G.P.-S.59968—1970-71—2 500

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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

Minister of Agriculture, *Appellant,*

versus

Estate M.J. Randeree & Ors, *Respondent*

Appellant's Attorney D. & S.A. (Bfn)
Prokureur vir Appellant

Respondent's Attorney Goodrickes & ~~Bart~~ & ~~Partners~~
Prokureur vir Respondent

Appellant's Advocate D. Isaacson Q.C.
Advokaat vir Appelland P.S. Combrinck

Respondent's Advocate M. P. Iscor on brief
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

Coram: Rumpff CJ, Williamson, Corbett, Hefer et Hunter JJA

(D.C.L.D.)

9:45 am ——— 11 00 am
11.15 am ——— 12.45 pm
2.15 pm ——— 3.15 pm

C.A.V.

The Court allows the appeal with costs, such costs not to include the

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:

THE MINISTER OF AGRICULTURE ..... Appellant

and

THE ESTATE OF THE LATE
MAHOMED ISMAIL RANDEREE,
M.S.E. RANDEREE and OTHERS ..... Respondents.

CORAM: Rumpff, C.J., Wessels, Corbett, Hofmeyr, JJ.A., et Hoexter, A.J.A.

HEARD ON: 11 September 1978.

DATE OF JUDGMENT: 29 September 1978

J U D G M E N T

CORBETT, JA:

By two notices of expropriation, each dated 4 September 1974, the appellant (the Minister of Agriculture), acting in terms of sec. 2(1) of the Expropriation Act, 55 of 1965, as amended ("the Act"), expropriated two vacant erven

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situated in Brickfield Road, Umgeni South, in the Municipality of Durban. Both erven fall within a group area established for the Indian group. The one erf (which I shall call "lot 131") is 1321 square metres in extent and at the time of expropriation ownership thereof was vested in the estate of the late Mr. M.I. Randeree. The other erf (which I shall call "lot 129") is 1261 square metres in extent and at the time of expropriation was owned in equal undivided shares by Mrs. M.S.E. Randeree, Mrs. A.S. Randeree, Mr. M.S.E. Randeree and the estate of the late Mr. H.A. Haffejee.

The present dispute relates to the amounts of compensation which the owners of the two properties are entitled to be paid by the State. In the case of lot 131 the owner last claimed R48 000 and the appellant's total offer amounted to R22 000, while in the case of lot 129 the figures were R45 000 and R22 000 respectively. The two amounts of R22 000, together with statutory interest, were paid to the owners in each case, who accepted payment subject

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to a reservation of rights. Thereafter the owner of lot 131 and the joint owners of lot 129 instituted separate actions in the Durban and Coast Local Division for the determination, in terms of sec. 7 of the Act, of the compensation to be paid by the State for the expropriated properties. At the hearing (which took place before SHEARER, J, sitting without assessors) the two actions were consolidated and I shall accordingly refer to the owners of the two properties collectively as "the respondents".

In the consolidated action the respondents asked that the compensation be fixed in the amounts last claimed by them, viz. R48 000 for lot 131 and R45 000 for lot 129. The appellant consented to a determination by the Court, in the case of each property, in the sum of R22 000 but otherwise prayed for judgment in his favour with costs. The trial Court, having heard evidence and argument, determined the compensation for each lot in the sum of R30 000, ordered the payment by appellant of interest to be deter-

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mined in accordance with sec. 8(2) of the Act, and ordered appellant to pay that portion of respondents' costs required to be paid in terms of sec. 10(2)(c) of the Act. Despite the consolidation of actions separate orders in these terms were issued. The appeal is against the whole of the judgment and the orders of the Court a quo. On appeal it was the general contention of appellant's counsel that the trial Court ought to have determined the compensation in the case of each property in the sum offered and paid by appellant, viz. R22 000, whereas respondents' counsel supported the trial Court's finding of R30 000 for each property.

The two erven in question form part of a block of 18 erven, situated in a locality known as "Essendene", which in turn forms part of the much larger area called Umgeni South. In terms of a new town planning scheme in the course of preparation for Umgeni South, published in October 1968 and adopted by the Durban City Council ("the Council") on 7 June 1971, these 18 erven were zoned for use

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for educational purposes (the use zone being actually termed "Educational 1"). Under an earlier town planning scheme, which was adopted by the Council in 1953 and remained in operation until 7 June 1971, these erven had fallen into a use zone termed "Special Residential". It appears that this alteration in the zoning of the erven was effected in order to provide for a site (referred to in the evidence as "school site no. 12") for the establishment of an Indian High School. The 1971 town planning scheme made provision for a number of such school sites in the whole area of Umgeni South. This was the result of consultation and collaboration between the City Engineer's department of the Council and the responsible educational authority, before 1 April 1966 the Natal Provincial Education Department and thereafter the Division of Indian Education of the Department of Indian Affairs. Briefly, the procedure was for the educational authority to state its general require-

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ments as to the number of school sites required and how many of these should be for high schools and how many for primary schools; for the City Engineer's department to put forward a number of proposed sites; and for the educational authority, having viewed the sites, to select those of which it approved. It is common cause that the purpose of expropriating respondents' properties was to acquire all the erven comprising school site no. 12 in order to give effect to the plan to establish thereon an Indian High School.

Sec. 8(1)(a) of the Act prescribes that the amount of compensation to be paid to an owner in respect of property expropriated in terms thereof shall not exceed the aggregate of—

> "(i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and
>
> (ii) an amount to make good any actual financial loss or inconvenience caused by the expropriation".

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The relevant meaning of "date of notice", as defined in sec. 1 of the Act, is the date upon which the notice of expropriation was delivered or sent by registered post to the owner. In this case we are concerned only with the amount referred to in (i) above but one of the problems immediately encountered in the determination of this amount arises from the fact that because lots 129 and 131 were zoned for educational purposes on the date of the notice of expropriation (which can be taken to be on or about 4 September 1971) there was on that date no open market for the expropriated properties. This was found to be the position by the trial Court, which held that on the evidence the prospects at that stage of a sale of the properties to any person or institution other than the expropriating authority were "negligible". This finding was not challenged on appeal.

The manner in which the trial Judge overcame

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this problem appears from the following passage in his judgment:

> "Of course, at the date of the notice, there was no open market, for the zoning restricted the use of the properties to educational. The only realistic possibility of a purchaser was, as I have found, the expropriating authority. The zoning of the properties and the consequent restrictions upon their use was the product of consultation and negotiation between the relevant State Department and followed the publication in October 1968 of the plan showing the proposed zoning. This publication had the effect of destroying utterly any prospects of selling the properties for residential use. To award an amount on the basis of educational use alone would, in my judgment, be unconscionable. There are, for example, zonings for cemeteries, and for a new and substantial 'Outer Ring Road' (New Streets). The effect of the zonings is to sterilise properties affected from any other use and to award compensation upon the basis that their use was limited by the zoning would probably result in a nil award. This could not have been intended by the legislature. In my view, the correct approach in the present matter is to regard the consultations, the publications of the plan and the subsequent adoption of the scheme as being part of the machinery of expropriation and to estimate the market value of the properties on the basis that their use was not restricted by their zonings as educational."

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Having excluded the educational zoning as the basis for the assessment of market value, SHEARER J then went on to consider what notional zoning should be put in its place. He held that in this context he was obliged to have regard to the existence and provisions of the 1971 town planning scheme and to consider what upon the view of the notional buyer and seller the probable zoning of the properties would have been under that scheme; and he decided that such persons would have concluded that the properties would have at least an "Extended Residential" zoning with "some possibility (which adds marginally to their value)" of a zoning as "General Residential". Upon this basis, and on his view of the evidence relating to the market value of the property so zoned, the trial Judge assessed the compensation for each property in the sum of R30 000.

At this point it is necessary to say something about the use zonings provided for in the 1971 town planning scheme and, in terms of the scheme, the purposes for which land

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in each use zone may be used or the purposes for which buildings may be erected thereon and used. (For sake of brevity I shall call these "use purposes".) In addition to the actual zoning of respondents' properties, viz. Educational 1 ("E 1"), the following zonings occur extensively in the vicinity of the properties and on the evidence are of immediate relevance: Special Residential ("SR"), Extended Residential ("ER") and General Residential 3 ("GR3"). The use purposes permitted under the scheme for each of these use zones are the following:

SR : Dwelling house, recreational building.

ER : Dwelling house, maisonettes, residential building other than hotels, boarding houses, residential clubs, hostels, and buildings comprising rooms which are individually let, recreational building.

GR 3 : Dwelling house, maisonettes, residential building, institution, recreational building.

E 1 : Place of instruction, recreational building.

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Many of these use purposes are separately defined in the scheme. Of these definitions it is necessary to refer to only one, viz. "residential building", which reads :-

> " 'residential buildings' means a building other than a dwelling house or maisonettes, used, constructed, designed or adapted to be used for human habitation together with such outbuildings as are ordinarily used therewith and includes a block of flats, or duplex flats, boarding house, hotel (other than a licensed hotel), residential club and hostel, but does not include any building mentioned whether by way of inclusion or exclusion in the definitions of 'place of instruction' and 'institution' ".

It is apparent from these provisions that the range of permissible use purposes varies considerably according to the use zone into which the land in question falls. E 1 imposes the most stringent restrictions as to use purposes and the other use zones become less and less restrictive in this regard as one proceeds from SR to ER to GR 3. This factor has a direct bearing upon the market value of land falling into these different use zones. Another factor of

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relevance in this regard is the fact that under the scheme the limitations placed upon the erection of buildings in regard to such matters as coverage, height and floor space (or bulk) also vary according to the use zone, the provisions in this regard being on the whole progressively more generous as one considers in turn SR, ER and GR 3 zones. In the result land falling in an ER zone generally has a higher market value than land in an SR zone and land zoned GR 3 is generally more valuable than land zoned ER.

I should add that in the scheme additional use purposes are listed in the case of each use zone as being purposes for which the land may be used or buildings erected and used with the special consent of the Council. It is not necessary, however, to refer to any details in this regard.

I return now to the problem as to how the provisions of sec. 8(1) of the Act are to be applied where, as in this case, owing to the nature of the zoning there is no open market for the property expropriated and the only potential

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purchaser is the expropriating authority. When a similar situation confronted this Court in Todd v Administrator of the Transvaal, 1972 (2) SA 874 (AD) (the report of the case describing the respondent as being the Administrator of Natal) the following approach was adopted (per RABIE JA, who delivered the judgment of the Court, at pp 881 H - 882 A):

> "It is obvious that when a situation arises where there is only one potential purchaser, viz. the expropriating authority itself, there can hardly be said to be an 'open market' in which the value of the property can be determined in the manner envisaged by sec. 8 (1) (a) (i) of the Act. The Act, however, requires the 'open market' test to be applied, and the question accordingly arises how that is to be done in a case like the present. The only possible answer, it seems to me, is that the arbitrator should determine the value of the property, with such potential as it has, in the same way as he would have done if there had been several possible purchasers. In other words, he must ignore the fact that there is only one potential purchaser, and he must assume that there is an 'open market'."

(The "arbitrator" mentioned in this extract must in this context be read as a reference to the Court constituted in terms of sec. 7 of the Act.) See also Bestuursraad, Sebokeng v M & K Trust en Finansiële Maatskappy (Edms.) Bpk., 1973 (3)

SA 376 (AD), at pp 388 G - 389 D.

It seems to me to be a logical and inevitable extension to this approach that in circumstances such as those revealed in the present case the Court charged with the task of determining compensation under sec. 8(1)(a)(i) should have regard, inter alia, to what a purchaser who does not wish to use the property for the purposes for which it has been zoned, viz. place of instruction or recreational building, would be willing to pay for the property. This follows from the assumption of an open market and a plurality of possible purchasers; for if, as a fact, there are no possible purchasers (other than the expropriating authority) for the property as an educational site, then the notional purchasers which the Court is required to assume in order to give effect to sec. 8(1)(a)(i) must inevitably be persons who would be interested in the property for its potential as a site which could be put to other uses. These uses could be either the uses to which the property could be put under the existing zoning but with

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the special consent of the Council or the uses which would be permissible were the property to be re-zoned.

This approach may be put slightly differently. The Act postulates not only a willing purchaser and an open market but also a willing seller. The willing seller of land zoned E 1, for which ex hypothesi there is no open market, would, when arriving at the price which he is prepared to accept for the land, zoned as it is, necessarily have regard to what in his estimation other potential purchasers would pay for the property with either a use with special consent or a re-zoning in mind.

That an approach along these lines must be adopted is made even clearer if one considers other categories of zone use. In the present case the evidence establishes that there is no open market for land zoned E 1. In other circumstances, and perhaps in other areas, it might be possible to show that there was some kind of a market for land so zoned, or at any rate, to point to other comparable transactions in terms of which land had been purchased by the educational

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authority. This might obviate the need to adopt the approach outlined above. But what of land zoned, for example, as a cemetery or as a public open space or as a new street? Unless in such cases a notional purchaser who has either a special consent use or re-zoning in mind is postulated, I have difficulty in visualizing upon what basis the Court can even begin to compute the compensation payable upon expropriation.

In coming to this conclusion I have not overlooked the remarks of RABIE JA in Todd's case, supra, at p 881 E-G. The property in question in that case was zoned Special Residential under the town planning scheme for the City of Johannesburg (this fact appears only from the original judgment, the version contained in the law reports being a truncated one) and the question was whether an interested purchaser would not have bought in the expectation of a change in the zoning to General Residential. The trial Court had come to the conclusion that the property had no

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potential for a use requiring re-zoning but that it did have a potential for institutional use (this also appears only from the original judgment) and this conclusion was endorsed by this Court. In each Court it was, as I understand the position, a finding based primarily on the facts of the case. I do not read the judgment of this Court in the Todd case to lay down generally that it is not permissible under any circumstances to take into account the expectation of a potential purchaser that the property in question may be re-zoned.

It will be apparent that the approach adopted by the trial Judge differs somewhat from that which I have held to be the correct one. In essence, SHEARER J decided to ignore the zoning for E 1 and to make his determination on the basis of what would otherwise, in the view of the notional buyer and seller, have been the probable zoning of the two properties under the scheme. In terms of this judgment the actual zoning cannot be ignored but the need in this case to postulate an open market and a plurality of buyers

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demands that in determining compensation regard must be had, inter alia, to what potential buyers would consider to be the prospects of obtaining a special consent or a re-zoning.

Respondent's counsel sought to justify the approach of the Court a quo on the following line of reasoning: (i) that the zoning of the properties in question enhanced their value because of the wider range of purposes for which the land might be used; that in view of the close collaboration between the Council and the expropriating authority the zoning was in fact part of the process of expropriation; and that in terms of sec. 8(4)(f) of the Act the zoning should, therefore, be left out of account. In my view there is no merit in this submission. The sub-section provides that in the determination of the amount of compensation —

> "any enhancement, before or after the date of notice, in the value of the goods (this should really read 'property', being a mis-translation from the Afrikaans, the signed version) in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or

> perform or intends to carry out or perform in connection with such purposes, shall not be taken into account".

Counsel sought to apply this sub-section here by contending that the zoning was an act carried out or performed in connection with the purpose for which the property was being expropriated, viz. the establishment of a school. It seems to me that there are several terse answers to this contention. The zoning was not an act carried out or performed by the State. There is no evidence that the zoning as E 1 enhanced the value of the properties. And, in any event, it is the enhancement, if any, which the Court is enjoined to ignore, not the act, i.e., the zoning.

The general approach which I have held to be the correct one in this case raises a problem of application in that the evidence led in the Court below, though far-ranging, was not directed specifically along the appropriate line of enquiry, viz. what the willing purchaser of the properties in question (other than the expropriating

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authority) would have rated the prospects of the properties being put to some other use either by way of a special consent by the Council or on the strength of a re-zoning; and, having regard thereto, what he would have been prepared to pay for the properties. Fortunately we have been assisted in this regard by a concession very fairly made by appellant's counsel to the effect that the willing purchaser to whom I have referred would in the circumstances have felt reasonably confident that if he acquired the properties, he could obtain an alteration of the zoning from E 1 to ER. Furthermore, the witness Hurt stated in evidence that in his opinion, if school site No. 12 (including respondents' properties) had not been zoned E 1 and a similar school site had been located elsewhere in the same area, the most favourable zoning which school site No. 12 would have received would have been ER. Hurt, a professionally qualified town planner, was head of the section in the City Engineer's Department engaged in forward planning and the preparation

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of town planning schemes and had been directly concerned in the formulation of the Umgeni South scheme. His opinion in this regard must carry very considerable weight. It is a fair inference from his evidence that the most favourable re-zoning that a potential purchaser of respondents' properties could reasonably expect to obtain would be to an ER zoning and that if such a purchaser - as he probably would have done - had made enquiries at the time from the appropriate section of the town planning department this is what he would have been told.

The only evidence contrary to this was given by Mason, a witness called ~~upon~~ on behalf of respondents and described by the trial Judge as "a valuer of impressive qualifications". He valued the properties in question on the basis of a GR 3 zoning on the ground that in his opinion this would in all probability have been the zoning had the properties not been required for educational purposes. In cross-examination Mason's evidence on the pro-

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bable zoning was challenged and Hurt's contrary opinion was put to him. Mason's reaction appears to have been to defer to Hurt's more knowledgeable view on the matter, as the following extract from the evidence shows:

> "Now, if Mr. Hurt gives evidence and says that in fact, if the row of properties fronting Brickfield Road from school site number 12, had not been zoned for Educational 1 purposes, as far as he is concerned it would be zoned Extended Residential, would you have any comment to make?-- It is his opinion against mine.
>
> He was the man in charge of Planning, as far as you know?-- Yes, he is in charge of planning. He has also collaborated with the authorities and because of the collaboration they have drawn up a certain plan. If that plan had been altered in collaboration with the authorities he might very conceivably have changed the whole concept of his plan. The fact that this particular plan, the way he has prepared it, indicates that that is a school site - if he says that it might have been Extended Residential, I accept that in his opinion it would have been Extended Residential. That was the way he must have thought. And I cannot argue with Mr. Hurt, and I don't know what he had in his mind when he did it. This is what I had in my mind when I did it.
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> He obviously had more control over what was going to happen than you have?-- He obviously is City Council."

/ I come.....

I come now to the reasons of the Court a quo for determining the compensation payable in respect of each property in the sum of R30 000. At the trial two valuers gave evidence, viz. Mason, to whom reference has already been made, and Hughes, who was called by appellant and who was described by the trial Judge as also having "impressive qualifications". Mason, as I have already indicated, based his valuation upon the supposition that the properties were zoned GR 3. On the strength of a number of sales of properties similarly zoned in the general vicinity of lots 129 and 131 (which were listed in a schedule attached to Exh. "D" and Exh. "E") he arrived at a valuation of R45 000 for lot 129 and R48 000 for lot 131. He conceded under cross-examination that he had not attempted to value lots 129 and 131 on the basis of an ER zoning.

I must digress at this point to explain that the ER zoning was a new concept introduced by the 1971 scheme. It was conceived to accommodate the extended family system,

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typical of the Indian way of life, whereunder married children very often move in with their parents and remain living with them under the same roof. Such dwellings were required by the scheme to be designed so as to take on the appearance of ordinary dwellings, but could be divided up into separate units of accommodation, if so desired. The number of such units which could be accommodated upon a particular site zoned ER would depend upon the basic floor space permitted in terms of the scheme, which in turn would be calculated by applying a certain formula to the area of the site.

Returning to the evidence of Mason, he was asked under cross-examination whether he agreed that lots 129 and 131, if valued at the date of expropriation on the basis of an ER zoning, could fairly be valued at R22 000 each. Mason stated that he disagreed and, while conceding that he had not done a "full-scale exercise on it", proceeded while in the witness-box to estimate a value of about R30 000 for each property. This he arrived at by calculating the permitted basic floor space in each case; by determining on the

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basis thereof that each site would accommodate three living units, each equivalent to a "reasonable size flat"; and by estimating the value of each such unit as being worth "something in the vicinity of R10 000". Cardinal to this estimate is the value of R10 000 placed on each living unit. Mason was further cross-examined about this. Eventually, after certain inconsistencies and contradictions in regard to this valuation of R10 000 per living unit had been pointed out to him, he made the concession that the R10 000 was —

> "More of a thumb-suck valuation than a reasoned valuation, because I haven't actually done an Extended valuation on these sites, and it was simply a quick calculation during lunchtime. I would not stand by it."

And he added, in answer to a further question, that if his evidence were to be taken into account by the Court, should it decide to value on the basis of an ER zoning, he would like sufficient time to prepare a valuation. No such further valuation by him was placed before the Court.

/ Hughes, ...

Hughes, on the other hand, initially approached the question of the valuation of lots 129 and 131 on the basis of a hypothetical zoning of SR. His reasons for doing so need not be canvassed. On the basis of comparable transactions he arrived at his valuation of R22 000 in each case. He stated that he felt that this was a "generous figure". Hughes, I should explain, had originally been commissioned by the expropriating authority to value the properties and it seems clear that appellant's final offer of R22 000 for each lot was based upon valuations made by him. The comparable transactions used by him at the time to make these valuations were drawn from his records. In support of his valuations he placed before the Court a list of sales of properties in the vicinity which were zoned SR and which had taken place over the period January 1973 to July 1975. Shortly prior to the hearing Hughes also gave consideration to a valuation on the basis of an ER zoning for the properties in question and to this end he prepared

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a schedule of comparable transactions involving land zoned ER (Exh. "G"). He stated in evidence that, having studied all the figures anew, he had come to the conclusion that his original figure of R22 000, based upon an SR zoning, had been "possibly over-generous in the first instance" and that this figure would be an appropriate valuation of the properties on the basis of an ER zoning, despite the fact that property zoned ER is generally speaking more valuable than property zoned SR. He contended that Exh. "G" confirmed his view that at the date of expropriation the value of lots 129 and 131, if zoned ER, would have been R22 000. When asked to assess the likely difference in the value to be placed upon the lots according as to whether they were zoned SR or ER, Hughes expressed the view that the value on the basis of an SR zoning would be "something like" R2 000 - R3 000 less than the value based upon an ER zoning.

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With reference to this evidence the trial Judge stated the following:

(1) "I do not propose, in this judgment, to embark upon an analysis of the detailed schedules of comparable sales put in as documentary exhibits by these two valuers. It is, I think, sufficient for me to say that these persuade me that Mason tends towards optimism and Hughes to conservatism. Neither professed to have investigated carefully the market price which a projected sale would have realised had the property been zoned extended residential. However, each in the witness box essayed a view on this question. Mason calculated upon mathematical ratios provided in the scheme that three residential units would have been a permissible development for each property and that this would result in a valuation at R30 000 (R10 000 for each unit). The ER classification contemplates a number of living units in a single building provided that the building itself has the external appearance of a dwelling house. Hughes, on the other hand, considered that these properties with an ER classification could have value which is R2 000 to R3 000 more than their value with a zoning as SR.

He said that further consideration had persuaded him that his SR valuation probably erred on the generous side and that he therefore considered R22 000 as an appropriate figure for an ER valuation. When earlier in this judgment I described my impression that Hughes

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> tended to conservatism it was this aspect of his evidence that I had in mind. It seems to me that the increase in the number of permissible units would inevitably result in a much more substantial increase in market value."

Having considered what the correct approach should be to the determination of compensation and having come to the conclusion, for the reasons already recounted, that he should assume at least an ER zoning with some possibility of a GR 3 zoning, SHEARER J concluded:

> (2) "It would therefore, in my judgment, be equitable to assess the market value of each of the two relevant properties as at the 4th September 1974 at R30 000, my impression that Mason tended towards generosity in his valuations being balanced by the prospects of a zoning which enhanced the valuation beyond that of an ER property. I do not draw any distinction between the two properties".

(For convenience of reference I have numbered these last two extracts from the judgment.)

It is true, as emphasized by respondents' counsel, that a determination of compensation in terms of sec. 7 of the Act is to a considerable degree dependent upon appraisers'

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valuations, which in turn are to a material extent matters of conjecture, and that this is a factor to be borne in mind when a court of appeal comes to consider whether there are good grounds for interfering with the trial court's determination (cf. South African Railways v New Silverton Estate Ltd, 1946 AD 830, 838). Nevertheless, there is a full appeal against the trial court's determination (see sec. 9) and the determination itself —

> "... though it relates to matters that may in many respects be so uncertain and so difficult to determine that no one can be dogmatic about them, nevertheless purports to be a finding of fact, a logical deduction from factual data....."

(Union Government v Jackson and Others, 1956 (2) SA 398 (AD), per FAGAN JA at p 419; and see Estate Marks v Pretoria City Council, 1969 (3) SA 227 (AD), at p 253 F-H). Consequently, where it appears, inter alia, that the trial Court has adopted the wrong general approach or has misconstrued the evidence or overlooked vital portions thereof

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or drawn incorrect deductions therefrom and as a result of this has arrived at a valuation which the court of appeal considers to be incorrect, then, in my view, proper grounds exist for interference on appeal.

In the present case there are, in my judgment, good grounds for interfering with the trial Judge's determinations. In the first place, as I have shown, the trial Judge's general approach differed somewhat from the approach which should have been adopted. This led him to apply the criterion of an ER zoning, with some possibility, adding marginally to value, of a GR 3 zoning. Generally, the evidence was not really directed along the lines of what I have held to be the correct approach, but on appeal the situation was saved, as it were, by the concession by appellant's counsel that a willing purchaser would have been reasonably confident of obtaining a re-zoning of the properties from E 1 to ER and would have purchased on that basis. This appeared to be in conformity with certain

/ evidence.....

evidence given by Hurt. In the circumstances it seems to me that the correct criterion must be that of an ER zoning.

Secondly, although the position is not altogether clear, the trial Judge would seem to have based his determination of R30 000 for each site solely upon the evidence of Mason. This appears from extracts (1) and (2) above, which indicate that Mason's valuation of R30 000 on the basis of an ER zoning was adopted, the witness's tendency to generosity ~~xg~~ being off-set against the possibility of an enhanced value by reason of a GR 3 zoning. This approach is erroneous for several reasons. The possibility of a GR 3 zoning should, for the reasons already stated, not have been taken into account. More importantly, the evidence of Mason in support of his valuation of R30 000 was shown in cross-examination to be wholly unreliable. As appears from extract (1) above and from my earlier consideration of Mason's evidence this valuation was

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based directly upon an estimate of R10 000 per living unit, which Mason subsequently described as a "thumb-suck" and which he quite claarly abandoned. The trial Judge appears to have overlooked this important aspect of Mason's evidence. And finally, apart from remarking that he tended to "conservatism", the trial Judge does not appear to have weighed the very considerable and largely uncontradicted evidence given by Hughes in regard to the value of the properties on the basis of an ER zoning. I shall return to this evidence shortly.

For these reasons I consider that the manner in which the trial Court made its determinations was faulty in several respects and that, as I shall show, this led to incorrect valuations. There are thus good grounds for interference. Moreover, I am of the view that in all the circumstances this Court should make its own determinations on the available material rather than refer the matter back to the Court a quo. This is a permissible procedure (see

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Todd's case, supra, at p 881 A-B) and, as I understand the position, this is what the parties would wish us to do.

Taking an ER zoning as the appropriate criterion, it is clear that the only witness who gave pertinent evidence was Hughes. This evidence has already been detailed. On the face of it Hughes's valuation of R22 000 based upon an ER zoning appears unconvincing when viewed against the fact that this was also his initial valuation on the basis of an SR zoning; and his explanation that he was over-generous with his SR valuation sounds a somewhat lame one. A closer analysis of his evidence, however, convinces me that he is substantiated by the facts. In support of his views on values Hughes gave copious information as to comparable sales, which as the courts have often remarked afford the most satisfactory guide in determining market value (Estate Marks v Pretoria City Council, supra, at pp 253-4). The transactions listed in Exh. "U" certainly

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lend support to the assertion by Hughes that a value of R22 000 was possibly over-generous for lots 129 and 131 on the basis of an SR zoning. These transactions (eight in all) admittedly relate to erven situated some distance from the Essendene block but, according to Hughes, in good, sought-after residential areas. (There are, in fact, no erven in the Essendene block or the adjacent Kenilworth block zoned SR under the 1971 town planning scheme.) Three of the erven referred to in Exh. "U" were vacant land at the time the relevant transaction took place, while in the case of each of the remaining five there was on the site at the time a building of poor quality, which would not have materially affected the market value of the property. The transactions cover the period January 1973 to July 1975. The size of the erven varies from 852 square metres to 3 775 square metres. The prices realized range from R8 500 to R20 000. The average price per erf works out at R14 594.

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In regard to the valuation based upon an ER zoning there are a number of transactions recorded in Exh. "G" which afford useful guidance. Of the 31 transactions listed which involved land with an ER zoning only two, unfortunately, relate to vacant land. In the case of the remaining 29 transactions there was in each instance a building, usually a dwelling, on the erf at the time of the transaction. These dwellings varied considerably in size and quality but Hughes was of the opinion that in general and especially if the house were of good quality its existence would enhance the value of the erf. This seems to accord with common sense and the probabilities. The difficulty, of course, is to quantify the amount of this enhancement so as to arrive at a proper basis for comparison with respondents' properties, which are vacant erven. Hughes deposed to the 1970 and 1975 municipal valuations of each the ER properties listed on Exh. "G". I have selected from Exh. "G" the transactions (21 in all, involving 19 properties)

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relating to erven situated in the Essendene and Kenilworth blocks (as being the erven situated in closest proximity to lots 129 and 131) and have correlated therewith the evidence as to municipal valuations. I think that some assistance can be gained from this correlation. Apart from one in February 1969, the transactions fall within the period May 1972 to May 1976. The sale figures would indicate a general upward trend in values. This is also reflected in a general increase in municipal valuations as between 1970 and 1975. These valuations give separate values for land and buildings. While it might be unsafe in each case to treat the value for buildings as being in any way an accurate reflection of the amount whereby the market value of the individual erf was enhanced by the presence of the buildings, the value for buildings does nevertheless give some indication of the size and quality of the buildings in question and of the general measure of the likely enhancement. According to Hughes, although the municipal valuation is

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never quite up to the market value of the property concerned, valuators for the 1975 revaluation were instructed to bring their valuations closer to the actual market value and this did in fact occur. This is confirmed by a comparison of the 1970 and 1975 valuation figures and also the sale prices under the different transactions. The selling price in 19 of the transactions which I have chosen from Exh. "G" (I ignore two of these transactions, which were donations) varied from R9 000 to R45 000. In only six instances did it exceed R22 000. These prices were R45 000, R27 500, R26 000, R24 000, R22 500 and R22 500. The highest price of R45 000 is quite out of line with the others and seems to be partly accounted for by buildings on the lot upon which the relatively high figure of R15 580 was placed under the 1975 municipal valuation. In the case of this lot the land was valued in 1975 at R14 500, giving a total municipal valuation of R30 080. The disparity between this total valuation and the price paid of

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R45 000 is proportionately far greater than in any of the other transactions. Similarly, the lowest price of R9 000 which was paid for a property in the Kenilworth block in February 1969 and the second lowest of R9 500 which was paid for a property in the Essendene block in February 1973 also appear to be out of line. Omitting these three transactions and making appropriate but arbitrary adjustments in three cases where only a half-share in the property was sold, the average price paid under the remaining 16 transactions was R19 443. This figure makes no allowance for enhancement of value due to the presence of buildings. Other relevant information is that erven involved in these transactions are for the most part approximately the same size as lots 129 and 131 and that the 1975 municipal valuations for land alone (apart from one case where there had been a re-zoning to GR 3) varied between R10 000 and R15 750. In most instances it was around the R15 000 mark.

/ Generally.....

Generally, in my opinion, these figures relating to comparable transactions involving land with an ER zoning substantiate the evidence of Hughes that his valuation of R22 000 for each of lots 129 and 131 was appropriate even on the basis of an ER zoning. His was the only available evidence on this aspect of the matter and in the circumstances I consider that it should be accepted. Viewing the question at issue upon this basis I hold that the amount which lots 129 and 131 would have realized if sold on or about 4 September 1974 in the open market by a willing seller to a willing buyer (having re-zoning in mind) would not have exceeded R22 000 in each case. And that is the determination which the trial Court should have made. It follows that the appeal succeeds.

In view of his success on appeal appellant is unquestionably entitled to the costs of appeal but we are not disposed to allow the costs of two counsel. As to the

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costs in the Court below, seeing that the amount of compensation as determined by this Court is equal to the amount last offered by appellant before the commencement of proceedings, these costs must be paid by the owner or owners concerned (see sec. 10 (2)(b) of the Act). The effect of the order made by SHEARER J consolidating the two actions initially instituted was, inter alia, to cause the provisions of Rule 10 of the Uniform Rules to apply, mutatis mutandis, to the consolidated action (Rule 11(b)). Rule 10 deals with the joinder of parties and causes of action. Rule 10 (4) provides, inter alia, for the question of costs where parties have been joined in terms of the rule. The effect of the sub-rule is to make specific provision for certain situations and yet at the same time to preserve the court's general discretion to make such order as to it seems just. (Cf. Parity Insurance Co. Ltd. v Van den Bergh, 1966 (4) SA 463 (AD), at p 481 F-H.) If, as seems to be

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the intent underlying Rule 11(b), consolidated actions by two plaintiffs against a common defendant be treated on the same basis as a joinder of two plaintiffs against one defendant, then it is clear that the situation which arises in this case, viz. both plaintiffs being unsuccessful, is not catered for by the specific provisions of Rule 10 (4). One is, therefore, thrown back on the general discretion vested in the court. In a case such as that postulated the court would normally order the costs of the successful defendant to be paid by the plaintiffs jointly and severally (see Yassen and Others v Yassen and Others, 1965 (1) SA 438 (N), at p 444 A - H and the cases there cited). This is the order which I think should be made in the present case, both as to the costs of appeal and as to the costs in the Court a quo.

The order of this Court is accordingly the following:

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(1) The appeal is allowed with costs, such costs not to include the costs of two counsel and to be paid by the respondent in what was originally case No. I 2555/75 and the respondents in what was originally case No. I 2634/75 jointly and severally, the one paying the other to be absolved.

(2) The order of the Court a quo is altered to read:-

"It is ordered —

(a) that the compensation payable by defendant to the plaintiff in what was originally case No I 2555/75 in respect of the property described as —

'Remainder of Lot 131 of Lot Essendene of the farm Brickfield No. 806 situate in the City and County of Durban, in extent 1 321 square metres'

be determined in the sum of R22 000;

(b) that the compensation payable by defendant to the plaintiffs in what was originally case No I 2634/75 in respect of the property described as —

/ 'Remainder....

'Remainder of Lot 129 of Lot Essendene of the farm Brickfield No. 806 situate in the City and County of Durban, Province of Natal, in extent 1 261 square metres'

be determined in the sum of R22 000;

(c) that the defendants' costs of suit be paid jointly and severally, the one paying the other to be absolved, by the plaintiff in what was originally case No. I 2555/75 and the plaintiffs in what was originally case No. I 2634/75."

M.M. CORBETT.

RUMPFF, C.J.)
WESSELS, J.A.)
HOFMEYR, J.A.) CONCUR.
HOEXTER, A.J.A.)