

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/10
[2011] ZACC 28

In the matter between:

MOHAMMED YUSUF HAFJEJEE N.O.

First Applicant

EBRAHIM YUSUF HAFJEJEE N.O.

Second Applicant

SARA HAFJEJEE N.O.

Third Applicant

and

ETHEKWINI MUNICIPALITY

First Respondent

MINISTER FOR PUBLIC WORKS

Second Respondent

PREMIER OF KWAZULU-NATAL

Third Respondent

Heard on : 19 May 2011

Decided on : 25 August 2011

JUDGMENT

FRONEMAN J:

Introduction

[1] This matter raises the question when compensation for expropriation of property in terms of section 25(2) of the Constitution is to be determined. In terms of section

25(2)(b) property may only be expropriated “subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”¹

[2] The applicants, trustees of the YGM Haffeejee Family Trust (Trust), contend that the determination of compensation is a pre-requisite for the constitutional validity of expropriation in terms of the provisions of section 25(2)(b) of the Constitution. Expropriation is thus not constitutionally valid until compensation has been determined. In this Court the Trust attacks the constitutional validity of various provisions of the Expropriation Act² (Act) as offensive to this requirement. They seek leave to appeal against the decision of Theron J in the Kwazulu-Natal High Court, Durban (High Court), holding otherwise. That finding resulted in an order evicting the Trust from properties that it purchased in 1992 without compensation having been determined before the eviction order.

[3] The respondents, the eThekweni Municipality (Municipality), the Minister for Public Works (Minister) and the Premier of the province of KwaZulu-Natal (Premier) all oppose the application, on procedural and substantive grounds. The substantive merits of the constitutional challenge will of necessity play a role in deciding whether it is in the interests of justice to grant leave to appeal.

¹ Section 25 is quoted in relevant part at [13] below.

² 63 of 1975.

[4] In view of this the sequence of this judgment is to set out the background first and then to turn to a discussion of the constitutional issue before dealing with the remaining procedural issues.

Background

[5] The Trust property lies on the banks of the Umgeni River in Durban. It originally formed part of a larger property, which had been earmarked for expropriation by the Municipality for the purposes of a canalisation programme. Its objective was to minimise the effects of flooding of the river. In 1972 the larger property was subdivided. According to the Municipality, a condition of the subdivision was that it would be given an undertaking by the registered owner of the properties not to claim compensation for any improvements should the Municipality expropriate the properties after 20 years had passed. The undertaking would be imposed on future owners as a condition in the deed of sale or other document of alienation and would also be shown on the building plans.

[6] The Trust bought its property in 1992. There is no endorsement in the deed of transfer of the condition, nor has any documentary proof of the undertaking in building plans or elsewhere been produced by the Municipality.

[7] In 2004 the Municipality resolved to expropriate the properties. It sent a notice to the Trust on 23 May 2005 indicating that its property was to be expropriated. At the time

the Trust's daily affairs were run by a trustee who is now deceased. He did not formally object to the notice. In reply he stated that he was willing to vacate the property, but that he wished to enter into a private treaty and that he wanted alternative land as compensation.

[8] On 30 June 2005 the Municipality sent a notice of expropriation by registered post to the Trust, fixing the date of expropriation at 31 July 2005. The notice contained no offer of compensation. On 31 July 2006 the Municipality offered 80% of the assessed market value of the property as compensation. The Trust rejected the offer on the basis that the validity of the expropriation was disputed. The Municipality instituted eviction proceedings on 11 September 2006 and in 2008 tendered payment of the full amount, but this was again rejected by the Trust.

[9] The Trust raised, amongst other defences, the invalidity of the expropriation in the eviction application. It instituted a separate application in which it sought to declare the offending provisions of the Act constitutionally invalid and asked for the consolidation of the eviction and constitutional applications. The High Court, in a single judgment, dismissed both the application for consolidation and the constitutional application, but granted the eviction application. Leave to appeal was sought in the High Court, but refused. The same fate befell the Trust's petition for leave to appeal to the Supreme Court of Appeal.

[10] The Trust then sought leave to appeal to this Court.³

[11] As indicated earlier I deal with the constitutional issue right at the outset. Its outcome will have a material bearing on the additional procedural obstacles the respondents raised in opposing the granting of leave to appeal. Counsel for the Trust conceded that the appeal must fail if the Trust's submission on the proper interpretation of section 25(2)(b) of the Constitution was rejected. Likewise, counsel for the respondents did not seriously advance any argument to justify the particular impugned provisions of the Act if the Trust's contention was correct. They did not abandon their procedural objections, but clearly a finding in favour of the Trust on the constitutional issue would open the way to granting the applicants relief.

[12] I thus turn to a discussion of the constitutional issue.

Constitutional and legal provisions

[13] Section 25 of the Constitution reads in relevant part:

- “(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest; and

³ Directions were issued on 7 February 2011 setting the matter down.

- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section—
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

[14] The Act is of pre-constitutional vintage. It is clear from its provisions that the amount of compensation and the time and manner of payment need not be determined before expropriation takes effect. Transfer of ownership and possession of the affected property may take place before that determination. The obligation to pay compensation is a condition of expropriation,⁴ but not a prerequisite for its operation.

⁴ Section 2(1) of the Act.

[15] The process of expropriation, once the Minister has “decided to expropriate”,⁵ starts with service of a notice of expropriation on the owner of the property. The notice must state the date of expropriation and the date upon which the State will take possession of the property.⁶ The Minister may offer an amount of compensation in the notice.⁷ In that case the owner must within 60 days from the date of the notice deliver a written statement to the Minister indicating either acceptance of the offer or the amount of compensation she claims.⁸ If no offer has been made in the notice the owner must similarly within 60 days from the date of the notice deliver a written statement indicating the amount of compensation claimed.⁹ If the Minister is not prepared to pay the amounts claimed in these circumstances, he must within a reasonable period offer a revised amount of compensation.¹⁰ In those cases where no compensation was offered in the notice and the owner did not indicate the amount claimed in response, the Minister must, within a reasonable period, offer an amount of compensation.¹¹

[16] Where no final agreement is reached between the parties on the amount of compensation the Minister must give notice to the owner to make application to court

⁵ Section 7(1) of the Act.

⁶ Sections 7(2)(b) of the Act.

⁷ Section 7(2)(d) and 10(1) of the Act.

⁸ Section 9(1)(a) of the Act.

⁹ Section 9(1)(b) of the Act.

¹⁰ Section 10(4) of the Act.

¹¹ Section 10(2) of the Act.

before a certain date,¹² failing which the owner shall be deemed to have accepted the offer made by the Minister.¹³

[17] Ownership of the property vests in the State on the date of expropriation mentioned in the notice of expropriation.¹⁴ In terms of the Act the State shall take possession of the property on a date stated in the notice of expropriation or on a date agreed upon between the parties.¹⁵

[18] Payment of at least 80% of the amount offered as compensation by the Minister must be made on the date of that offer, or if the State has by then not taken possession of the property, on the date of its taking possession.¹⁶

[19] The Municipality's power to expropriate derives from the provisions of section 190 of the Local Authorities Ordinance, KwaZulu-Natal.¹⁷ That power is explicitly made subject to the provisions of the Act. The constitutional validity of section 190 is only indirectly challenged by virtue of its dependence on the provisions of the Act.

¹² Section 10(5) read with section 14(1) of the Act.

¹³ Section 10(5)(a) of the Act.

¹⁴ Sections 7(2)(b) and 8(2) of the Act.

¹⁵ Section 8(3) of the Act.

¹⁶ Section 11 of the Act.

¹⁷ No 25 of 1974.

The contentions of the parties

[20] The Trust argues that the right encapsulated in section 25 of the Constitution should be interpreted in accordance with its transformative potential, namely to ensure that deprivation of property is now dealt with in a different way from the arbitrary deprivation of property under apartheid. No real transformation can be achieved if newly empowered property owners are at the same risk of being dispossessed as they would have been in the absence of the Constitution. The right to just and equitable compensation, the amount and time and manner of which are determined before dispossession, all subject to court oversight, strike the proper balance between the need for expropriation and the interest of the property owner.

[21] The Trust accepted that payment of compensation may take place after the expropriation, but insisted that the plain text of section 25(2)(b) – “subject to compensation, the amount of which and the time and manner of payment of which *have either been agreed to . . . or decided or approved by a court*” – require that agreement be reached or the amount of compensation and the time and manner of its payment be determined, before the expropriation. It sought support for this textual reading in the change of language from the interim to the final Constitution.¹⁸ The system of

¹⁸ Section 28 of the interim Constitution provides in relevant part:

“(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation,

expropriation provided for in the Act¹⁹ is inconsistent with this fundamental premise, as well as with the right of access to courts under section 34 of the Constitution. In addition, the Trust argued that the basis on which compensation is determined in section 12 of the Act is in conflict with the provision in section 25(3) of the Constitution that requires compensation to be just and equitable. The Trust abandoned its attack on certain provisions of the Act based on section 9, the equality clause, as well as its earlier reliance on section 33, the administrative justice clause, of the Constitution.

[22] The Municipality contends that an interpretation of section 25(2)(a) of the Constitution that compensation must be determined before expropriation would frustrate its obligations to render basic services to residents and the transformative socio-economic purposes of the Constitution. It would subject the attainment of these objectives to interminable delays in the legal process by people intent on pursuing their personal objectives at the expense of the wider public common good. It argues that textually section 25(2)(a) is open to a meaning different from the supposedly plain meaning contended for by the Trust; that foreign legal instruments that require compensation before expropriation do so in express and clear terms; and that the requirement of just and equitable compensation in section 25(3) will be unnecessarily restricted if compensation has to be determined before expropriation.

the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.”

¹⁹ In particular sections 2(1), 7(1), 8(1), 9(1), 9(3), 9(6), 10(1), 10(2), 10(5), 11, 12, 21 and 22.

[23] To these the Minister added that the purpose of section 25(2) and (3) was to facilitate expropriation in order to advance development. Owners of expropriated property will not be prejudiced, because they are always entitled to just and equitable compensation in terms of section 25(3) of the Constitution. The Premier, although not directly implicated in the constitutional challenge to the Act, nevertheless supported its constitutional validity on textual and pragmatic grounds.

The High Court and Supreme Court of Appeal

[24] In the High Court the constitutional challenge was rejected on the basis that the language of the section does not require prior determination of compensation²⁰ and that an owner would suffer no prejudice if the amount of compensation were to be determined at a later date.²¹ The constitutional issue was not raised in the petition for leave to appeal to the Supreme Court of Appeal, which was refused.

Approach to the interpretation of section 25 of the Constitution

[25] This Court, in *First National Bank*,²² noted that “[c]onstitutional property clauses are notoriously difficult to interpret”.²³ Fortunately though, the judgment in that case has made the task easier for those who follow in its step.²⁴

²⁰ *eThekweni Municipality v Haffeejee NO and Others; Haffeejee NO and Others v eThekweni Municipality and Others* 2010 (6) BCLR 578 (KZD) (High Court judgment) 14 December 2009 at para 23.

²¹ *Id* at para 11.

²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[26] *First National Bank* broke down the structure of a section 25(1), (2) and (3) analysis into the following sequential questions:²⁵

- “(a) Does that which is taken away from [the holder of property] amount to ‘property’ for the purpose of section 25?
- (b) Has there been a deprivation of [that] property by the [State]?
- (c) If there has, is [the] deprivation consistent with the provisions of section 25(1)?
- (d) If not, is [the] deprivation justified under section 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purposes of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?”

[27] In this case there is no dispute that the Trust’s property is “property” under section 25(1); that the Municipality deprived the Trust of that property; that it was done in terms of a law of general application that was not arbitrary; that it qualifies as an expropriation for purposes of section 25(2); and that the expropriation was for a public purpose or in the public interest in terms of section 25(2)(a). What remains, in terms of *First National Bank*’s structural analysis, is whether the expropriation complies with the requirements of section 25(2)(b) and, if not, whether the expropriation is justified under section 36 of the Constitution. Justification under section 36 has, however, not been raised on the papers.

²³ Id at para 47, with acknowledgement of contributions of South African scholars in this regard.

²⁴ See also *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at paras 34-5; and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) at para 47.

²⁵ *First National Bank* above n 22 at para 46.

[28] In order to determine whether the expropriation complies with the requirements of section 25(2)(b), the general approach to the purpose and meaning of section 25 articulated in *First National Bank* is still apposite.

[29] The starting point for constitutional analysis, when considering any challenge under section 25 for the infringement of property rights, must be section 25(1).²⁶ The interpretation of the section must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.²⁷ International law must be considered²⁸ and foreign law may be considered.²⁹ Pre-constitutional expropriation law must be approached circumspectly.³⁰

[30] Protection for the holding of property is implicit in section 25.³¹ Section 25(1) must be construed in the context of the other provisions of section 25 and in the context of the Constitution as a whole. Sections 25(4) to (9) underline the need for the redress and transformation of the legacy of grossly unequal distribution of land in this country.³²

²⁶ *First National Bank* above n 22 at para 60.

²⁷ Section 39(1)(a) of the Constitution.

²⁸ Section 39(1)(b) of the Constitution.

²⁹ Section 39(1)(c) of the Constitution. Compare *First National Bank* above n 22 at paras 71-99.

³⁰ *First National Bank* above n 22 at para 59. Compare *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) (*Du Toit*) at para 26.

³¹ *First National Bank* above n 22 at para 48. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Judgment*) at para 72.

³² *First National Bank* above n 22 at para 49.

The historical context in which the property clause came into existence should be remembered.³³ These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations.³⁴

[31] The purpose of section 25 is to protect existing private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto. Its purpose is also to strike “a proportionate balance between these two functions.”³⁵

[32] With this general approach in mind it is necessary to return to the issue at hand, namely when agreement or court determination of the “amount . . . and the time and manner of payment” of compensation should take place in terms of section 25(2)(b).

[33] The Trust argued that the words “have . . . been agreed to . . . or decided or approved” in section 25(2)(b) plainly mean that determination, either by agreement or court sanction, of the amount and time and place of payment of compensation should precede perfection of the expropriation. This argument was buttressed by the opening phrase “subject to” in section 25(2)(b). The counter to this was, firstly, that the phrase “subject to” has no single legally determinative meaning³⁶ and that it does not have a

³³ Id at para 64.

³⁴ Id at para 49.

³⁵ Id at para 50.

³⁶ *Premier, Eastern Cape, and Another v Sekeleni* 2003 (4) SA 369 (SCA) at para 14. See also *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187I-1188A.

temporal connotation. Secondly, it was stated that the use of the past perfect tense in section 25(2)(b) implies no future conditionality, and that it could simply refer to determination before payment of compensation, not as a precondition for expropriation. On this approach, the wording of the provision indicates merely that determination of compensation is a condition, not a condition precedent, for expropriation.

[34] Comparative law, too, is inconclusive. Some countries require compensation before expropriation; others do not.³⁷

³⁷ See *First Certification Judgment* above n 31 at para 73. This Court is a member of the Venice Commission, an entity comprising all 46 member states of the Council of Europe and co-operating with 15 other countries from Africa, the Americas, Asia and Europe. The Commission provides support in the form of comparative constitutional research to those that request it. In an investigation on the question of compensation and expropriation, conducted through the Venice Commission, it emerged that comparative law is inconclusive with regard to the requirement of compensation before expropriation:

Article 33 of the Spanish Constitution requires “a proper compensation” be paid. The timing of this is not stipulated in the provision.

In terms of article 62 of the Portuguese Constitution, requisitions and expropriations in the public interest shall only occur on a legal basis and upon payment of just compensation. It is not clear from the text whether compensation should be effected before expropriation.

Article 50 of the Constitution of Croatia provides that payment of compensation at market value is required but it is not clear as to when this should occur. The provision states that “[p]roperty may... be restricted or expropriated by law upon the payment of compensation”

In the Constitution of Georgia, article 21.3 provides that expropriation may only occur with appropriate compensation but, again, does not state when the compensation should occur.

In Estonia, article 32 of the Constitution requires fair and immediate compensation.

Article 14 of the Basic Law of the Federal Republic of Germany does not make mention of the timing of compensation.

The Constitutions of both Botswana and Nigeria speak of the *prompt payment of compensation* (in sections 8(b)(i) and 44(1)(a) respectively). Similarly, the Kenyan Constitution speaks of “prompt payment” in section 75(2)(b), as does the Ghanaian Constitution at section 20(2)(a).

The Namibian Constitution provides that “subject to” the payment of just compensation, in accordance with its requirement and procedures, expropriation may take place (article 16(2)). Again, no mention is made of timing of payment.

[35] The text of section 25 does not exclude an interpretation that compensation must precede expropriation. The language of the clause is compatible with compensation being a condition precedent to a valid expropriation, but the opposite is equally plausible.

[36] As mentioned previously, the Municipality and the Minister contend that an interpretation that compensation must be determined before expropriation would frustrate the socio-economic developmental purposes of the Constitution. To the extent that this argument is based on the fundamental socio-economic rights of others, it may be more relevant to the definitional stage of enquiring into the nature and ambit of the right to compensation for expropriation of property. I nevertheless make the following observations about this contention.

[37] It is not clear why this general purpose of socio-economic development would necessarily be frustrated by the determination of compensation before expropriation. There is also some merit in the contention that the Constitution's transformational purposes include better protection than under apartheid for those who are now able to gain access to property resources denied to them previously.

[38] A more cogent reason for looking more critically at an inflexible requirement of compensation before expropriation is the content of section 25(3). It provides that the amount of compensation and the time and manner of payment must be just and equitable,

“reflecting an equitable balance between the public interest and the interests of those affected”. Relevant circumstances in this regard include the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.³⁸

[39] It is not too difficult to envisage situations where some of the circumstances required by section 25(3) will make it difficult, if not impossible, to determine just and equitable compensation before expropriation and the taking of possession of the affected property. Urgent expropriation in the face of natural disaster is one example, and there are others. But even in those cases compensation must be determined as soon as is reasonably possible.³⁹

[40] So one is faced with potential factual situations where, on the one hand, expropriation without attendant determination of compensation may be unjust, and, on the other, where insistence on the determination of compensation before expropriation may likewise be inequitable. The former is exemplified when people upon eviction will lose their homes or livelihood, and the latter in cases like natural disasters as mentioned above.

³⁸ Section 25(3)(a)-(e).

³⁹ For instance, in Croatia, article 25 of the Expropriation Act requires that the amount of compensation be paid within 15 days from the legal validity of the decision on expropriation. In terms of article 33.3 of the Spanish Constitution, compensation must be paid as soon as it is required by the owner of the expropriated goods or rights. See also above n 37.

[41] In both cases, however, other provisions of the Constitution provide safeguards to ensure equitable relief. Section 26(3) provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances.⁴⁰ Self-help too, is inimical to the rule of law.⁴¹ Section 34 guarantees access to courts for disputes that can be resolved by the application of law.⁴² Contested eviction matters must thus be resolved in the courts. And the courts will be able to determine just and equitable outcomes for these cases, on the basis of the provisions of sections 25(3) and 26(3) of the Constitution.

[42] The question therefore is which of the two possible interpretations is more compatible with the Constitution as a whole. Allowing compensation to be fixed after expropriation burdens the property owner and triggers repellent memories of pre-constitutional arbitrary dispossessions. Although post-expropriation compensation

⁴⁰ Section 26 states in relevant part:

“(1) Everyone has the right to have access to adequate housing.

....

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

See also *Gundwana v Steko Development and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC) at para 49; and *Jaftha v Schoeman and Others: Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 52 and 64.

⁴¹ *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11.

⁴² Section 34 states:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

burdens the property owner, making it a pre-condition would also burden the State unduly. This, in the end, is the compelling reason why the applicant's contention cannot be upheld.

[43] In summary then:

- (a) The provisions of section 25(2)(b) do not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation under section 25(2);
- (b) Generally the determination of compensation, in accordance with the provisions of section 25(3), before expropriation will be just and equitable;
- (c) In those cases where compensation must be determined after expropriation, this must be done as soon as reasonably possible, in accordance with the provisions of section 25(3);
- (d) Eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision; and
- (e) In disputed cases of eviction the courts must grant orders that ensure just and equitable outcomes in accordance with the provisions of sections 25(3) and 26(3) of the Constitution.

The outcome of the constitutional challenge to the Act

[44] As indicated earlier, the Trust did not contend that the provisions of the Act are unconstitutional on any basis other than that compensation has to be determined before expropriation, except in one respect, dealt with in the next paragraph. Whether any of the provisions of the Act are in conflict with the Constitution on any other basis was not in issue before us. The Trust's broad constitutional challenge must thus fail.

[45] The exception is the Trust's challenge to the constitutionality of the determination of compensation under section 12 of the Act, as being in conflict with section 25(3) of the Constitution. This is an issue that was not raised before this Court in *Du Toit*.⁴³ The Trust belatedly sought to introduce this independent and separate ground of alleged constitutional invalidity in this Court, not having done so in the High Court or the Supreme Court of Appeal. That is probably sufficient reason not to entertain the challenge, but there is another reason. The amount of compensation to which the Trust may be entitled to, has never formed a part of the present dispute between the parties. It is not in the interests of justice to grant leave to raise this issue in these circumstances.

[46] The respondents objected to leave to appeal being granted to the Trust on other procedural grounds as well. The most important of these was that the constitutional challenge was not pursued in the petition for leave to appeal to the Supreme Court of

⁴³ *Du Toit* above n 30 at paras 46-53 was decided on an acceptance that the determination of compensation under section 12 of the Act nevertheless, on the facts, amounted to just and equitable compensation in terms of section 25(3) of the Constitution.

Appeal. The Trust sought to explain this failure on the basis of incorrect legal advice received from its erstwhile legal team. It is not necessary to determine this issue since the challenge fails anyhow. Even so, an important and arguable constitutional point has been raised. Leave to appeal should be granted, but the appeal must fail.

Costs

[47] Although the constitutional challenge has failed, I would nevertheless consider this a matter in which an important constitutional issue had been raised by a private litigant and that costs should not follow the result.⁴⁴

Order

[48] The following order is made:

- a. The application for leave to appeal is granted.
- b. The appeal is dismissed.
- c. Each party pays its own costs.

⁴⁴ *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Ngcobo CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ,
Nkabinde J and Van der Westhuizen J concur in the judgment of Froneman J.

For the Applicants:

Advocate S Yacoob instructed by Omar
& Associates.

For the First Respondent:

Advocate VI Gajoo SC and Advocate S
Mahabeer instructed by Naidoo Maharaj
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For the Second Respondent:

Advocate V Soni SC and Advocate K
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For the Third Respondent:

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