

NOTES / AANTEKENINGE

THE VALUE OF A NEIGHBOUR'S VIEW

1 Introduction

The recent judgment of the Supreme Court of Appeal in *Paola v Jeeva NO* (2004 1 SA 396 (SCA)) has caused quite a stir in the property industry. The court ruled that in terms of section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977 a local authority cannot approve a building plan if the proposed building would obstruct the view from an adjoining property to such an extent that the obstruction would in fact derogate from the market value of the latter property. Some property practitioners have interpreted the judgment to mean that a municipality is now prohibited from approving the building plan relating to the construction of any building if the proposed development would impair the view from an adjoining property. Many believe that

“the logical conclusion of the ... decision is that he who first develops his property may be able to prevent his neighbours from developing their properties in similar fashion, to any extent that it detracts from his view” (Kritzinger “Right to a View?” 2004 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 150).

Based on this interpretation of the judgment, owners of vacant land in coastal resorts whose view is currently obstructed by an existing building may rightfully fear that they will be forced to live with this given the position that they cannot build a double storey to obtain some view if by doing so they would, in turn, obstruct the view from an adjoining property. In fact, this belief has prompted some estate agents to advise sellers of vacant land that since they cannot erect a building obstructing their neighbour's view, the value of their properties has been diminished substantially, hence they should lower their asking price. Against this background it is perhaps not surprising that it has been suggested that the judgment “cannot be a correct interpretation of the relevant section” and that the Supreme Court of Appeal “needs to reconsider its broad-brush approach to the meaning of value ... and in any event that the legislature needs to amend the section to ensure that it is interpreted sensibly” (Kritzinger 2004 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 150).

The purpose of this note is to place the Supreme Court of Appeal's judgment in proper perspective. It is submitted that the decision is perfectly

correct and, properly interpreted, does not support any of the aforesaid contentions.

2 The background facts

The appellant (hereinafter referred to as the “back owner”) sought an order setting aside a decision by the relevant local authority to approve a building plan submitted by the first and second respondents, the trustees of a trust (the “front owner”). The front owner’s property was contiguous to that of the back owner, and was situated somewhat lower than the latter property. The back owner’s house, constructed about 20 years ago at a time when the existing house on the front owner’s property had already been built, was specifically designed and positioned to maximise the outlook and surroundings. The front owner wanted to make certain alterations and additions to its property which, if effected, would have substantially impaired the exceptional view enjoyed by the back owner.

Affidavits deposed to by an estate agent and a valuer expressed the view that the market value of the back owner’s property would be significantly diminished by the proposed development on the front owner’s land. This was not placed in dispute by the front owner. The case therefore proceeded on the basis that the proposed building by the front owner would in fact derogate from the value of an adjoining property, namely that of the back owner.

The local authority approved the building plan, contending that a value was not ordinarily attributed to a view for planning purposes and that the front owner should not be prohibited from developing its property in accordance with its design in order to preserve the back owner’s view.

The back owner’s attack on the approval of the building plans in question was originally based on three grounds, namely that –

- (a) due to its size, proximity and position relative to the back owner’s house, the proposed development would probably or in fact derogate from the value of the back owner’s property, with the result that the local authority was in terms of section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977 precluded from approving the building plans;
- (b) the relevant official had failed to apply her mind properly to the consideration of the plans; and
- (c) the plans were approved in breach of the provisions of the town planning regulations, in that the space between the rear of the building and the rear boundary of the front owner’s property was less than five metres.

For present purposes it is not necessary to examine grounds (b) and (c). To understand the first ground of attack it is necessary to have regard to sections 5(1), 6(1) and 7(1) of the National Building Regulations and Building Standards Act (“the Act”), which read as follows:

- “5(1) ... [A] local authority shall appoint a person as building control officer in order to exercise and perform the powers, duties or activities granted or assigned by or under this Act.
- 6(1) A building control officer shall –
- (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with s 4(3) ...
- 7(1) If a local authority, having considered a recommendation referred to in s 6(1)(a) –
- (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
- (b) (i) is not so satisfied; or
- (ii) is satisfied that the building to which the application in question relates –
- (aa) is to be erected in such manner or will be of such nature or appearance that –
- (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
- (bbb) it will probably or in fact be unsightly or objectionable;
- (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
- (bb) will probably or in fact be dangerous to life or property
- such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.”

The trial court upheld the local authority’s argument and dismissed the order sought by the back owner. The latter then lodged an appeal with the Supreme Court of Appeal. However, before the appeal was heard the back owner discovered that at the time when the building plan in question was approved the local authority did not have a building control officer as required by section 5(1) of the Act. The back owner then argued this technical point on appeal, contending that given the absence of a building control officer the approval of the building plan was in any event invalid.

The SCA upheld the latter argument and the appeal succeeded. However, the court also expressed its view on what was originally the main argument raised by the back owner, namely that the construction of the proposed dwelling would derogate from the value of his (the back owner’s) property. The back owner did not have a servitude over the front owner’s property in terms whereof the latter was restricted from erecting buildings impairing the back owner’s view. The proposed building was also not prohibited by the town planning regulations. The back owner stressed that in these circumstances he was not contending that he had a *right to a view* that was being infringed, but that he did have a right not to have plans passed in

respect of an adjoining erf in circumstances where a statute (namely s 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act) prohibited the passing of such plans.

The front owner repeated the argument raised by him in the trial court, namely that the loss of a view was not something that should be taken into account in determining whether there would be a derogation from the value of adjoining or neighbouring properties. It was argued further that what was contemplated by “adjoining or neighbouring properties” in section 7(1)(b)(ii)(aa)(ccc) was *all* the adjoining or neighbouring properties, and not simply one of them. The local council supported this argument, stating that the derogation from value contemplated by the aforesaid section was a diminution of value of the neighbouring properties as a group. The local council furthermore maintained that for purposes of the said section value must be assessed on the basis that no value is attributed to a view for planning purposes.

The SCA’s judgment in this respect was the following:

- It is not possible to interpret section 7(1)(b)(ii)(aa)(ccc) so as to give the word “value” a meaning other than its ordinary meaning, namely market value. The section does not envisage that value flowing from a view which can be enjoyed from a property should be excluded for planning purposes.
- The use of the plural in section 7(1)(b)(ii)(aa)(ccc) does not indicate an intention to refer to all adjoining or neighbouring properties as a group. Section 6 of the Interpretation Act 23 of 1957 indicates that the use of the plural normally includes the singular. The court referred to the following example:

“What if there is only one adjoining property, such as an erf by the seaside surrounded by one other property? Does the section only begin to apply if that other property is subdivided so that there is a group of adjoining or neighbouring properties from whose value there will be a derogation?”
- Once it is clear, as it was on the facts before the court, that the execution of the plans would significantly diminish the value of the adjoining property, then on its plain meaning the section prevents the approval of the plans.

The court thus also upheld the back owner’s ground of attack based on section 7(1)(b)(ii)(aa)(ccc). The trial court’s order was set aside and replaced with an order setting aside the local authority’s decision to approve the front owner’s building plans. In arriving at its decision the SCA observed in passing that it was not necessary for the purposes of its judgment to consider whether an insignificant diminution (not so slight as to be trivial in nature) is

to be regarded as a derogation for the purposes of section 7(1)(b)(ii)(aa)(ccc).

3 Analysis of the judgment

It is important to note that the SCA did not decide that –

- (a) a front owner's building plans cannot be approved if the proposed building would obstruct the back owner's view; or
- (b) the erection of a building on the front owner's property which totally or partially obstructs the back owner's view, necessarily in all instances significantly diminishes the value of the latter property; or
- (c) a back owner enjoys a common law right to a view which, if threatened, can be protected by interdict proceedings.

It is submitted that no inference can be drawn from the judgment supporting any of these contentions. Moreover, the decision cannot be interpreted to mean that the owner who builds first, determines what the neighbours can build. In other words, there is nothing in the judgment suggesting that where a back owner has built a single storey house, the front owner is now effectively prohibited from building a double storey where this would impair the back owner's view, thereby derogating from the value of the latter property. Any such interpretation would open the door to the owner of an undeveloped front property opposing the erection of a single storey on the back property on the grounds that the erection of a single storey would prohibit the front owner from building a double storey and that this would derogate from the value of the front owner's property. Nothing in the judgment warrants an argument along these lines.

In the *Paola* case the SCA was faced with a given fact, *namely that the proposed building would substantially derogate from the value of the back owner's property*. All that the court decided was that in these circumstances section 7(1)(b)(ii)(aa)(ccc) on its plain meaning prevented the approval of the building plan in question. This reasoning cannot be faulted.

In arriving at its decision the SCA gave no indication as to how a municipality should go to work to determine whether the erection of a building on a front owner's property, that would obstruct the back owner's view, would "probably or in fact derogate from the value of adjoining or neighbouring properties" as envisaged by section 7(1)(b)(ii)(aa)(ccc). For purposes of the judgment it was not necessary to examine this at all, *since it was not contested by the front owner that the execution of the plans in question would significantly diminish the value of the adjoining property*. To arrive at such determination a municipality would need to understand and

apply certain fundamental principles underlying the valuation of immovable property. A brief outline would suffice for present purposes.

4 Valuation of immovable property

The market value of immovable property is the price which a willing buyer would pay to a willing seller on a specific date. The “willing seller” and the “willing buyer” are not the actual persons buying and selling, but a notional willing seller and a notional willing buyer negotiating with each other on an equal footing, assuming that neither party is overly anxious to buy or sell by reason of special or extraordinary reasons (*Sher NNO v Administrator, Transvaal* 1990 4 SA 545 (A) 547H). Both the willing seller and willing buyer are assumed furthermore to be *fully informed* about the property in question – its advantages and disadvantages, its potentialities and everything which affects it (*Sher NNO v Administrator, Transvaal supra* 547H). In other words, to assess the likely market value of a property one postulates an *informed* buyer who is presumed to be fully acquainted with the economic attributes of the property and the legal restrictions and limitations affecting it. In *Bestuursraad van Sebokeng v M & K Trust en Finansiële Maatskappy (Edms) Bpk* (1973 3 SA 376 (A)) the court dealt with the determination of compensation payable in accordance with section 8(1)(a)(i) of the Expropriation Act 55 of 1965. In this regard Botha JA said the following (384F):

“Die bedrag van die vergoeding wat in art 8(1)(a)(i) beoog word, is ’n bedrag gelykstaande aan die redelike en billike markwaarde van die onteiene grond op die datum van onteiening ... Die oogmerk van die Wet is dieselfde as dié van die gemene reg, nl dat die ekwivalent in waarde aan die onteiene toegeken moet word om die plek in te neem van die grond wat hom ontnem is (*Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 242-243). Die gewillige verkoper en die gewillige koper waarna in art 8(1)(a)(i) verwys word in verband met die bepaling van die billike markwaarde, is nie die onteiene en die onteienaar nie, maar ’n denkbeeldige gewillige verkoper en ’n denkbeeldige gewillige koper wat met mekaar op gelyke voet onderhandel, en wat albei ten volle ingelig is oor die op die datum van onteiening bestaande voor- en nadele en potensialiteite van die grond en oor alles wat dit affekteer. (*Minister of Water Affairs v Mostert* 1966 4 SA 690 (A) 722, 726 and 727). Om die billike markwaarde van die onteiene grond te bepaal, is dit in die eerste plek nodig om vas te stel wat die potensialiteite van die onteiene grond op die datum van onteiening was, nie as gerealiseerde werklikhede nie maar as redelike moontlikhede” (my emphasis). (See also *Minister of Agriculture v Davey* 1981 3 SA 877 (A) 897.)

For the purposes of assessing the likely market value of land the notional “fully informed” buyer and seller are not expected to make the same enquiries in respect of each and every property which is bought and sold. As was said in *Davey v Minister of Agriculture* (1979 1 SA 466 (N) 469C):

“In my view a realistic and practical interpretation is to be given to the reference ... to a ‘fully informed buyer and seller’. Theoretically there is virtually no limit to the enquiries and investigations, which can be made and conducted, to determine the defects, attributes, and the potential, of farm land. Information in this regard can be obtained from pedologists, climatologists, agronomists, agricultural economists and other experts. In addition a detailed analysis and examination of other sales in the

area, whether to a greater or lesser extent comparable, can be undertaken. This is the sort of evidence which is customarily led in expropriation cases. But this is not the manner in which a buyer or seller normally sets about deciding upon the price at which to conclude a sale. The practical steps which would be undertaken differ in each case and cannot be precisely enumerated. Much will depend upon the nature of the property concerned, the extent to which its use or potential use relates to a specialised activity, and upon the amount which is likely to be paid for its purchase. Obviously a more detailed investigation can be expected in the case of the transaction involving a large sum of money. It is, however, in my mind implicit in the test to be applied that the facts a court should take into account *are those which would be known to a buyer, who has taken such practical steps as are reasonably necessary to become properly acquainted with the property he has in mind purchasing*" (my emphasis).

In my opinion it cannot be contested that a notional willing buyer of a property enjoying a spectacular view can reasonably be expected to make enquiries as to whether or not that view is guaranteed. This would be particularly so where the property in question adjoins vacant land. If the buyer considers the view an important factor for the purposes of making an offer in respect of the property, then common sense dictates that enquiries would be made as to whether the back owner has a right to a view or whether the view can be obstructed by developments on the front property. Where there is no servitude, restrictive condition of title or township planning condition guaranteeing the back owner's view, the notional willing buyer cannot close his eyes to reality. The *informed* notional willing buyer will, when deciding upon the price to offer for the property, make significant allowance for the fact that the view is not guaranteed.

It has been suggested (Kritzinger 2004 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 152) that buyers

"are generally prepared to pay something of a premium for a view looking over undeveloped or under-developed neighbouring properties, and are willing to assume the risk that those properties would not (or not soon) be developed or extended. A buyer's feel for the likelihood of development of those properties and timing of such development would determine how much (if any) of a premium he would be willing to pay. In accordance with the usual definitions of market value, such a premium would be reflected in the market value of the subject property ...

The buyer of a property with excellent views resulting from the fact that neighbouring properties have not been developed (or developed fully), would probably have paid something of a premium above what the market price would have been without those views. According to *Paola*, the buyer would have effectively sterilised the ability of the neighbours to develop or add to their properties as they would otherwise have been entitled to do, if that would adversely affect the views from the buyer's property."

I do not agree. The market value of a property is not simply the price which a particular buyer paid for a property at a particular point in time. A valuer postulates the notional willing buyer, fully informed of all relevant facts and circumstances pertaining to the subject property. Can it be said that the notional buyer will always assume the risk that neighbouring properties "would not (or not soon) be developed or extended" and that such notional buyer would in all instances be prepared to pay substantially more than he would have paid had the view in fact been obstructed at the time of

purchase? In my opinion the answer is no. The fully informed notional buyer is expected to take rational decisions, not to make an offer on a property based on the speculative hope that the owners of adjoining properties will not (or not soon) exercise their proprietary rights to develop their properties in a legally permissible manner. A *particular* buyer (not the notional buyer) who is prepared to assume a risk that a non-guaranteed view would not be obstructed by developments on neighbouring properties, cannot be heard to complain if the risk materialises. Such buyer took the risk of paying a premium and surely cannot contend that the price paid for the property, based on the assumption of risk, was the true market value.

I fully support the following statement:

“In a normal open market valuation we have to envisage an informed market with the normal criteria that applies to (the) definition of market value. The value of a property can therefore not change because an adjoining owner has exercised his or her rights. It is preposterous to even think that way! When you value property you must be fully informed of the bundle of rights of the subject property, but also of the neighbouring properties, as it has a direct bearing on the value of your property. If a neighbour could possibly obstruct the views of a property due to the rights he may have to a future development ..., such possible risks and restrictions must be taken into account. Sad to say these are normal fundamentals in valuation. The property’s value can therefore not suddenly change because the neighbour purely exercised his rights.” (Du Toit “Re: Protection of View Article in SA Valuer of 2003 – ‘a valuer’s blunder!’” March 2004 77 *The South African Valuer* 7.)

This raises the crucial question: is it open for a front owner to contend that a building which partially or totally impairs the back owner’s view would not for the purposes of section 7(1)(b)(ii)(aa)(ccc) “probably or in fact derogate from the (market) value of adjoining or neighbouring properties”? The answer requires a careful analysis of section 7(1)(b)(ii)(aa)(ccc).

5 Analysis of section 7(1)(b)(ii)(aa)(ccc)

Section 7(1)(b)(ii)(aa)(ccc), read in the context of the SCA’s judgment, obliges a municipality to refuse the approval of a building plan if -

- (a) it (*ie* the municipality) is satisfied;
- (b) that the proposed building will probably or in fact derogate from
- (c) the market value of any adjoining property.

A municipality is therefore not obliged to refuse the approval of a building plan if the proposed building would *not* probably or in fact derogate from the market value of an adjoining property. But how is a municipality to decide whether or not the market value of an adjoining property will be negatively affected by the proposed building? In my opinion section 7(1)(b)(ii)(aa)(ccc) clearly postulates that when considering a building plan the municipality must have some idea about the current market value of the adjoining properties. What it must decide is whether the proposed building would

probably or in fact derogate from that value. The starting point is therefore the current market value of an adjoining property, that is, its market value without taking into account the proposed dwelling on the front owner's property. Here lies the crux. In assessing the current market value of an adjoining property all relevant facts and legal restrictions must be taken into account, particularly whether –

- (i) the front owner is in terms of a negative servitude or other restrictive condition of title restrained from erecting a building which may obstruct the back owner's view; and
- (ii) the relevant town planning scheme allows or prohibits the proposed construction on the front owner's property.

If the front owner is not prohibited by servitudes, restrictive conditions of title or the town planning scheme to erect a double storey which may obstruct the back owner's view, it would obviously be wrong to assess the market value of the back owner's property *as if it has a legal entitlement to an unrestricted view*. What must be taken into account in assessing the market value of that property is the fact that its view *can, and probably may or will be*, obstructed by the front owner. In the *Paola* case the SCA was at pains to point out that it was not in dispute that the construction of the proposed building would substantially derogate from the value of the back owner's property. However, this does not mean that in all cases where a front owner wishes to erect a building which obstruct the back owner's view, the current market value of the latter property is negatively affected. It all depends on what the current market value of the property is, *taking into account that it has no legal right to an unobstructed view and that the front owner may by law build a double storey which could obstruct its view totally*.

It goes without saying that where a front owner is not by law prohibited from erecting a building which may obstruct the back owner's view, the market value of the back owner's property would be substantially less than it would have been if by law the front owner could not erect the building concerned. Where a front owner is not by law prohibited from constructing a building which may obliterate the back owner's view, *that (lesser) market value is what the municipality must take into account when deciding whether a proposed building on the front owner's property would probably or in fact derogate from the value of the back owner's property*. The municipality cannot simply say that the back owner currently enjoys an unobstructed view and that, since this view would be impaired by the proposed dwelling, the market value of the back owner's property will be negatively affected by the proposed building. Such approach would not give effect to a fundamental principle of market valuation, namely that a valuation must be done *taking into account all relevant facts and circumstances*. One crucial relevant fact is that the back owner has no legal entitlement to an unobstructed view.

Failure to allow for this when assessing the current market value of the back owner's property would in effect give the back owner's property an attribute which by law it does not have, namely an entrenched right to a view.

6 Conclusion

The Supreme Court of Appeal's judgment in the *Paola* case poses no threat to property owners. There is no need for panic action or to amend the legislation in question. It is my submission that if the fundamental principles of market valuation of immovable property are properly applied, then in most instances where a front owner intends erecting a building on his property which will partially or totally obstruct the back owner's view, the proposed building would *not* derogate from the current market value of the adjoining property as contemplated by section 7(1)(b)(ii)(aa)(ccc). The "view obstruction" factor should be taken into account in the assessment of the current market value of the back owner's property. Naturally, different considerations would apply if the design of the proposed building is such that its appearance (and not the view obstruction factor) would derogate from the value of the adjoining property.

Henk Delpont
University of Port Elizabeth