21-9-70

G.P.-S.33967—1968-69—1,000. J. 219

49/70

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

{ APPELLATE Provincial/ Division.) Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

YOUNGLESON INVESTMENTS (PTY) LIMITED *Appellant,*

versus

SOUTH COAST REGIONAL RENT BOARD.....First RESPONDENT
RENT CONTROL BOARD.....Second RESPONDENT *Respondent*

Appellant's Attorney McIntyre & van der Post *Respondent's Attorney* Dep. S.A. (Durban)
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate D. J. Shaw S.C *Respondent's Advocate* R.C.A Feetham S.C
Advokaat vir Appellant R. B. McNall *Advokaat vir Respondent* M. L. Mitchell

Set down for hearing on
Op die rol geplaas vir verhoor op 22-9-70

13.9.70

Coram: Van Blerk A.C.J, Rumpff, Wessels, Potgieter, JJA et Corbett AJA

(D.C.L.D.) 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.30 pm

per Wessels J.A.:—

Appeal dismissed with costs including the costs of two counsel.

REGISTRAR.
17.11.1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

1. YOUNGLESON INVESTMENTS (PROPRIETARY) LIMITED ..... APPELLANT.

AND

SOUTH COAST REGIONAL RENT BOARD ..... 1st RESPONDENT.

AND

RENT CONTROL BOARD ..... 2nd RESPONDENT.

In the matter between:

2. GRAHAM PROPERTIES LIMITED ..... APPELLANT.

AND

SOUTH COAST REGIONAL RENT BOARD ..... 1st RESPONDENT.

AND

RENT CONTROL BOARD ..... 2nd RESPONDENT.

CORAM: VAN BLERK, A.C.J., RUMPFF, WESSELS, POTGIETER, JJ.A. et CORBETT, A.J.A.

HEARD: 22 September 1970. DELIVERED: 17 November 1970.

J U D G M E N T.

WESSELS, J.A. :-

Inasmuch as the two appeals were heard together, it is convenient to deal with them both in this judgment. I shall refer to the appellants as Youngleson and Graham respec-

tively, and to the respondents as the Rent Board and the Control Board respectively.

Youngleson is the owner of premises at 80 Aliwal Street, Durban. During the years 1958 to 1960 a building was erected on the site, and during the year 1962 substantial alterations were effected thereto. The building is known as King's Hall and it consists of two wings, referred to as the main wing and a rear wing. The first two floors of the main wing and the five floors of the rear wing are occupied as shops, commercial premises, a parking garage and servants' quarters. The top thirteen floors of the main wing contain 180 flats, of which 52 are one-bedroomed flats and 128 so-called bachelor flats.

Graham is the owner of premises situated at the south-eastern corner of Smith and Broad Streets, Durban. The building complex on the site consists of:-

(a) Graham Buildings, a seven-storey industrial building, with a floor area of approximately 7,150 square feet per storey.

(b) A double-storey commercial building, with a floor area of approximately 3,200 square feet per storey.

3/.....(c)

(c) A warehouse, to the rear of the above-mentioned double-storey building, which is interconnected with Graham Buildings. It comprises three floors of approximately 3,300 square feet per floor. On the roof of this building there has been constructed servants' quarters and box-rooms in extent approximately 2,000 square feet. There is also an area for drying laundry. The servants' quarters, box-rooms and drying area serve the building referred to in paragraph (d) hereunder.

(d) A building known as City Heights, the erection of which was completed in the year 1965. The ground floor, said to be 9,895 square feet in extent, was let as shops. The top 14 floors, in extent 81,950 square feet, were let as flats. There is a lift motor-room in extent 493 square feet.

Prior to 31 May 1966 none of the above-mentioned premises was subject to the provisions of the Rents Act, 1950 (No. 43 of 1950) as amended. The business premises as well as the flats were let at rentals agreed upon between the owners and the individual lessees. By virtue of Proclamations Nos. 317 of 4 November 1966 and 356 of 15 November 1968, published in terms of section 31(1A) of the Rents Act, the

provisions thereof were applied to the flats in both King's Hall and City Heights with effect from 31 May 1966, and remained applicable thereto at all material times thereafter. In terms of the provisions of section 31(1A) (d) of the Act, the rents charged on 31 May 1966 for the flats in question were deemed to be rents determined by the Rent Board therefor. The provisions of the Rents Act were, however, at no time applied to the remainder of the premises. It follows that as from 31 May 1966 the flats in King's Hall and City Heights became "controlled premises" as defined in section 1(iii) of the Act, each flat constituting a "dwelling" as defined in section 1(iv) thereof.

During July 1968 both Youngleson and Graham separately applied to the Rent Board in terms of the provisions of section 5(1)(b) of the Act for authority to charge for their controlled premises rents higher than those which could validly be charged in terms of section 2(1) thereof, on the ground that such rents were not reasonable rents within the meaning of the Act. The applications, and objections thereto, were heard by the Rent Board during September 1968. Thereafter, on 17 October 1968, the Rent Board made determinations of reasonable rents in

respect of the controlled premises in both King's Hall and City Heights. Both Youngleson and Graham were aggrieved by these determinations, and applied in terms of section 12 of the Act to have them reviewed by the Control Board. The Control Board thereafter confirmed the determinations made by the Rent Board. Thereupon both Youngleson and Graham separately instituted review proceedings in the Durban and Coast Local Division, each claiming, inter alia, an order setting aside the above-mentioned determinations made by the Rent Board and the confirmation thereof by the Control Board. The respondents opposed the grant of the relief claimed. The two matters were argued together before Henning, J., who dealt with them both in one judgment. The learned Judge dismissed both applications with costs, holding that neither applicant had been prejudiced notwithstanding the fact that the respondents had erred in a fundamental respect in their approach to the determination of reasonable rents for the controlled premises in question. Both Youngleson and Graham now appeal to this Court against the judgment of Henning, J.

It is common cause that the approach

followed by the Rent Board, and confirmed on review by the Control Board, in determining a reasonable rent for the controlled premises, i.e., the flats in King's Hall and City Heights, was broadly speaking as follows:

1. The Rent Board determined the reasonable rent value of the whole premises as if the provisions of the Rents Act applied to such premises as a whole.

2. Having made this basic determination of the reasonable rent value of the whole premises, the Rent Board proceeded to determine a reasonable rent for such premises, again as if the provisions of the Rents Act applied to the whole premises.

3. Having so determined a reasonable rent for the whole premises, the Rent Board proceeded to an allocation thereof as between the controlled premises (the flats) and that portion of the premises to which the provisions of the Rents Act did not apply (the business premises). It determined that the rent in fact being charged for the business premises was a reasonable quid pro quo therefor, and accordingly allocated that amount to the business premises.

4. The amount of the rental thus allocated to the business premises was then deducted from the amount of the reasonable rent determined for the whole premises, the balance constituting the reasonable rent for the totality of the controlled premises (i.e., the flats as a whole).

5. Thereafter the Rent Board completed its task by determining a reasonable rent for each flat in King's Hall and City Heights by allocating to each flat a portion of the reasonable rent determined in respect of the totality of controlled premises.

After considering the approach of the Rent Board, as outlined above, Henning, J., concluded that it had neither disregarded the provisions of the Rents Act nor acted arbitrarily in any manner whatsoever in the determination of a reasonable rent for the controlled premises by first making the determinations detailed in paragraphs 1 and 2 above. The learned Judge a quo proceeded to a consideration of the further determinations made by the Rent Board, as summarised in paragraphs 3 and 4 above, and concluded that in this respect the Rent Board had acted arbitrarily. The correctness of this

8/.....conclusion

conclusion was not challenged on appeal before this Court by counsel appearing for the respondents, and I am satisfied that counsel acted with due propriety in conceding that the Rent Board had erred in this respect in seeking to determine a reasonable rent for the controlled premises in question. Having regard to the provisions of the Rents Act relating to the determination of a reasonable rent for controlled premises, on the one hand, and the factors which operate in the determination by agreement between a lessor and a lessee of the rent for "uncontrolled" premises, on the other hand, the rent actually being charged for the "uncontrolled" portion of composite premises could hardly ever be a relevant consideration in the determination of a reasonable rent for the "controlled" portion thereof. In the case of "uncontrolled" premises, considerations arising from the economic laws of supply and demand usually operate decisively in the determination by agreement of the rent to be charged therefor. If the lessor bargains from a position of strength (e.g., because there is a shortage of the kind of premises in question), the rent agreed upon will, save in exceptional circumstances, tend to be far higher than would be the case where circumstances favour the lessee (e.g.,

where the availability of premises of the kind in question exceeds the demand therefor). It necessarily follows from the method employed by the Rent Board that, in the case of composite premises, the lessor will not retain, as he is entitled to, the financial benefit derived from the "high" rental income yielded by the "uncontrolled" portion thereof; such benefit will unjustifiably be passed on to the lessees of the "controlled" portion thereof. In the converse case, the lessees of the "controlled" portion would unjustifiably be called upon to pay a higher rent and so compensate the lessor for the relatively low rent charged for the "uncontrolled" portion.

The learned Judge concluded, however, that in the particular circumstances the above-mentioned arbitrary approach on the part of the Rent Board had not resulted in prejudice to either Youngleson or Graham, and this led him to dismiss both applications. In so far as the Youngleson matter is concerned, the judgment of Henning, J., reads as follows:

9/....."In

"In this case, however, there are considerations which persuade me that the eventual determination of the Rent Board of the rents for the flats should not be disturbed.

As part of the information which accompanied the application for an increase in rent for the flats, there was a statement by a firm of architects setting forth the area in square footage of the flats and of the business premises, and other portions of the building. It is not possible to determine with arithmetical accuracy the precise total area of the flats and the area of the business premises. The ratio appears to be about four to one. It will be recalled that the applicant all along contended that the business premises comprised 21 per cent of the building, and the flats the remainder.

I have already held no fault can be found with the adoption by a Rent Board of a method whereby it set out to determine a reasonable rent, in terms of the Rents Act, for the whole of a composite building, to enable it to arrive at a reasonable rental for the flats. I am of the view that in this case, the safest, the most practical and the fairest manner in which to allocate the rent thus determined to the whole building is to apportion it between the controlled and uncontrolled portions in accordance with the respective total areas in square feet of each portion. An allocation on this basis should ignore the rent actually received by the lessor for the uncontrolled business premises, with the result that it is not deprived of the benefit of a comparatively high income return - if that is what it received - for such premises.

It is paradoxical that, although the applicant contends, and the Rent Board freely concedes, that the rent obtainable for business premises greatly exceeds that for residential premises, that is not so in this case. When the application for an increase was lodged the applicant received R8,001 for the flats and R2,107 for the business premises.

10/.....This

> This means that the two sections produced almost exactly the same rent per square foot, accepting their total areas as being 79 to 21. The allocation of the Rent Board works out at a proportion of 80 to 20, which favours the applicant. It follows that, although the Rent Board adopted a wrong approach in making its allocations, the result of the allocation was correct in the peculiar circumstances of this case."

At the hearing of the appeal, appellants' counsel submitted that Henning, J., had misdirected himself in holding that although it "is not possible to determine with arithmetical accuracy the precise total area of the flats and the area of the business premises ..... (the) ratio appears to be about four to one." It was, furthermore, submitted that in stating, "It will be recalled that the applicant all along contended that the business premises comprised 21 per cent of the building, and the flats the remainder," the learned Judge overlooked the fact that the contention was based not on floor areas but on rentals. Counsel for the respondents conceded that Henning, J., had wrongly determined the ratio as about four to one, and that it would be more nearly correct to determine it at approximately two-and-a-half to one. Counsel for the appellants did not appear to dispute this. On the in-

formation before the Court it is impossible to determine the ratio with any accuracy, but one of approximately three to one appears to me likely to be nearer the mark than the ratio of four to one. This misdirection does not assist Youngleson because, if the correct ratio is approximately three to one and not four to one, the allocation of rentals as between controlled and business premises by the Rent Board is more favourable to Youngleson.

In adopting the same approach in the Graham matter Henning, J., concluded that, testing the Rent Board's allocation on the basis of comparative floor areas, it appeared that the determination in question favoured Graham and that there was, therefore, no valid ground for setting aside the determination of reasonable rents for the controlled premises in City Heights.

In exercising its powers under section 5(1)(b) of the Rents Act, the Rent Board is bound to have regard to the provisions of the Act, and in determining what

equipment, machinery or plant, or for any services supplied by the lessor, not included under paragraph (h) or paragraph (j);

(e) any premiums payable by the lessor in respect of plate glass insurance and the insurance of the premises and any furniture, fittings or equipment therein against fire and consequential loss arising therefrom and against public liability;

(f) such amount (if any) as the board may consider reasonable in respect of collection charges;

(g) an amount not exceeding two per cent. per annum on the value of the buildings in respect of maintenance, repairs and depreciation and not exceeding seven-and-one-half per cent. per annum on the value of any plant and machinery supplied, not being part of the buildings, to cover depreciation;

(h) the amount of any wages paid by the lessor to any caretaker or other employee for the upkeep, care and servicing of the premises: Provided that if such wages are in the opinion of the board unreasonably high, this amount be reduced to such amount as the board shall deem to be reasonable;

(i) the amount of any fees, contribution or assessment paid by the lessor in respect of any employee mentioned in paragraph (h) in terms of the laws relating to the registration of Bantu employees, unemployment insurance and workman's compensation, the Bantu Services Levy Act, 1952, and the Bantu Transport Services Act, 1957;

(j) any amount expended by the lessor in supplying electric current, gas, water, fuel or sanitary services:

Provided that, in determining such rent the rent board shall have due regard to rents charged in the vicinity for premises of a similar class, nature or situation: Provided further that where a lessor fails to maintain or repair any dwelling, plant or machinery in respect of which the rent board may allow an amount in terms of paragraph (g), the rent board may decide not to allow any amount under the said paragraph in respect of the

dwelling, plant or machinery concerned until it is satisfied that such dwelling, plant or machinery has been satisfactorily maintained or repaired:

Provided further that where a rent board is satisfied that any rent determined as aforesaid will not by reason of the bona fide rate of interest (not being a rate of interest higher than that currently charged by financial institutions such as are referred to in the Inspection of Financial Institutions Act, 1962 (Act No. 68 of 1962), on loans for the erection or purchase of the type of premises concerned) payable on any loan secured by a mortgage bond registered against the land on which the premises are situate, give to the lessor such a return as is referred to in paragraphs (a) and (b) on the amount of the difference between the unredeemed balance of the said loan and the total value of the premises, the rent board shall, in determining the rent in respect of such premises, in lieu of the return referred to in paragraphs (a) and (b) allow the lessor -

(i) the amount of interest payable under such loan at the date such determination; and

(ii) an amount which bears to the aggregate of the amounts determined in terms of paragraphs(a) and (b) the same proportion as the amount of the difference between the unredeemed balance of the capital owing under the said loan on the said date and the total value of the premises bears to the total value of the premises;"

Section 1(xiii) of the Rents Act then read as follows:

" 'value' in relation to any controlled premises or any land means a value which a rent board in all the circumstances of the particular case, determines to be a reasonable rent value (which may or may not coincide with the market-value) of such premises or land, regard being had inter alia, to -

15/.....(a)

(a) actual cost of erection of such premises;
(b) any municipal or divisional council valuation of such premises or land;
(c) any sworn valuation or building society valuation of such premises or land;
(d) the purpose for which such premises are used, or such land is used:

Provided that -

(i) the land is to be valued separately and without improvements;
(ii) the value of the buildings is to be obtained by determining the value of the land together with the buildings and other improvements on it, and by subtracting the value of the land."

A consideration of the history of the legislation whereunder reasonable rentals have had to be determined is of assistance in the construction of the above-quoted definitions of "reasoanble rent" and "value". It is, however, unnecessary for me to detail the history in this judgment, because it has already been adequately set out by Colman, J., in his judgment in Lukral Investments (Pty) Ltd. v. Rent Control Board, Pretoria, and Others, 1969(1) S.A. 496. I am in agreement with Colman, J., where he states (at p. 500H) that since the amendment of "reasonable rent" by section 1(e) of Act No. 47 of 1964 "a number of the previous decisions of the Courts would seem to have become unsafe

guides to the meaning and proper application of the definition."

There is another aspect of the historical background of the legislation which merits some attention. In section 14 of Act No. 13 of 1920 there appears in the definition of "reasonable rent" the following proviso, "..... in

> the case of a dwelling erected since the first day of July, 1914, no rent shall be regarded as unreasonable which ..... gives the lessor an annual return of not more than ten per cent. on the actual cost of erection of the dwelling and six per cent. on the actual cost ..... of the land on which 'the dwelling' is situate and occupied in connection with it."

In Act No. 33 of 1942, the "annual return" to which a lessor was entitled, was related to the "value of the dwelling" and "the value of the land". In passing, it may be noted that in dealing with the annual return on the "value of the land", the words, "on which it" (i.e., the dwelling) "is situate and occupied in connection with it", were omitted by the legislature. (Cf. the above-quoted proviso in the definition of "reasonable rent" in the 1920 Act). However, in paragraph (c) of the definition of "reasonable rent" in the 1942 Act, which deals with the allowance in respect of rates and taxes paid by the lessor, reference is made to the amount

paid in "respect of the dwelling, and of the land on which it is situate and which is occupied in connection with it". (My italics). See also ~~CXXXXXX~~ in this regard, the definition of "value" in the 1942 Act, paragraphs (b) and (c) of the definition of "reasonable rent" in the 1950 Act (as amended) and the definition of "value" in the latter Act. In my opinion, the "land" which has to be valued for the purpose of determining a "reasonable rent" for controlled premises is the land on which the premises is situate and which is occupied in connection with it. That this must be so, appears from the definition of "rent" in both the 1942 and 1950 Acts. In so far as it is material hereto, the definition in the 1950 Act reads as follows:

> "In this Act, unless the context indicates otherwise - 'rent' in relation to controlled premises includes, in addition to the sums payable periodically by the lessee for use or occupation thereof and of any grounds and outbuildings used in connection therewith, any moneys which the lessee pays .....". (My italics).

In terms of the definition thereof in the 1942 Act, "value" meant "a reasonable value for such dwelling or land" determined by the Rent Board with due regard to such matters as the actual cost of erection of the dwelling and any municipal, divisional council or sworn valuation of the dwelling

or land. In Chaitowitz v. Johannesburg Rent Board and Another, 1943 T.P.D. 333 and Tilsim Investments (Pty) Ltd. v. The Pretoria Rent Board and Another, 1946 T.P.D. 289, it was decided that "value" in Act 33 of 1942 referred to market value. This question arose for consideration by this Court in Durban Rent Board and Another v. Edgemount Investments, Ltd., 1946 A.D. 962. In the course of his judgment Watermeyer, C.J., concluded that the "reasonable value" which had to be determined by a rent board was not the "market value" of the dwelling or land in the ordinary sense of that term. It was pointed out, with reference to Durban Corporation and Another v. Lincoln, 1940 A.D. 36, "that there can be no such thing as the market value of a building divorced from the land upon which it stands." At pp. 973/4 Watermeyer, C.J. observes as follows in regard to the "reasonable value" which the legislature had in mind:

> "The fact that a rent board is directed to have regard to the cost of erection, the municipal or divisional council valuation and any sworn appraisement suggests that a rent board is required by the Act to determine a value which can be regarded as an intrinsic value of a more enduring nature than one which is dependent on temporary market fluctuations. That suggestion arises from a consideration of the material upon which it is directed to work. A sworn valuation is usually an estimate of market

value, but whether or not it is, will depend on what kind of an appraisement the valuer intended it to be. The cost of erection is a definite amount, not an estimate; though it may be a factor which normally has both a temporary and long run effect upon market value, it is not a factor which necessarily determines the existing market value, which may temporarily differ considerably from such cost. Municipal and divisional council valuations are made upon different principles in different provinces of the Union. Judging from the evidence furnished by two letters from the Durban town clerk which appear in these proceedings, the present practice in Durban in relation to the valuation of buildings is to estimate the replacement value of the building and then deduct from it 20 per cent. to cover a possible over-estimate, and from that figure to deduct 25 per cent. as an allowance for high building costs, inflation, etc. In the Cape Province the matter is governed by Ordinance 7 of 1914, under the provisions of which land is valued at its market value and buildings at their cost of erection less structual depreciation and any depreciation due to unsuitability for the purpose for which they were intended or are being used; or, if the cost of erection does not, in the opinion of the valuer, serve as a sufficient guide to enable him to arrive at a fair and equitable valuation, then the productivity of and the possibilities of the property as an investment are used as a factor in determining its value. It will thus be seen that a rent board, in estimating the value of property, is not confined within any rigid limits."

In a concurring judgment Schreiner, J.A., dealt at some length with what he described as the proper approach by a Rent Board to the problem of fixing a reasonable rent under the Act of

1942. At p. 983 he is reported as follows:

> "There seems to be nothing in the Act to show that in the present case if the rent board disregarded the cost of erection in arriving at a reasonable rent it was wrong in so doing. In my opinion it was entitled to examine the premises and estimate a reasonable rent by a consideration of the accommodation provided. In so doing the members of the board would inevitably draw upon their own experience, making at least subconscious comparisons with the rents being paid for similar accommodation in the same or neighbouring areas. But they were not obliged to rest their conclusion in any degree whatsoever on the capital value of the building or its cost of erection, the latter factors only requiring consideration in relation to the up-limit."

In a further passage, at p. 983, the following is stated:

> "Whether in this case the Provincial Division was in any degree justified in inferring that the board must have calculated the value of the building from the rent which it had already fixed as reasonable seems to me to be of no importance. The board may have vacillated somewhat in its attitude towards the value factor. But I see no reason to doubt that it based its estimate of the reasonable rent on its view of the rental value of the accommodation provided; it was entitled to do so and to disregard, save in relation to the up-limit, both the cost of erection and the capital value of the property."

An interesting aspect of this last-quoted passage is the reference by Schreiner, J.A., to "the rental

value of the accommodation provided."

The formulation of the new definition of "value" in Act No. 43 of 1950 may have been influenced by the terms of the judgments of Watermeyer, C.J., and Schreiner, J.A., in Durban Rent Board and Another v. Edgemount Investments, Ltd., (supra). This new definition makes it clear that "value" does not mean "market value", albeit that the value determined may coincide with "market value". The definition deals with the impossibility, referred to in Durban Corporation and Another v. Lincoln, (supra), of determining the market value of a building divorced from the land upon which it stands, by specifically providing how the value (i.e., the reasonable rent value) thereof is to be determined for the purposes of the Act. It is indeed possible, too, that the use of the term "rent value" in the definition may have been suggested by the term "rental value" used by Schreiner, J.A., in the above-quoted passage from his judgment. In my opinion, as I shall presently indicate, the meaning of the phrase "reasonable rent value" in the definition in question is different from the meaning of the phrase "rental value" as used by Schreiner, J.A.

The term "rental value" (Afrikaans "huurwaarde") is more usually employed to indicate the annual rent which a tenant might reasonably be expected to pay for leased premises. It is in this sense that the term is usually employed in certain English statutes. (E.g., Allotments Act, 1922, 12 and 13 Geo. 5. Ch. 51 sect. 10(7); Allotments Act (Scotland) 1922 12 and 13 Geo. 5 Ch. 52 sect. 10(6) Mining Industry Act, 1926, 16 and 17 Geo. 5 Ch. 28 sect. (4). See also, Commissioners of Inland Revenue v. Truman, Hanbury, Buxton & Co. Ltd., and Another, 1913 A.C. 650 and Butterworth's Words and Phrases (2nd Ed.) s.v. "annual value" and "rental value"). The following meaning is given to "huurwaarde" in Die Afrikaanse Woordeboek - "Bedrag wat 'n perseel ..... aan huur kan opbring."

The context in which "reasonable rent value" appears in the definition of "value" in the Rents Act of 1950, leads me to conclude that the phrase is not used in what I might call its ordinary dictionary meaning, i.e., as meaning the annual rent which the hypothetical tenant might reasonably be expected to pay for the premises or land. Such a meaning

would make nonsense of paragraphs (a) and (b) of the definition of "reasonable rent", which clearly contemplate an annual return on a value of a capital nature. In the definition of "value" it is indicated that it " may or may not coincide with the market value" of the controlled premises or land. This indication is not particularly helpful, because it does not suggest in what circumstances "market-value" and "reasonable rent value" could properly coincide, nor whether a "market-value" could be determined for the controlled premises divorced from the land on which it stands. (See, Durban Rent Board and Ano. v. Edgemount Investments, Ltd., (supra) at p. 973). In the last-cited case Watermeyer, C.J., stated at p. 973, that "a rent board is required by the Act to determine a value which can be regarded as an intrinsic value of a more enduring nature than one which is dependent on temporary market fluctuations." In my opinion the legislature probably had this "intrinsic value" in mind when the existing definition of "value" was incorporated in the Rents Act of 1950. I, therefore, conclude that "reasonable rent value" means a reasonable money value of a capital nature which the controlled premises and the land have for the lessor

24/.....as

as a rent-producing investment, i.e., the value of a capital nature is solely related to the rent potential of the existing controlled premises and the land in question at the time the value thereof has to be determined. Any other unexploited potentiality which the premises or land might have at that time must be ignored. It is not contemplated that a lessee should pay a higher rent for a "dwelling" because it is situate on land which has a high market value as such on account of the fact, e.g., that business premises or a block of flats may be erected on it. This aspect of the matter should not be overlooked where a Rent Board proceeds to value the land and the buildings in accordance with the proviso to the definition of "value" in the 1950 Act. (See, in this regard, the remarks of Colman, J., in the Lukral Investments case (supra) at p. 505). The "reasonable rent value" could, therefore, in appropriate circumstances be said to be a "market value" in a restricted sense, i.e., the price which the hypothetical purchaser could reasonably be expected to pay in all the circumstances for the premises and the land in the condition in which it then is, and having regard only to its then existing rent-producing

25/.....potential

potential and upon the assumption that its value is not enhanced by any other potential which may still be exploited to additional financial advantage. In this connection a further question arises for consideration, namely, whether the value of the premises in question is to be determined with or without having regard to the fact that the provisions of the Rents Act apply thereto. It is at least likely that this circumstance would ordinarily have some bearing on both the market value and the reasonable rent value of the premises in question. Rent control is a clog on the maximum exploitation of the potential of a rent-producing investment, and limits the return which a lessor may lawfully receive in respect thereof. In my opinion the legislature primarily intended to control only the percentage return on the value of the buildings and the land (disregarding the further allowances provided for in the definition of "reasonable rent"). The Rent Board must inevitably determine "value" before it can determine "reasonable rent". In my opinion it follows that "value" must be determined without that determination being influenced by the circumstance that the provisions of the Rents Act apply to the premises in

25(a)/.....question.

question. It must determine the "value" to the lessor of the premises in question on the basis of the rent potential it has in circumstances where that potential is not affected by the provisions of the Rents Act.

The Rent Board is required to determine this value, "regard being had" to, inter alia, (a) the actual cost of erection of the premises, (b) any municipal or divisional council valuation of the premises or land, (c) any sworn valuation or building society valuation of the premises or land and (d), the purpose for which the premises are used or the land is used. In my opinion this means that if the information referred to in paragraphs (a) - (d) is before the Rent Board, it must have regard to it, and decide what weight is to be given thereto, in determining the reasonable rent value along the lines indicated in the proviso in the definition of "value". This, however, does not mean that the consideration of the information in question is in any way a condition precedent to the determination by a Rent Board of the "value" of the premises or the land. The information mentioned in paragraphs (a), (b) and (c), or some of it, may not be available, or may not be placed before the Rent Board. The purpose for which the controlled premises and the land are used would

ordinarily be known to the Rent Board. In the absence of the kind of information mentioned in paragraphs (a), (b) and (c), the Rent Board would nevertheless be required to proceed to a determination of the "reasonable rent value" of the premises concerned and of that of the land upon such information as is available to it. (See in this regard, The Ark Company v. The Rent Board for Johannesburg and Khusal, 1941 W.L.D. 114, at p. 117). The Rent Board is in any event only required to have regard, "inter alia", to the information detailed in paragraphs (a) - (d). It may thus also have regard to other information which is relevant in an economic or commercial sense to the determination of a reasonable rent value. E.g., if there is information before a Rent Board that the controlled premises was purchased at a public auction shortly before the date on which a reasonable rent therefor has to be determined, it may no doubt have regard to the purchase price paid for the premises in determining the reasonable rent value thereof. The Rent Board would then ascertain whether the purchase price was related to the premises in its existing condition as an investment yielding a certain annual rental without any unexploited potential

of the premises influencing the purchase price. If so, the purchase price might then be a reasonably accurate indication of the reasonable rent value of the premises, unless the Rent Board is satisfied that particular circumstances which were temporarily operative at the time of the auction unduly inflated or deflated the price. The Rent Board will have regard to these circumstances, and fix the reasonable rent value at a figure which is either lower or higher than the purchase price.

It follows that where a Rent Board proceeds to value the land separately and without improvements, it must nevertheless assume that its potential is limited to the improvements then on the land. As was pointed out above, if there is an ordinary dwelling-house on the land, its value cannot be inflated by reason of the fact that business premises or a multi-storey block of flats may be erected on it. A similar approach is essential where the value of the land together with the buildings on it has to be determined. Thus, a building on land which is being used for residential purposes might have a particular market value because the building may readily be converted into business premises yielding an increased rental. This potential is to

be disregarded in determining the value of the land together with the buildings on it.

In regard to the determination of a reasonable rent value, it becomes necessary to refer to the first proviso in the definition of "reasonable rent". In so far as it is material hereto, it reads, "Provided that, in determining such rent the Rent Board shall have due regard to rents charged in the vicinity for premises of a similar class, nature or situation .....". Prior to the amendment of paragraphs (a) and (b) in the definition of "reasonable rent" by section 1(e) of Act No. 47 of 1964, the application of the proviso presented no problems, because the Rent Board had a discretion in fixing the percentage return on the value of the buildings and the value of the land (subject only to the up-limit provided for). I am in agreement with the conclusion of Colman, J., in the Lukral Investments case (supra at p. 503H) that it was unlikely that the proviso was deliberately retained to offer guidance to the Rent Board in exercising its discretion in determining the allowances provided for in paragraphs (d), (f), (g) and (h) of the definition of "reasonable rent". Its reten-

tion, without amendment, in the definition of "reasonable rent" might well be an example of legislative inadvertence. If its operation is to be restricted to the stage in the determination of "reasonable rent" which follows upon the determination of "value", the proviso does not make sense. Nevertheless, the proviso was retained and is part of the Act, and it is the duty of the Court, if at all possible, to give it a workable interpretation rather than to disregard it as a nullity. (Minister of Labour and Others v. Port Elizabeth Municipality, 1952(2) S.A. 522 (A.D.) at p. 534 A-E).

The Rent Board is in terms enjoined by the proviso to have regard to the rents charged for comparable premises in "determining" a reasonable rent for the controlled premises. After the amendment of paragraphs (a) and (b) of the definition of "reasonable rent" by the 1964 Act, the determination of the reasonable rent value of the controlled premises became a step of fundamental importance in the ultimate determination of a reasonable rent. Upon the determination of the reasonable rent value of "the buildings" and "of the land", the allowances to be made under paragraphs (a) and (b) become a matter of simple arithmetical calculation. It would, therefore,

not result in any undue straining of the language of the proviso, if its operation were to be related to the "valuing" stage of "determining" a reasonable rent, rather than to the stage thereof which follows upon the determination of a reasonable rental value. A consideration of the ascertained reasonable rent value of comparable premises may possibly afford some guidance to a Rent Board in seeking to determine the reasonable rent value of the controlled premises in question. (Lukral Investments case, at p. 504B). This may be illustrated by an uncomplicated example. A dwelling (not subject to the provisions of the Rents Act), which yields a nett annual rent of R2,000 is purchased as a rent-producing investment at a public auction for R20,000. The price paid would in the circumstances presumably indicate market value as well as a "rent value", inasmuch as the purchaser considered that the annual rent income was worth a capital expenditure of R20,000, since it afforded him an annual return of some 10% on his capital invested in the dwelling. If a Rent Board is thereafter required to determine the reasonable rent value of comparable controlled premises it may no doubt have regard, inter alia, to the "rent

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value" of the first-mentioned building, evidenced by the purchase price paid for it at a public auction. The difficulty will normally be to discover sufficiently comparable examples.

I have dealt at some length with the definitions of "reasonable rent" and "value" mainly to indicate how radically the amendment of the 1950 Act by the 1964 Act altered the functions of the Rent Board in regard to the determination of a "reasonable rent". Its main task is now to act as a valuator of controlled premises and land by determining their respective reasonable rent values in a prescribed manner. When this task is completed the "reasonable rent" is for all practical purposes automatically determined, save for the discretionary determination by the Rent Board of the allowances to be added in terms of paragraphs (c), (d), (f), (g) and (h) of the definition of "reasonable rent", where applicable. In this regard I should add that, in my opinion, the reasonable rent value to be determined is not a value arrived at by the exercise of any discretionary power vested in the Rent Board in regard thereto. The Rent Board is required on the material before it to determine objectively on the evidence as best it

can a definite value representing the reasonable rent value.

In my opinion it is to be inferred from the terms of the amendments introduced by the 1964 Act and by section 1(c) of Act No. 54 of 1966, that the legislature intended to encourage developers to play their part in satisfying the ever-increasing demand for residential and other accommodation, by virtually guaranteeing to them a fixed return on their investment, which the legislature itself regarded as reasonable. As I have already pointed out above, the main function of the Rent Board now is to determine the "value" of the buildings and the land respectively in accordance with the provisions of the Act. I am, furthermore, of the opinion that the legislature intended the ascertainment by the Rent Board, on the basis of such relevant information as might be placed before it, of the reasonable money value to the lessor of the investment in question, i.e., a value determined upon a reasonable approach to the relevant factual information before it. If the information reasonably justifies a particular value, the Rent Board is not invested with a discretionary power to determine some lesser value, because it is of the opinion that the allowance of the

on a reasonable approach, a Rent Board would feel justified in determining the value of the investment at a higher figure. It is only in this sense that it might perhaps be said that the Rent Board has some measure of discretionary power.

Subject to what has been set out above, I am generally speaking in agreement with the approach to the problem of determining the "reasonable rent value" of controlled premises suggested by Colman, J., at p. 505C of the Lukral Investments case (supra).

When the legislature amended the Rents Act in 1964, it no doubt aimed at simplifying the task of the Rent Boards. In the case of controlled premises consisting of one dwelling unit only, this purpose was probably achieved in some measure at least. It is to be doubted whether this object has been achieved in the more complex type of case, such as the Rent Board and the Control Board had to deal with in this matter. It is to be borne in mind that, in so far as it is material hereto, "controlled premises" means a dwelling, and the term "dwelling" is defined as "any room or place occupied as a human habitation." It follows that the individual flats only in

King's Hall and City Heights are the "controlled premises" to which the provisions of the Rents Act were applied by the above-mentioned Proclamations. The flats in the buildings, and not the buildings in which the flats are, are the "controlled premises". In the case of King's Hall, a portion of the building is let as business premises, and the provisions of the Rents Act do not apply thereto. City Heights building is one of several buildings on one plot of land. A portion of City Heights is let as flats. The remaining portion of City Heights and the other buildings are occupied as business premises, and the provisions of the Rents Act do not apply to such premises. Because Youngleson and Graham, as lessors, applied for authority to charge increased rents for the "controlled premises" (the flats) as a whole, it followed that the Rent Board was required to determine a reasonable rent for each of the "controlled premises" i.e., for each flat. I have already referred to the fundamental importance of the determination of the "reasonable rent value" of "controlled premises" in determining a "reasonable rent" therefor. A Rent Board is set the formidable task of determining the "reasonable rent value" (which may or may

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not coincide with the market value) of one flat (the "controlled premises") in a multiple-storey building and also of the land on which it is situate and which is occupied in connection with it. The Rent Board is enjoined to have regard, inter alia, to (a) the actual cost of erection of the controlled premises, (b) the municipal or divisional council valuation of the controlled premises or the land, (c) a sworn or building society valuation thereof and, (d) the purpose for which the premises and the land are used. In terms of the proviso in the definition of "value", the land is to be valued separately and without improvements and the value of "the buildings" is to be obtained by determining the value of the land together with "the buildings and other improvements on it", and by subtracting the value of the land. (My italics). I take it that "buildings" is intended to refer to "controlled premises". The phrase, "other improvements" on the land to be valued in accordance with paragraph (ii) of the proviso in the definition of "value", presumably refers to improvements on land, (e.g., outbuildings) to the use or occupation of which the lessee is entitled by virtue of his occupation of the "controlled premises" as lessee thereof.

In this connection it must be borne in mind that the rent which a lessee pays to the lessor is not only for the "use and occupation" of the "controlled premises" but also for "any grounds and outbuildings used in connection therewith". It stands to reason that the value (i.e., the reasonable rent value) of any "controlled premises" must of necessity be affected by the nature and extent of a lessee's right to the user of "any grounds and outbuildings" by virtue of his right of occupation of the "controlled premises". Thus, the lessee of a flat in a multiple-storey block of flats, may have the use of a well-tended garden, a tennis court, bowling green, swimming-pool, etc., which are provided by a lessor as amenities for communal use by his tenants. Amenities of the kind mentioned would, of course, tend to affect the reasonable rent value of the block of flats as a whole, and the Act does not offer guidance to a Rent Board which is set the task of determining the "value", e.g., of "controlled premises" consisting of one flat in a building containing, say, 100 flats. The same difficulty arises, too, where a Rent Board undertakes the valuation of "the land ..... separately and without

improvements", in terms of the proviso in the definition of "value". If the reasonable rent value of one flat (the "controlled premises") has to be determined, how is the "value" of "the land" to be related to the "controlled premises", (i.e., the one flat)? Doing the best I can by way of permissible interpretation, I am of the opinion that a Rent Board can, generally speaking, only give practical effect to the intention of the legislature in resolving the difficulties I have outlined above, by in every case first making a valuation (i) of the land (without improvements) as a whole and, (ii) of the whole of the land together with the whole of "the buildings and other improvements" on it. Having thus determined the value (i.e., reasonable rent value) of the whole of the land and of the whole of "the buildings" in the prescribed manner, the Rent Board must then proceed from there to determine the separate values "of the buildings" and "of the land" for the purposes of paragraphs (a) and (b) of the definition of "reasonable rent". It must not be overlooked that this definition in terms relates "reasonable rent" to "controlled premises". This necessarily involves allocating to each of the separate

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"controlled premises" some portion of the total values already determined upon a basis which the Rent Board considers in all the circumstances to be appropriate, e.g., in the case of "buildings", on a square footage basis, where the only difference of any significance in so far as value is concerned relates to a difference in the floor areas of the several "controlled premises" (i.e., the individual flats). In so far as "the value of the land" is concerned, it would also appear that an exercise in apportionment must necessarily be undertaken. In this regard it would appear at least to be consistent with the intention of the legislature if the Rent Board were to determine the ratio between the "value" of the "controlled premises" in question and the value of "the buildings" as a whole, and to apply that ratio in the allocation of some portion of "the value of the land" to the "controlled premises" in question. It seems to me that in the more straightforward type of case, e.g., an ordinary block of residential flats on land, a Rent Board may in practice and as a matter of convenience determine a "reasonable rent" for the flats if it were to omit the intermediate steps of determining in respect of each separate flat

a reasonable rent value. As I see it, no prejudice can result if, having once determined the reasonable rent value of the land as a whole and of the building as a whole, the Rent Board were to determine a "reasonable rent" for the totality of the "controlled premises", as if the building itself were "controlled premises", and thereafter to allocate to each flat its appropriate share of the composite reasonable rent (e.g., on the basis of comparative floor areas). In the more complicated type of case, e.g., where the land in question "supports" both "controlled" and "uncontrolled" premises, the Rent Board may obviously have to adjust its approach with due regard to the particular circumstances of each case. The"controlled premises" may be luxury flats in a building in which the lower floor or floors are used as a parking garage which has been only roughly and inexpensively finished off. In such a case an apportionment of value as between "controlled" and "uncontrolled" premises on a square footage basis only would obviously be wholly inappropriate. In such a case a Rent Board may probably have regard to information, e.g., as to what proportion of the total cost of erection is to be allocated to the "controlled" portion

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of the building. It is, however, obviously quite impossible even to attempt to offer guidance to a Rent Board as to how it could properly determine the value of land and buildings in every type of composite premises it might have to deal with. Its objective must, however, in every case be the ascertainment of a reasonable rent value upon which the determination of a "reasonable rent" for the "controlled premises" in question can be made.

From what I have set out above it is only too clear that the provisions of the Rents Act offer very little real guidance to a Rent Board, except in so far as relatively uncomplicated cases are concerned. It would appear that present day circumstances urgently require that the legislature should in the field of legislation grapple with the problems which arise in regard to the determination of reasonable rents in cases such as those which the present respondents were required to deal with.

In so far as the flats in King's Hall and City Heights are concerned, the Rent Board was no doubt well aware of "the purpose for which" they were used. In so far as

paragraphs (a), (b) and (c) of the definition of "value" is concerned, none of the information therein mentioned was placed before the Rent Board in relation to any of the individual flats, no doubt because such information was not available. There was, however, placed before the Rent Board information of that kind in relation to the buildings and the land as a whole. I do not propose entering into the details of such information, because the issues which arise for determination relate more specifically to the method employed by the Rent Board in determining a reasonable rent for the flats in question.

The Rent Board is an agency experienced in the determination of a "reasonable rent" for "controlled premises" in terms of the provisions of the Rents Act. There is nothing in the papers before this Court which justifies a finding that it did not appreciate the nature of its powers and functions under the Act. It was aware of its duty to determine the reasonable rent value of the controlled premises in question. It was contended that the Rent Board had not, as it was required to do, determined the value of the controlled premises by itself, and

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that in determining the value of the whole of the premises, it had used the provisions of the Rents Act in relation to the business premises as if those provisions were in fact applicable thereto. Youngleson and Graham were entitled to have the reasonable rents determined by the Rent Board in accordance with the provisions of the Rents Act. This was not done, so it was contended, and the determinations should be set aside, unless an ex post facto proper determination reveals that there has been no prejudice.

Inasmuch as the only information relevant to the determination of "value" related to the buildings and land as a whole, it appears to me that the Rent Board's basic approach to the problem of determining a reasonable rent value for the "controlled premises" was in the circumstances neither inconsistent with the provisions of the Act nor arbitrary in any manner whatsoever. On the information placed before it, it would have been a well-nigh impossible exercise for the Rent Board to have undertaken a separate valuation of each flat in accordance with the provisions of the definition of "value"

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in the Act without using the information regarding the buildings and the land as a whole as a starting point. The approach aimed, firstly, at a determination of the reasonable rent value of the controlled premises as a whole and of the land. In order to do this, the Rent Board valued the premises as a whole and the land, and applied the definition of "value" as if it applied to the whole premises and the land. It appears that it would have been more appropriate for the Rent Board at that stage to have apportioned the value so determined as between the controlled and uncontrolled premises, and thereafter to have apportioned the value of the whole controlled premises between the individual controlled premises. The Board, however, proceeded to determine a composite reasonable rent for the whole premises on the basis of the definition of "reasonable rent". In my opinion this step was in the circumstances not arbitrary at all.

On the information before it, the Rent Board determined the reasonable rent value of the premises as a whole, and I have already indicated that it would probably have been a more logical approach for the Rent Board first to

have determined what portion of that value is to be allocated to the controlled premises as a whole. On the facts of this case it could have proceeded to an allocation based on the relative floor areas of the controlled and "uncontrolled" premises. Having thus ascertained the value of the controlled premises as a whole, the Rent Board could then conveniently have determined a composite reasonable rent for the controlled premises as a whole before determining the reasonable rent for each individual flat. I say conveniently, because, as I have already indicated, it might be said to be more logical first to allocate a separate value to each flat and to determine the reasonable rent therefor on the basis of such value. It is my impression, however, that in the case of a block of flats, it may very well be more convenient first to determine a composite reasonable rent based on a composite reasonable rent value before determining a reasonable rent for each flat, particularly where the only real difference between the various flats relates to floor areas. If there are other factors relevant to the reasonable rent value of each individual flat, the allocation of value cannot be made on a square footage

basis only. Thus, in one multiple-storey building, one floor may be divided into economy-type bachelor flats, another floor divided into two and three bedroomed flats, some with two bathrooms, etc., and a third floor may be occupied as a luxury-type penthouse, with a private lift and swimming-pool. It is, in my opinion, obvious that a Rent Board cannot determine a reasonable rent for each of the "dwellings" by first determining a reasonable rent for the premises as a whole, based on a composite reasonable rent value, and then allocating to each "dwelling" a reasonable rent based on comparative floor areas only. In such a case the Rent Board would inevitably have to give weight to the other factors which have a material bearing upon the reasonable rent value of the individual "dwellings" and thus upon the "reasonable rent" therefor. The combined efforts of a builder, an architect and a quantity surveyor may possibly yield useful information as to how the total cost of erection of the building complex is to be apportioned as between the individual "dwellings". This may assist a Rent Board in arriving at a reasonable rent value for the individual "dwellings", and thus at a "reasonable rent" therefor, in a more

realistic manner than if it were to rely only on comparative floor areas. In the present case the information before the Court indicates that no prejudice could have resulted from the fact that the Rent Board proceeded to determine a composite reasonable rent for the building complexes as a whole based on a prior determination of their respective composite reasonable rent values.

It was at this stage that the Rent Board proceeded to determine a composite reasonable rent for the whole of the controlled premises. In order to do so it took the third and fourth steps, the details of which have already been set out earlier in this judgment.

I have already indicated that I agree with the conclusion of Henning, J., that in regard to these steps the Rent Board erred. However that might be, I also agree with the reasoning of Henning, J., that if the allocation of the composite reasonable rental were to have been done on a square footage basis as between the controlled premises as a whole and the remainder of the premises, such a method would on the available information not have been open to attack. As appears from

the reasoning of Henning, J., a determination made on this basis reveals that the above-mentioned erroneous approach of the Rent Board did not in the ultimate result prejudice Youngleson and Graham. It was not contended that in so far as the Rent Board determined "the value of the land", any prejudice had resulted to either Youngleson or Graham.

Rumpff, J.A., is, owing to indisposition, prevented from participating in this judgment. Pursuant to the provisions of section 12(3) of the Supreme Court Act, No. 59 of 1959, this judgment will therefore be the judgment of this Court.

The appeals are dismissed with costs including the costs of two counsel.

P. Hoexter

VAN BLERK, A.C.J.
POTGIETER, J.A.
CORBETT, A.J.A. } CONCUR.