foregone conclusion. That is mainly because of the huge divergent approaches of the experts on the subject. Indeed, it will require a party constituted in the manner the First Respondent is and with extensive expertise to reconcile the discrepancies in approach. Additionally, according to the authority of Trencon *supra*, unless the Court is in as good a position as the First Respondent to make the decision, the outcome can never be ordained.

HAS THE FIRST RESPONDENT EXHIBITTED BIAS OR INCOMPETENCE TO SUCH A DEGREE THAT IT WOULD BE UNFAIR TO ASK THE APPLICANT TO SUBMIT TO ITS JURISDICTION AGAIN

[143] Whether or not a party in the position of the First Respondent has demonstrated bias or can reasonably be suspected to have done so is difficult. While there might be a reasonable suspicion that the decision of the First Respondent was, it remains a suspicion. The fact is that the decision might have also been induced by errors of law. In this regard, it could be useful to have regard to the reason that the First Respondent furnishes for rejecting the version of the Applicant – it had to prefer one of the two. In support of that approach, it cites relevant case law but overlooks the fact that it had to do so with reasons. In any event, in consequence of the order that is to ensue, this fear of bias will turn out not to be well-founded.

WILL FURTHER DELAY CAUSE UNJUSTIFIABLE PREJUDICE TO THE APPLICANT

[144] The Applicant has described in detail the period this matter took before it got to this Court. Thus, it argues, remitting the matter to the First Respondent will add to that

inordinate period that it took to come before this Court. If that were to happen, the financial prejudice and generally, lack of resolution of the matter will be palpable. Arguing against that contention, the Municipality has referred this Court to the provisions of Section 55 of MPRA, which provides that if the market value is finally determined at less than the figure in the general valuation roll 2018, the Applicant will be reimbursed for rates paid in the meantime.

[145] To a greater degree therefore the financial prejudice is not as tangible as in circumstances where no reimbursement would occur regardless of the outcome of the determination of the valuation. Besides, the prejudice will be more if this matter is left to an institution, such as this Court that does not have the expertise to decide the valuation. The First Respondent, properly prompted into the right direction, has all the expertise and resources to revisit its decision. I am acutely aware that it will certainly mean more delay but in these circumstances it would be reasonable to have delay trumped by expertise of the First Respondent.

CONSIDERATION OF FAIRNESS TO ALL IMPLICATED PARTIES

[146] A reflection on the above dictates that it will be fair and just that this matter be remitted to the First Respondent because it is suited and has the necessary expertise to decide the matter. Besides, this Court should loath arrogating a discretion that legislatively vests in another body which has been executively appointed for the purpose. The First Respondent is such a body and in these circumstances it will be fair and just that this matter be deferred to it.

CONCLUSION

[147] In the circumstances, the application succeeds and I make the following order:

1. The decision of the First Respondent is reviewed and set aside;

2. The matter is remitted to a differently constituted First Respondent for a

decision;

3. The First Respondent is specifically directed to consider and weigh the evidence of the witnesses of both sides;

4. The Municipality is directed to pay the costs of the Applicant including those of two Counsel, where applicable.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 April 2023 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv FH Terblanche SC** **Adv HC Bothma SC**
Instructed by:	**Webber Wentzel** **C/O Du Toit-Smuts & Partners**
Counsel for the First Respondent:	**Adv T Ntoane**
Instructed by:	**State Attorney Nelspruit**
Counsel for the Third Respondent:	**Adv SJ Grobler SC** **Adv A Liversage SC**
Instructed by:	**A M Vilakazi Tau Inc Attorneys**
Date of Judgment:	**14 April 2023**