REPUBLIEK VAN SUID-AFRIKA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 71/96 /mb

In the matter of:

RANDBURG TOWN COUNCIL

APPELLANT

and

KERKSAY INVESTMENTS (PTY) LTD

RESPONDENT

CORAM: SMALBERGER, SCHUTZ, SCOTT, PLEWMAN JJA

et VAN COLLER AJA

HEARD: 28 AUGUST 1997

DELIVERED: 9 SEPTEMBER 1997

JUDGMENT

SCOTT JA -

SCOTT JA:

The respondent (to whom I shall refer as 'the claimant') is the registered owner of erf 843, Ferndale, Randburg in terms of a deed of transfer dated 3 July 1974. The property is bordered on one side by Oak Avenue. By notice of expropriation taking effect on 3 April 1990 the appellant ('the council'), acting in terms of the Expropriation Act, 63 of 1975 ('the Act'), expropriated a road widening servitude, 147,83 square metres in extent, over the property. The area affected was a strip of land some 3,13 metres wide and 47,23 metres long adjacent to Oak Avenue. As the subject of the expropriation was a right, as opposed to property, the compensation to which the claimant became entitled was in terms of s 12(l)(b) of the Act not to exceed 'an amount to make good any actual financial loss or inconvenience caused by the expropriation or the taking of the right'. (The words 'or inconvenience' were subsequently deleted by

s ll(b) of Act 45 of 1992.)

The council offered an amount of Rl 401 as compensation.

This amount was stated in the notice of expropriation to be made up of Rl 400 for the improvements (there were seven large trees in the servitude area) and Rl for the land. The offer was rejected by the claimant which in turn claimed R40 000. Application was made in terms of s 16 of the Act to the now defunct compensation court for the determination of compensation. That court dismissed the claim for compensation and made no order as to costs. The claimant appealed successfully to the Transvaal Provincial Division which awarded it compensation in the sum of R40 000 (less the amount of Rl 401 previously paid) together with interest and costs. The decision has been reported, see Kerksay Investment (Pty) Ltd v Randburg Town Council 1997 (1) SA 511 (T). The council applied for leave to appeal but this was refused by the court a quo. Leave was

subsequently granted pursuant to a petition to the Chief Justice.

Before turning to the issues presently in dispute between the parties, it is necessary to refer to certain events which preceded the expropriation as well as to the manner in which the parties sought to dispose of the matter in the compensation court. These were dealt with in some detail in the judgment of the court o quo (Van Dijkhorst J and McCreath J) and may be stated shortly.

Prior to 6 November 1974 the property was zoned 'special residential' in terms of the Randburg town-planning scheme of 1954 which was the scheme then in force. On that day and at the instance of the owner the scheme was amended by the rezoning of the property from 'special residential' to 'special'. The new zoning permitted the property to be developed for use as offices. The amendment was made subject to certain conditions, one of which, (condition j) provided

'The owner shall register, free of charge, a servitude 1,57 metres wide for road widening purposes and a further servitude of 18,43 metres for public parking purposes over [the property] in favour of the Council.'

Following the amendment there was no development of the property to utilize the new zoning; nor was the servitude referred to in the condition ever registered.

On 29 December 1976 the 1954 scheme (as amended) was replaced by the Randburg town-planning scheme of 1976. The zoning of the property remained unchanged. The new scheme provided, infer alia, that 'no residential buildings, hotels, business premises, places of amusement, public garages, social halls, shops or industries or additions' were to be permitted on the property 'unless a right-of-way for general street purposes', 3,2 metres wide and abutting Oak Avenue was registered against the property. The same limitation was imposed in respect of other erven abutting Oak Avenue. In terms of s 45 of the Town-planning and

Township's Ordinance 25 of 1965 (Transvaal) which was then in force, any person having an interest in land who suffered 'any diminution in value' by reason of the operation of any provisions in an approved scheme (such as the 1976 scheme) was entitled to claim compensation. Such a person was, however, obliged in terms of s 45(2) to lodge such a claim within 6 months from the coming into operation of the approved scheme, failing which he or she would no longer be entitled to any compensation. It is common cause that no claim for compensation was lodged by the claimant; nor was any attempt made to develop the property or use it in a manner that would have required the registration of a servitude as contemplated in the 1976 scheme. The expropriation which forms the subject-matter of these proceedings occurred thirteen years later on 3 April 1990. It was only in July 1993 that steps were taken to develop the property, by which time Oak Avenue had been widened.

No evidence was led at the hearing before the compensation court. Instead, the parties at a pre-trial conference agreed upon a set of facts which was placed before the court. The issue between the parties which the court was asked to resolve was formulated in the minutes of the conference as follows:

'1.1 If it is legally permissible to take into account the diminution in value of the applicant's property, being lot no 843, Ferndale township ("the applicant's property") which occurred in consequence of the coming into operation of the Randburg Town Planning Scheme, 1976 on 29 December 1976 ("the scheme"), in the calculation of compensation payable to the applicant in terms of section 12(l)(b) of the Expropriation Act No 63 of 1975, then the appropriate compensation to be paid by the respondent to the applicant for the expropriation of a road widening servitude, 147,83 square metres in extent, is the amount of Rl 401,00.

1.2 If it is not legally so permissible, then the appropriate compensation to be paid by the respondent to the applicant for the aforesaid expropriation, is the amount of R40 000,00.'

The question which the parties clearly had in mind was

whether in terms of s 12(5)(f) of the Act the depreciation in value caused by what may be described in broad terms as the road-widening provisions of the 1976 scheme had to be disregarded for the purpose of determining the compensation payable to the claimant. It was common cause and recorded in the pre-trial minutes that the 1976 scheme had caused 'diminution in value of the property'.

Section 12(5)(f) of the Act provides:

> '(5) In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely -
>
> (f) any enhancement or depreciation, before or after the date of notice, in the value of the property 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 already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;

In as much as the section deals with any enhancement or depreciation 'in the value of the property in question' it would more commonly apply in cases involving the expropriation of property where in terms of s 12(l)(a)(i) the compensation payable is to include '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'. Nonetheless, it is clear from the first part of s 12(5) that the provisions of ss (f) are applicable for the purpose of determining compensation under s 12(l)(b) to the extent that the value of property in respect of which a right has been expropriated may be relevant in quantifying the actual financial loss or inconvenience caused by the expropriation. While in the present case it is apparent from the pleadings that the value of the property played a role in the calculation of the claim of R40 000, details of how that amount was made up are unknown. It is also unknown, apart from what is said above, how the offer by the council

was computed. Evidence in this regard became unnecessary by reason of the agreement reached by the parties as to the quantum of compensation to be awarded depending on whether depreciation in the value of the property occasioned by the 1976 scheme was or was not to be disregarded.

The compensation court did not confine itself to the issue formulated by the parties as recorded in the pre-trial minutes. It decided the matter on another basis. In short, it held (contrary to the agreement between the parties) that the 1976 scheme did not have any material effect on the value of the property as the strip of land designated for road widening purposes had previously been precluded from being developed by the amendment to the 1954 scheme in 1974 and that the amendment had been brought about at the instance of the owner who had consented to the limitation. Accordingly, so it was held, although the purpose of the expropriation in 1990 coincided with that of the 1976 scheme in so far as

the widening of Oak Avenue was concerned, this was of no consequence, as the scheme had not had the effect of depreciating the value of the property. The council's offer of Rl 401 had previously been paid to the claimant and the compensation court therefore made no award as such but simply dismissed the claim for compensation. It declined, however, to make an order as to costs on the ground that counsel on both sides had provided little if any assistance and had 'almost completely ignored' the 1974 amendment. The court a quo, correctly in my view, decided that the compensation court had misdirected itself in departing as it did from the confines of the agreement between the parties. This conclusion was not challenged in this Court.

The sole question in issue in this court was that formulated by the parties in para 1 of the pre-trial minutes quoted above. Stated shortly, it is whether the admitted depreciation in the value of the property caused

by the 1976 scheme is to be disregarded for the purpose of determining the compensation payable to the claimant in 1990. As previously indicated this involves the interpretation of s 12(5)(f) of the Act. The section embodies a principle of valuation in expropriations which has received at least partial statutory recognition since about the turn of the century (see Gildenhuys, Onteieningsreg 155). In England it is known as the Pointe Gourde principle - a principle formulated in Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565 (PC) and extended in subsequent cases so as to apply not only to an enhancement but also to a depreciation in value of the expropriated property. (See, for instance, Jelson Ltd v Blaby District Council [1978] 1 All ER 548 (CA) at 553 j; Melwood Units Pty Lft v Commissioner of Main Roads [1979] 1 All ER 161 (PC) at 165 a - b.) The object of the section would seem clear enough. In Port Edward Town Board v Kay 1996 (3) SA 664 (A) at

'specific' purpose of the expropriation was the widening of Oak Avenue (cf Bestuursraad van Seboteng v M & K Trust & Finansiële Maatskappy (Edms) Beperk 1973 (3)) SA 37(5 (A) at 386 A- C; Bonnet v Department of Agriculutural Credit and Land Tenure 1974 (3) SA 737 (T) at 751 A).

On the facts which were common cause the inference is overwhelming that this was also the purpose of the relevant provisions of the 1976 scheme which caused a depreciation in value of the property. The 'scheme' to widen Oak Avenue first became apparent with the 1974 amendment; it was refined in 1976 and was finally implemented shortly after the expropriation. Merely because the notice of expropriation referred to a 'road widening servitude' while the 1976 scheme referred to 'a right-of-way for general street purposes' is no basis for supposing that the purpose of both was not the same, viz to widen Oak Avenue. The difference in width of the strip of land involved (3,2 metres as opposed to 3,13 metres) is to my mind of

no consequence. Nor, should it be observed, was it ever suggested by counsel on either side that the position was otherwise. That this was indeed the position was found by the court a quo and not challenged on appeal. In these circumstances it must follow that on a literal interpretation of s 12(5)(f) the depreciation resulting from the 1976 town-planning scheme is to be disregarded.

Mr Van der Merwe on behalf of the council submitted, however, that properly construed s 12(5)(f) was to be understood as being not applicable to a situation where the depreciation in the property results from a zoning provision or some other provision in a town-planning scheme such as the one presently in issue which amounts to a legally enforceable encumbrance on the property. The reason for this, he contended, was that the rights of ownership of which the owner had previously been deprived by reason of the encumbrance could not be the subject of the

expropriation and therefore any depreciation resulting from that encumbrance had to be taken into account and could not be disregarded in terms of the section. The simple answer to this contention is, I think, that it involves reading into the section a distinction between depreciation arising from an encumbrance and depreciation arising from some other cause. I can find nothing in the section or the Act to justify such a distinction. Such a construction of the section would in any event be in conflict with what was held by this court in Port Edward Town Board v Kay, supra. In that case the court found on the facts that a distinction was to be drawn between policy considerations which the provincial authorities had adopted for many years and the zoning of the property. Depreciation arising from the former was held to be a factor to be taken into consideration while depreciation arising from the zoning was held to be a factor which would have to be disregarded in terms of s 12(5)(f). After

stating that s 12(5)(f) could not be invoked in relation to the general policy

of the authorities regarding the preservation of the environment, the

judgment proceeds (at 681 I - 682 B) -

> 'The approach is different, however, in respect of the zoning of the property as "conservation reserve". That zoning was by the defendant itself in pursuance of its own policy of nature conservation in respect of the particular property. That, in a broad sense, was also why the property was eventually expropriated. Zoning (unlike the policy statement known as the Green Wedge policy) was a legally enforceable encumbrance relating to the property. Its effect would be to inhibit the marketing of that property, whether by way of implementation of the Leggo scheme or otherwise. This is a restriction that the owner (the plaintiff) would have had to overcome. As such, the zoning does result in a depreciation in the value of the property. The necessary link between the zoning, the depreciation and the expropriation is therefore clear: the common denominator, the "purpose", was nature conservation. Any devaluation or diminution due to the zoning or to the necessity of its removal or amendment would therefore in principle have to be disregarded.'

I can see no reason for departing from what was said by this court on that

occasion. It follows that the interpretation contended for cannot be upheld.

The further argument advanced by Mr Van der Merwe both in

this court and in the court below, and which he described as his 'main point', can be summed up as follows. The words of s 12(5)(f) cannot be given their ordinary literal meaning, as to do so would mean that when valuing the property in question for the purpose of determining compensation payable under the Act, any depreciation in value due to the purpose of the expropriation would have to be disregarded even if the owner had previously been compensated for such depreciation or his failure to receive compensation on a previous occasion had been due to his failure to lodge a claim timeously. Accordingly, so the argument went, it is necessary to read into the section such words as are required to avoid such a result.

In relation to the present case, it was pointed out that the claimant could have recovered compensation in terms of s 45 of Ordinance 25 of 1965 (subsequently replaced by Ordinance 15 of 1986 (Transvaal))

and that the reason for the claimant not having received compensation at the time was its failure to lodge a claim within the prescribed time limit. It was argued that in circumstances such as the present a literal construction of s 12(5)(f) could accordingly result in the payment of double compensation. Such a result, it was contended, was an absurdity and contrary to the whole scheme of the Act and, in particular, the provisions of s 12(1) which provide that the compensation to be paid 'shall not .... exceed' the amounts referred to in subsections (a) (market value) and (b) (actual financial loss and inconvenience).

The prohibitory terms of s 12(1) are somewhat tempered by the provisions of s 12(5) which have the effect that, depending on the circumstances, compensation payable under the Act may substantially exceed the actual market value of the property. Counsel for the claimant contended that because of this there was no basis for giving s 12(5)(f) a

restrictive interpretation in order to avoid compensation being awarded in excess of that contemplated in s 12(l) (a) or (b), even if a literal interpretation of s 12(5)(f) resulted in double compensation. But the various provisions of s 12(5) are aimed, in the main, at ensuring that the positive and negative aspects of the expropriation are disregarded for the purpose of determining the amounts payable in terms of s 12(l)(a) and (b) or, as it is sometimes expressed, that the compensation reflects the value of the property in the hands of the expropriatee. There is nothing in the Act to suggest that the legislature ever contemplated that the owner could be compensated twice for the same deprivation. On the contrary, the provisions of s 12(1), read in the context of s 12 as a whole, indicate to my mind that the payment of double compensation in this sense would clearly be contrary to the intention of the legislature.

Although much was made in argument before us of the spectre

of double compensation, it is important to bear in mind that the issue in the present case was not whether the language of s 12(5)(f) had to be modified in order to preclude the owner from being compensated twice for the same deprivation but whether such an approach was justified in order to preclude the owner from receiving compensation under the Act in circumstances where previously he or she could have, but had failed to recover compensation under some other statutory provision.

The starting point in statutory interpretation remains an endeavour to ascertain the intention of the legislature from the words used in the enactment. Those words must be attributed their ordinary, literal, grammatical meaning. Before a court may do otherwise, whether by cutting down or adding to or varying the actual language of the statute, it must be shown that the case falls within what has been described as the rule in R v Venter 1907 T S 910. That is, that a court may depart from the

ordinary literal meaning of the words used only where not to do so

> 'would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account'. (Per Innes CJ at 915.)

The rule has been consistently applied over the years. (For two more recent examples, see S v Tieties 1990 (2) SA 461 (A); Bras v Randburg Stadsraad 1992(3) SA 371 (A).) The courts have, however, repeatedly stressed the dangers of speculating as to the intention of the legislature and the need for caution when departing from the literal meaning of the words of a statute. As observed by De Villiers JA in Shenker v The Master and Another 1936 AD 136 at 143, 'The absurdity must be utterly glaring and the intention of the legislature must be clear, and not a mere matter of surmise or probability'. (See also Savage v Commissioner for Inland Revenue 1951 (4) SA 400 (A) at 409 A; Summit Industrial Corporation v Claimants

Against The Fund Comprising the Proceeds of the Sale of the MV Jade Transporter 1987 (2) SA 583 (A) at 596J - 597 B.) In Bhyat v

Commissioner for Immigration 1932 AD 125 at 129 this court cited with approval the dictum of Lord Bramwell in Cowper Essex v Local Board Action 14 AC 153 at 169, '[T]he words of a statute never should in interpretation be added to or subtracted from, without almost a necessity.' (See also Land- en landboubank van Suid-Afrika v Rousseau NO 1993 (1) SA513(A)518H-J.)

Considered against the principles set out above, it may well be that in construing s 12(5)(f) its language falls to be modified so as to avoid the payment of compensation twice. Whether this could be achieved by interpreting the word 'depreciation' in the section to mean 'depreciation in respect of which compensation has not already been paid' or whether the same result may be achieved in some other way need not be considered.

Nor do I express any final view on the matter. What is in issue is whether there is justification for departing from the ordinary meaning of the language so as in effect to preclude an owner from receiving compensation under the Act on the ground that he or she could previously have recovered some compensation under another statutory enactment for the same deprivation, but allowed the claim to prescribe. I am unpersuaded that such a course is justified. The fact that an owner may be permitted in such circumstances to recover compensation under the Act can hardly be characterised as an absurdity, let alone one that can be said to be glaring. Such a result does not strike me as being clearly unfair to either party. What the legislature would have intended in a situation like the present must therefore remain a matter of surmise. There is nothing that I can find in the context of the section or elsewhere in the Act to compel the conclusion that the legislature must have intended the ordinary meaning of

the language of the section to be curtailed to the extent contended for by the council.

It follows that in my view the court a quo was correct in coming to the conclusion that the depreciation in the value of the property attributable to the 1976 town-planning scheme had to be disregarded for the purpose of determining the compensation payable under the Act. The parties, however, were agreed that in the event of the appeal not succeeding the award of interest made by the court a quo be altered to reflect the agreement between the parties as contained in the minutes of their pre-trial conference.

The appeal is accordingly dismissed with costs, including the costs of two counsel, and the order of the court a quo is confirmed save that the following paragraph is substituted for paragraph 3 of that order:

'3. The respondent is to pay interest on the amount of compensation awarded at the rate of 16,75% per annum

calculated from 3 April 1990 to the date of payment.'

D G SCOTT

SMALBERGER JA)
SCHUTZ JA)-Concur
PLEWMAN JA)
VANCOLLER AJA)