IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 615/02

In the matter between

THE MINISTER OF TRANSPORT **APPELLANT**

and

P J DU TOIT **RESPONDENT**

Coram: **HOWIE P, HARMS, FARLAM, CAMERON and HEHER JJA**

Heard: **13 MAY 2004**

Delivered: **28 MAY 2004**

Summary: **National Roads Act s 8(1)(c) and Expropriation Act s 12(1)(b) – Land – expropriation of temporary right to use property for purposes of upgrading national road – actual financial loss – proof of – Constitutional entitlement (s 25(3)).**

JUDGMENT

HEHER JA

HEHER JA:

[1] Moordenaarskop is a hill on the farm Hooi Kraal in the Swellendam district. No doubt its history was bloody. It certainly has a heart of stone that has been the

cause of the litigation in this matter. To its north runs the N2/5 highway and to its south the Witsand road (MR271). Both need to be maintained and upgraded from time to time. This appeal involves a claim by Mr du Toit, the owner of the farm, to be compensated for 80198 cubic metres of gravel excavated and removed on behalf of the South African Roads Board pursuant to a notice issued in terms of s 8(1)(c) of the National Roads Act 54 of 1971 read with s 12(1)(b) of the Expropriation Act 63 of 1975 ('the Act'). In the Cape Provincial Division Jamie AJ upheld the claim and awarded the respondent compensation of R240594,00 plus a solatium of R17029,70 (s 12(2) of the Act), interest at the prescribed rate and costs. His judgment is reported as *Du Toit v Minister of Transport* 2003(1) SA 586 (C). The present appeal is with leave of the Court *a quo*.

[2] The farm is some 614 hectares in extent. The notice of expropriation concerned two small areas of which only a portion of 3,03 hectares on which Moordenaarskop stands is relevant to the dispute. The expropriation took effect on 17 November 1997 from which date possession of the land was taken by the contractors of the Board for a purpose described in the notice and its accompanying letter as the exercise of a temporary right to use the land for a period of 18 months as a borrowpit and access road.

[3] When the parties could not reach agreement on the amount of compensation Du Toit sued for payment of R801980,00. He alleged that the expropriation was properly one in terms of s 8(1)(b) of the National Roads Act and that the correct measure of compensation was to be found in s 12(1)(a) of the Act, *viz* the market

price of the gravel taken by the Board. He relied in the alternative on the right to just and equitable compensation enshrined in s 25(3) of the Constitution. The Minister of Transport resisted the claim. He tendered compensation in an amount of R6060,00 for the actual financial loss suffered by Du Toit in consequence of the expropriation (s 12(1)(b)), which, he pleaded, was an amount not higher than the full market value of the portion of land taken, *viz* R2000 per hectare, plus the solatium in an amount of R606,00. The Minister pleaded in the alternative that should s 12(1)(a) of the Act be applicable, the open market value of the *in situ* gravel on the date of expropriation did not exceed its value as agricultural land and that no willing buyer and seller would negotiate any premium for the presence of gravel in the land. The matter proceeded to trial. Both parties produced expert evidence relating to the nature and extent of gravel deposits on and in the vicinity of the farm and the market for gravel. Du Toit testified about his sales of gravel from the farm and eventual application for a licence for a quarry which he opened subsequent to the expropriation.

[4] Jamie AJ found that the Board had taken a temporary right which comprised the use of the land and the permanent removal of gravel during that use. Counsel for Du Toit submitted that the learned Judge had erred: the principal source of the expropriation power was to be found in s 8(1)(b) of the National Roads Act and not in s 8(1)(c) alone. Consequently there had been a permanent expropriation of the gravel which required compensation by the measure of its market value under s 12(1)(a) of the Act and not the mere taking of a temporary use right to which s

12(1)(b) would apply. I am unable to agree. Section 8(1)(c) authorizes the Board to take the right to use land temporarily 'for any purpose for which the Board may expropriate that land'. Such purposes, according to s 8(1)(a), include 'works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance . . .' The mining and acquisition of the materials referred to in that subsection will inevitably result in a permanent deprivation of the ownership in those materials. The Board did exactly as the power provided. Section 8(1)(b), by contrast, empowers the Board to 'take gravel, stone, sand, clay, water or any other material or substance on or in the land for the construction of a road or for works or for purposes referred to in paragraph (a)'. Without attempting any in-depth comparison of this power with that in s 8(1)(c) it is sufficient to point out that the last-mentioned section couples the taking of materials with a temporary right of use of land whereas s 8(1)(b) does not. That, of itself, rendered s 8(1)(b) inapposite to the powers which the Board wished to exercise. I conclude, therefore, that Jamie AJ was correct in regarding s 8(1)(c) as the source of the Board's powers in this case and also in his analysis of the dual nature of such powers.

[5] The learned Judge proceeded to apply the terms of s 12(1)(b) to the case before him. Because he was faced with the taking of a right of use that section set out the proper measure of compensation: *Estate Marks v Pretoria City Council*

1969(3) SA 227 (A) at 241E-242E and cf *Huddlestone Motors (Pty) Ltd v South African Railways and Harbours* 1980(4) SA 764 (D) at 766E-767F.

[6] The learned Judge attempted to determine whether Du Toit had suffered actual financial loss by asking whether there existed a market for the right of temporary use taken by the Board. He concluded that no such market existed and that he was, therefore, entitled to rely on proviso (bb) to s 12(1) in order to fix the amount of compensation. He was wrong in so reasoning. To explain why it, would be as well to quote s 12(1) in full:

'(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed-

(a) in the case of any property other than a right, excepting a registered right to minerals, 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 caused by the expropriation; and

(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:

Provided that where the property expropriated is of such nature that there is no open market therefore, compensation therefore may be determined-

(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or

(bb) in any other suitable manner.'

The legislature has in the opening words of this section drawn a clear distinction between the expropriation of property and the taking of a right to use property. The distinction is carried through paragraphs (a) and (b). The first-mentioned relates only to property other than rights (excepting registered rights to minerals) which is expropriated; paragraph (b) relates both to rights (excepting registered rights to minerals) which are expropriated and to rights to use property which are merely taken for a temporary period (as was the right with which the learned Judge was concerned). The proviso, however, is limited in its application to property which is *expropriated* and has, therefore, no bearing on the determination of actual financial loss caused by the taking of a right of use and the learned Judge was wrong in resorting to it.

[7] The task of the trial court should have been confined to s 12(1)(b). That section also provides the field for our reassessment of the matter in the appeal.

[8] Before proceeding further three points require emphasis. First, an owner of land is not entitled to compensation merely because a right to use his property is taken, even if the exercise of the right involves, as it does here, a permanent deprivation of some elements of his land. Compensation is only payable if the taking has caused 'actual financial loss' ie loss that flows directly from the taking and is not hypothetical or too remote. It was not argued, nor could it have been, that these provisions of the Act are in conflict with the Constitution, whose injunction against any law permitting 'arbitrary deprivation of property' is

designed 'not merely to protect private property but also to advance the public interest in relation to property' (*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 (4) SA 768 (CC) at para 64). Second, the measure is the loss suffered by the owner (whether he is worse off because of the taking) and not the gain of the taker (whether he is better off in consequence), which is an entirely irrelevant consideration. Third, although the immediate cause of the loss is the taking of the right vested in the owner to use his own property and exploit his own gravel during the temporary period, a secondary but equally direct result of the taking is the permanent deprivation of the owner's right to exploit gravel in the quantities removed. The value of that deprivation (if any) will also be part of the loss caused by the taking.

[9] Having dealt with these preliminary matters one is free to turn to the evidence which has a bearing on the question of whether the respondent suffered an actual financial loss in consequence of the taking of the right. Because Du Toit did not rest his case on s 12(1)(b) no real attempt was made to prove the existence of an actual financial loss. Reliance was placed on an entitlement to the market value of the gravel removed by the Board. I shall in due course discuss whether that approach furthers the owner's cause.

[10] Prior to the date of expropriation mining of gravel on Hooi Kraal had taken place *ad hoc* on an informal basis. Some time before the Board's intervention Du Toit applied for permission to operate a quarry in terms of s 9(1) of the Minerals

Act 50 of 1991. The permit was issued on 26 November 1997, within two weeks after the expropriation and related to land not subject to the notice. No gravel pit was in existence on the portion of land taken by the Board at the date of expropriation.

[11] The undisputed evidence of Mr Marten, the Minister's expert valuer, was that over the preceding four years and four months Du Toit had sold an annual average of 1766 cubic metres of gravel. Counsel for the Minister submitted that these sales were illegal and must be left out of account because of the provisions of s 12(5)(c) of the Act which reads:

'if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;'.

I cannot agree that the evidence proves that the value of the land, the right of use that was taken or the gravel contained in it, was increased in consequence of such use. For that reason I shall bear in mind the proven fact that sales during the aforesaid period produced an average of R10 per cubic metre for gravel removed by the buyer at his own cost.

[12] Du Toit's geological expert, Mr Galliers, testified that abundant quantities of rock and gravel suitable for road building and repair were located in the area of the project which gave rise to the expropriation, although little commercial exploitation had occurred. The Minister's expert, Mr Melis, agreed. On the farm Hooi Kraal, after the expropriator had done its worst, there apparently remained exploitable reserves of between 100 000 and 200 000 cubic metres of such

material.

[13] I agree with the submission of the Minister's counsel that in calculating the actual financial loss suffered by the owner one is bound to think away the market for gravel created by the project, to the extent that it reflected an enhancement in value, since the increase owed its existence to the specific purpose for which the expropriation took place (s 12(5)(f); *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) at 679C). Counsel for Du Toit argued that that market was in truth the ripening fruit of the construction of the national road in 1948, which, he said, had created the potential. But that is not borne out by the evidence. Almost half a century after the road was built sales of gravel in the open market had reached less than 1800 cubic metres annually. The sudden spike in demand was solely due to the project. Nor was there any evidence that the price of land had benefited from the assumed potential for sales of gravel thus created. Counsel also submitted that similar projects were likely to recur at ever-shortening intervals (the previous upgrade having taken place about 1983) because of increased traffic carried by the roads. That factor must, he said, influence an assessment of the rate of consumption of the existing reserves of gravel. The evidence however does not provide support for these submissions either.

[14] The following conclusions are justified by the evidence. (1) The subtraction of 80000 cubic metres of gravel from Moordenaarskop reduced the volume available for commercial exploitation by Du Toit. But the absence of the gravel taken by the Board had no adverse effect on his ability to excavate and dispose of

gravel because of the enormous reserves available to him. (2) A sale by Du Toit of 80000 cubic metres of gravel from Moordenaarskop in the open market at the date of expropriation would have required the opening of a new quarry, duly licensed, on the expropriated property. He had already applied for and shortly obtained such licence for land not subject to the expropriation. He would undoubtedly have used that quarry to meet the hypothetical purchaser's requirements, given that the contract for supply was to be executed over a period of 18 months. (3) There is no reason to find that Du Toit will feel the effect of the expropriation, if at all, until his reserves diminish to levels insufficient to supply the demand. On the evidence that should not happen for at least 60 years, all other things remaining equal. But things seldom remain unchanged over so long a period: the demand may in the meantime increase or decrease, the number of alternative sources of supply may increase, perhaps greatly, by the opening up of new quarries or the discovery of new deposits, methods of extraction may improve opening previously inaccessible bodies of gravel to the market, costs of extraction and rehabilitation may change and influence supply, cheaper methods of road building may be developed. At so great a distance the imponderables and contingencies multiply to such an extent that the issue of whether Du Toit will ever suffer a financial loss becomes highly speculative. Certainly, no evidence of any kind was led to help answer the question. Similar uncertainties attach to the question of whether, should a loss finally eventuate, a direct causal connection between such loss and the expropriation will exist: *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) at

25B.

[15] Counsel for Du Toit sought to meet this difficulty. If, he submitted, the Board, as a willing buyer, had appeared in the market at the date of expropriation seeking to acquire about 80000 cubic metres of gravel, the owner, as a willing seller, would have negotiated with it an agreed price for the gravel at the ruling market price for smaller quantities (R10 per cubic metre) discounted to take account of the fact that he would be paid immediately for a quantity of gravel that he would in the ordinary course only have been able to dispose of in 45 years. That immediate cash loss, counsel submitted, was a proper measure of his client's actual loss. I cannot accept this argument. It does not address Du Toit's actual financial loss at all. While it is correct, as pointed out in *Kangra Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA) at 336I-337A that the *measure* of such loss will include the equivalent of the market value of what is taken by the expropriator, that does not mean that the market value can always be used to prove the *fact* that such a loss was suffered. The circumstances of this case emphasise the difficulty. Du Toit was bound to take reasonable steps to mitigate his loss: *Minister of Water Affairs v Mostert and others* 1966 (4) SA 690 (A) at 735H-736B and the evidence establishes that he could readily have done so. Any open market sale of the nature postulated by counsel would probably have been satisfied from other sources and Du Toit would have suffered no shortfall in income as a result. The evidence of market value produced on his behalf was (in addition to the problem of the appropriate bulk discount) extremely misleading

since the price of R10 per cubic metre was obtained for small quantities of gravel by purchasers willing and able to undertake the excavation at their own cost. If Du Toit had sold 80000 cubic metres to the Board which (contrary to the probabilities) was to be sourced from the expropriated portion he would, as I have pointed out, have been obliged to open a new quarry. Whether the cost of doing so, and of extracting the quantity required at his own expense, knowing that only 1800 cubic metres would be sold annually thereafter and that the quarry land would eventually have to be rehabilitated at his cost, would have justified the venture – all material considerations in my view – was not explored in evidence. The failure to do so means that the so-called market price was an unreliable guide to whatever financial loss he might, in the long run, suffer.

[16] In the result Du Toit failed to prove that he suffered any actual financial loss as a result of the taking of the right to use his land. One cannot realistically be satisfied that the market value of agricultural land with an underlying gravel content carried any premium above the price of land without gravel. In the circumstances a purchaser, unable to negotiate a price for gravel alone would simply have acquired the land at its market value. The Minister offered the market value of the portion which it took. Although that is more than the owner's proved entitlement it represents fair and equitable compensation for what was taken (s 25(3) of the Bill of Rights).

[17] The following order is made:

1. The appeal succeeds with costs.

2. The order of the trial court is set aside and replaced with the following:

‘(a) The defendant is ordered to pay compensation to the plaintiff in the amount of R6060,00 plus a solatium in terms of s 12(2) of the Act in an amount of R606,00, both sums to carry interest in terms of s 12(3)(a) of the Act from 17 November 1997 to date of payment.

(b) The plaintiff is to pay the costs of the action.'

J A HEHER
JUDGE OF APPEAL

HOWIE P)Concur

HARMS JA)

FARLAM JA)

CAMERON JA)