THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 209/2014

Non reportable

In the matter between:

ATHOLL DEVELOPMENTS (PTY) LTD	**APPELLANT**

and

THE VALUATION APPEAL BOARD FOR THE THE CITY OF JOHANNESBURG	**FIRST RESPONDENT**
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**

Neutral citation: *Atholl Developments v The Valuation Appeal Board for the City of Johannesburg* [2015] ZASCA 55 (30 March 2015)

Coram: Ponnan, Willis, Saldulker JJA and Van Der Merwe and Meyer AJJA

Heard: **27 February 2015**

Delivered **30 March 2015**

Summary: Appeal – Appealability - appeal does not lie against the reasons for an order of court - matter struck off the roll

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ORDER

On appeal from: Gauteng Local Division, Johannesburg (Vally J sitting as court of first instance).

The matter is struck off the roll with costs, including the costs of two counsel.

JUDGMENT

Saldulker JA (Ponnan, Willis JJA and Van Der Merwe and Meyer AJJA Concurring):

[1] The appellant, Atholl Developments (Pty) Ltd (Atholl), is the lessee, in terms of a 99 year registered long lease (the lease), of Erven 482 and 483, Illovo Extention 4, Johannesburg (the property). The property, which is located opposite the Wanderers Cricket Stadium, is owned by the Wanderers Club. Pursuant to the lease the appellant constructed a hotel on the property and has for some time now traded as the Protea Hotel Wanderers (Protea). The appellant is responsible for the payment of the rates levied on the property. Aggrieved by a valuation, and the assessment of rates pursuant to that valuation, which was levied by the second respondent, the City of Johannesburg Metropolitan Municipality (the City) in respect

of the property, the appellant appealed to the first respondent, the Valuation Appeal Board (the Appeal Board).

[2] The Appeal Board is a statutory body established in terms of s 56(1) of the Local Government: Municipal Property Rates Act 6 of 2004 (the MPRA) to hear and decide reviews and appeals against the decision of a municipal valuer. The effect of the Appeal Board's decision was to overturn the valuation imposed by the City. On 13 June 2012, the Appeal Board handed down the reasons for its decision. The Appeal Board determined that the combined value of the leased property was approximately R308 million. Not persuaded by the reasons of the Appeal Board for its decision, the appellant launched an application in the Gauteng Local Division, Johannesburg to review and set aside that decision.

[3] The appellant sought the following order:

'1. Reviewing and setting aside the following decisions of the first respondent [the Appeal Board], delivered on 13 June 2012 and reasoned on 12 July 2012:

1.1 The decision to value the registered lease over stand 482 Illovo Extension 4, Johannesburg in an amount of R130 390.000 (One Hundred and Thirty Million, Three Hundred and Ninety Thousand Rand); and

1.2 The decision to value the registered lease over stand 483 Illovo Extension 4, Johannesburg in an amount of R161 610 000.00 (One hundred and Sixty One Million, Six Hundred and Ten Thousand Rand).

. . . .

3. In the alternative to paragraph 2 above, remitting the matter to the first respondent for the appeal against the decision of the municipal valuer, communicated to the applicant on 17 February 2012, to be reconsidered In the light of this Court's judgment.

4. Ordering the first respondent [the Appeal Board] and second respondent [City] to pay the applicant's [Atholl's] costs, jointly and severally, the one paying the other to be absolved.'

The application succeeded with costs before Vally J who set aside the decision of the Appeal Board and remitted the matter to it for reconsideration of the objection of the appellant.

[4] That notwithstanding the appellant sought and obtained leave from Vally J to appeal to this court. In its notice of appeal the appellant intimated that its appeal lay only in respect of certain paragraphs of the judgment, namely 32, 40, 46, 47 and 49. Prior to the hearing of the matter the registrar of this court directed correspondence to the parties at the instance of the presiding judge, requesting the parties to file additional heads of argument to address whether: (a) an appeal properly so-called served before this court inasmuch as, on the face of it, the appeal appeared to be directed at the reasons for judgment as opposed to the substantive order of the court below; (b) the judgment sought on appeal will have any practical effect or result; and (c) entertaining the appeal now opened the door to the fractional disposal of matters and the piecemeal hearing of appeals. In response, the appellant filed supplementary heads of argument in which it indicated that it was persisting with the appeal because Vally J had found against it on two main grounds, which, so it was suggested: (a) constitute final and binding findings as between the parties and would be binding on the Appeal Board; and (b) an appeal lies against those findings. Each of those contentions will be considered in turn.

As to a:

[5] It is so that usually when a court reviews and sets aside a decision of an administrative body it almost always refers the matter back to that body to enable it to reconsider the issue and make a new decision (per Heher JA, *Gauteng Gambling Board v Silverstar Development Ltd & another* 2005 (4) SA 67 (SCA) para 1). In circumstances such as those it would ordinarily be prudent for a court not to expressly itself too firmly on any matter that has been remitted for a fresh decision to the decision maker. For, to do so may well be to fetter the decision of the decision maker called upon to reconsider the matter. And whilst Vally J may well have ranged beyond that narrow remit in this case, I do not believe that anything that was said by him will either have the effect of unnecessarily fettering the Appeal Board in its later decision or will in truth be binding on it in its reconsideration of the matter.

[6] In my view the appellant's rights remain unaffected. The views expressed by Vally J are not automatically binding on the appellant, which will be free to reconsider the matter (*True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA)). As Cameron JA put it in *True Motives* at para 103: 'the most authoritative and illuminating exposition in our law of the distinction between what is binding in a previous decision, and what is stated "by the way", is that of Schreiner JA in *Pretoria City Council v Levinson*.' In *Pretoria City Council v Levinson* 1949 (3) SA 305 at 317, Schreiner JA stated:

'(W)here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided *(a)* that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, *(b)* that they were not merely a course of reasoning of the facts . . . and *(c)* which may cover *(a)*) that they were necessary for the decision, not in

the sense that it could not be reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.'

[7] Vally J remitted the matter to the Appeal Board. That order has pivotal significance in applying Schreiner JA's distinction. Whatever Vally J said in the offending paragraphs was merely incidental to and in no way formed part of the *ratio* of his judgment. This means whatever was said in those paragraphs can in no way be binding on the Appeal Board.

As to b:

[8] It will be immediately apparent that when one compares the relief sought to that granted, the appellant was wholly successful before Vally J. In *Administrator, Cape & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 714I-715D, this Court said:

'In legal usage the word *judgment* has at least two meanings: a general meaning and a technical meaning. In the general sense it is the English equivalent of the American *opinion*, which is "(t)he statement by a Judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based". (*Black's Law Dictionary* 5th ed *sv* opinion.) In its technical sense it is the equivalent of *order*…

When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by the Court, not against the reasons for judgment.'

[9] In the oft-quoted judgment by Centlivres CJ in *Western Johannesburg Rent Board & another v Ursula Mansion (Pty) Ltd* 1948 (3) SA 353 (A) at 354, the following is said:

'This court *mero motu* drew counsel's attention to the fact that the so-called notice of appeal was not a notice of appeal at all, for it does not purport to note an appeal against any part of the order made by the court *a quo*. Even apart from sub-rules (2) and (3) of Rule 6 of this Court, it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court.'

[10] More recently, in *Tecmed Africa (Pty) Ltd v Minister of Health & another* [2012] 4 All SA 149 (SCA), Ponnan JA put it thus (paras 16-17):

'[16] Before us, Counsel was constrained to concede that securing a licence for the use of the machine by Cancare at the Durban Oncology Centre had indeed become academic. That notwithstanding, so he urged upon us, the appeal should nonetheless be entertained. His argument, consistent with the approach adopted in the affidavit filed on behalf of Tecmed on this aspect of the case, amounted to this: the approach and reasoning of the Full Court to the disputed factual issues on the papers would stand and were it not to be set aside by this court, would serve as an insurmountable obstacle in due course to the successful prosecution of its envisaged civil claim against the Minister. In my view, for the reasons that follow Counsel's submission lacks merit.

[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same.'

[11] As the appeal is directed at the reasons as opposed to the substantive order of the court below, there is no proper appeal before us.[1] It must follow that the appeal must be struck off the roll.

[12] I turn to consider the question of costs. There can be no dispute that the first respondent was brought to court by the appellant as an unwilling party. When the application for leave to appeal was set down before Vally J, the first respondent did not appear in court to oppose the application, in the belief that an appeal did not lie against the reasoning of a court. Vally J granted the appellant leave to appeal on 5 March 2014. No reasons were furnished as to why he believed the matter to be appealable. At the very first opportunity, on 1 June 2014, the first respondent's attorney addressed a letter to the appellant, raising the question of appealability. This letter reads:

'At the outset we wish to advise that we are of the opinion that your client is not entitled to an appeal, and our understanding of Rule 49 of the uniform rules of Court is that an Applicant can only appeal the judgment or order, and never the reasons for the judge reaching his or her conclusion. In this matter the order as granted was the order as prayed for by the Applicant and as such it is our contention that the Applicant would not be entitled to proceed with this appeal. It is on this basis that our clients never opposed the Application for Leave to Appeal in front of Judge Vally, and we are surprised that leave to appeal was indeed granted. In this regard we refer you to Rule 49(4) and to the discussion thereon contained on pages 356 and 357 of Erasmus: Superior Court Practice:

[1] Rule 49(4) of the Uniform Rules of Court reads: 'Every notice of appeal and cross-appeal shall state - (*a*) what part of the judgment or order is appealed against; and (*b*) the particular respect in which the variation of judgment or order is sought.'

"*An appeal can be noted only against the judgment itself (i.e., the substantive order), not against the reasons for judgment and a notice which purport to appeal against the reasons for judgment is bad*".

In light of the above it is our contention that leave to appeal should not have been granted and that this is a matter that the Supreme Court of Appeal cannot entertain.'

The appellant had thus been alerted to the point by its opponent at a fairly early stage and even after the issue had been raised by the Registrar of this court it chose to persist with the appeal. The first respondent was thus compelled to appear before this court.[2] It follows that the appellant should bear those costs, which it was agreed should include those of two counsel.

[13] In the result the matter is struck off the roll with costs, including the costs of two counsel.

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H Saldulker

Judge of Appeal

[2] *Deutsches Altersheim Zu Pretoria v Dohmen & others* [2015] ZASCA 3 paras 11 – 12.

APPEARANCES:

For the Appellant	A Subel SC (with him A Friedman)
	Instructed by:
	Shapiro- Aarons Inc, Johannesburg
	Matsepes Inc, Bloemfontein
For the First Respondent:	M M Rip SC (with him J Vorster)
	Instructed by:
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