THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No 429/05

In the matter between:

THE CITY OF CAPE TOWN
Appellant

and

HELDERBERG PARK DEVELOPMENT (PTY) LTD
Respondent

Coram: HARMS, MTHIYANE, NUGENT, CONRADIE JJA and THERON AJA
Heard: 17 AUGUST 2006
Delivered: 31 AUGUST 2006

Subject: Expropriation; determination of market value; effect of s 12(5)(f) of the Expropriation Act 63 of 1975; Pointe Gourde principle.

Neutral Citation: This judgment may be referred to as City of Cape Town v Helderberg Park Development (Pty) Ltd [2006] SCA 93 RSA

J U D G M E N T

HARMS JA:

BACKGROUND

[1] This is an expropriation case and the issue on appeal concerns the amount of compensation payable to the dispossessed owner. In particular, the question relates to the effect on the determination of compensation of the so-called Pointe Gourde principle as reflected in s 12(5)(f) of the Expropriation Act 63 of 1975.

[2] The problem can be illustrated by means of an example even though the facts of this case are somewhat different. An owner of land applies for the rezoning of the land from agricultural to commercial. The local authority grants the rezoning subject to the condition that a portion of the land must be set aside as public open space. The owner accepts the condition. Later the local authority expropriates the public open space for use as a public park. Is the owner entitled to compensation based on the assumption that the expropriated land was zoned commercial and not public open space?

[3] The plaintiff, Helderberg Park Development (Pty) Ltd, is the owner of a property, which fell within the municipality of Helderberg, Western Cape. On 4 December 2000, the municipality became part of the City of Cape Town (the appellant) and all its rights and obligations were assumed by the latter and it was therefore cited as the defendant in the High Court. For ease of reference I intend to refer to the plaintiff (the present respondent) as ‘Helderberg’, and I shall not distinguish between the two local authorities and simply refer to them interchangeably as ‘the local authority’.

[4] The local authority expropriated a strip of land 25 metres wide and 1,037 ha in extent along the one border of the property during August 2000 for the purposes of a stormwater canal, a sewer line and a walkway.

[5] Relying on the provisions of s 12(1)(a)(i) of the Act, Helderberg claimed compensation in the amount of R1 386 260,92 representing its assessment of the market value of the expropriated portion. In addition, Helderberg claimed an amount of compensation for actual financial loss under sub-para (ii).[1] The court below (Allie J) awarded the sum of R705 160 under sub-para (i) – together with a *solatium* calculated in accordance with sub-sec (2) and interest under sub-sec (3) – but dismissed the claim under sub-para (ii). The High Court also dismissed a counterclaim by the local authority which was based on an alleged overpayment made to Helderberg as a result of a calculation based on the wrong assumption that the area expropriated was 1,583 ha and not 1,037 ha. On this basis the local authority had paid Helderberg R304 000. Its case in the court below and before us was however that the market value of the expropriated strip amounted to no more than R207 400.

[1] Section 12(1) provides as follows:

'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 therefor, compensation therefor 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.'

[6] The local authority lodged an appeal and Helderberg a cross-appeal. The sole issue on appeal is whether the High Court erred in its determination of the compensation payable under sub-para (i). Helderberg accepts the findings of the High Court in relation to sub-para (ii). Our assessment of the compensation payable will therefore determine both the appeal and the cross-appeal and simultaneously the outcome of both the claim and counterclaim.

[7] I should note that neither party has suggested that the value of the land should have been determined by means of 'any other suitable manner' in terms of proviso (bb) of the subsection instead of in relation to its market value, and none springs to mind.

NATURE OF THE PROPERTY AND ITS HISTORY

[8] It is necessary to deal in some detail with the nature and history of the property. The property concerned is the Remainder of Erf 18835, The Strand. The original Erf 18835, some 52,7 ha, initially formed part of the farm Die Bos No 1056 and belonged to a company known as Farm One Nought Five Six Die Bos (Pty) Ltd.

[9] Erf 18835 was more or less rectangular in shape and situated between the proposed N2 highway on its north-western border and Broadway Road on the south-eastern border. The property was later subdivided in stages into three portions and for the sake of convenience I shall refer to the three portions as Phases 1, 2 and 3. If a line were to be drawn through Erf 18835 from the north-west to the south-east, Phases 1 and 2 would lie on the one side and Phase 3 on the other. The strip of land expropriated was a portion of Phase 3 along its border with Phase 2.

[10] Erf 18835 was zoned as agricultural land but due to its location it had township development potential. However, by its very nature it had a

developmental limitation because it was duty bound to receive stormwater from properties higher up. The maps and diagrams show a number of natural water courses, collectively referred to as a 'river', crossing the property and collecting in a relatively marshy area thereon.

[11] The owner of the erf (represented by a potential purchaser, to whom I shall refer as Guldenland) applied for the local authority's consent to subdivide the erf by creating a separate property, which came to be known as Phase 1, and for the rezoning of Phase 1 from agricultural to sub-divisional area in order to provide for 76 residential erven. The remainder of the erf (the future Phases 2 and 3) was to remain agricultural. This application was granted on 10 December 1992 subject to conditions. These were to form an agreement between the owner and the local authority. Important for present purposes is the condition that the river had to be canalised to deal with a 1:50 year flood and that the canal had to be designed in accordance with a floodwater report prepared some years earlier by the local authority's consulting engineers, Messrs Hill, Kaplan and Scott.

[12] The river in the main ran (a) diagonally across Phase 2 (where it appeared to have been canalised by means of a ditch or furrow) and then (b) more or less along the border between Phase 1 and Phase 3. The local authority additionally required that a condition be entered in its favour against the title deed of the property obliging the owner of the property to allow the conveyance of, inter alia, stormwater of any other erf across the property without compensation.

[13] The owner accepted these conditions, and a Certificate of Consolidated Title was issued accordingly. Phase 1 was in due course sold to Guldenland. Guldenland then considered purchasing another part of the erf for the development of Phase 2. This again required consent from the local authority for the subdivision of the remainder of the erf (*sans* Phase 1) into two parts, Phases 2 and 3. Guldenland on behalf of the owner of the remainder submitted a stormwater management plan to the local authority in compliance with the conditions imposed when Phase 1 was rezoned. It proposed that the section of the river that bisected Phase 2 (numbered (a) above) be rerouted to the border between Phases 2 and 3, but to run mainly on Phase 3. The rest of the canal (b) was then to be built along the border of Phases 1 and 3. The local authority accepted these proposals provisionally on 20 October 1994.

[14] Later Guldenland elected not to purchase Phase 2. Instead Helderberg, which is a related company, during August 1995 purchased Phase 3 for developmental purposes in order to establish a township with mixed uses, predominantly commercial and light industrial with a smattering of general residential. The price was R1 625 000. The sale was subject to the approval by the local authority of the subdivision. This application also involved the

rezoning of the land to ‘subdivisional area’ with a mixed bag of uses. The proposed uses included, for instance, 112 general residential units covering an area of 1,8215 ha and retail use on 4,4913 ha, in all about 26 ha. Of the 32,5 ha some 6,47 ha was allocated to road reserves, public open spaces, a detention pond (another aspect of stormwater management but which need not be discussed for present purposes) and the stormwater canal. The application was approved and the suspensive condition accordingly fulfilled on 12 December 1995. The approved sub-divisional diagram shows the 25 m reserve as described above for both existing and future canalisation.

[15] Guldenland, in order to develop Phase 1, undertook the construction of that part of the canalisation of the river which affected Phase 1 – numbered (b) above. The area expropriated was accordingly the portion of land on Phase 3 which had been reserved for the rerouted riverbed between Phases 2 and 3.

[16] The effect of all this was that the area set aside for the stormwater canal became sterilised from a develpmental point of view. The river had to be canalised and diverted in order to make the land useable for township development. The canal was consequently a necessary precondition for the development of the properties concerned. This Helderberg knew when it purchased Phase 3 and it, in other words, bought some 32,5 ha of land knowing full well that about 6,5 ha of land could not be used for development purposes. The price it paid must have taken this material factor into account.

[17] Realising that the canal area had no or little commercial value to it, Helderberg undertook to register, free of charge, a 25 m servitude in favour of the local authority along the border of Phase 3 for purposes of a stormwater canal and relief sewer line. In fact, at the time of expropriation the necessary diagram was being prepared and the Surveyor General approved it shortly after the expropriation.

[18] In spite of this the local authority chose to expropriate the servitude area. The reason for the decision is not entirely clear but there are indications in the evidence that it may have been due to the unwillingness of Helderberg to permit the local authority to use part of the servitude area for a walkway of 4 m, leaving 21 m for the canal.

THE STATUTORY SETTING

[19] Compensation for expropriation is by virtue of the provisions of s 25(2) and (3) of the Bill of Rights a constitutional issue. This means that the compensation award has to fulfil the requirements of the Bill of Rights, more in particular the amount of compensation 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' of which the market value of the property is listed as but one of five.[2] The problem is, however, that apart from state investment, the market value of the property is the only factor listed in s 25(3) that is capable of quantification.[3] As Currie and de Waal point out:[4]

'That makes market value pivotal to the determination of compensation. Once market value has been determined, the court can then attempt to strike an equitable balance between private and public interests.'

This can be done by an upward or downward adjustment, having regard to the other relevant factors.

[20] In *Du Toit*,[5] the Constitutional Court held that compensation must be determined in two stages. First, the court must establish the amount of compensation according to the provisions of s 12 of the Act and then it has to consider whether that amount is just and equitable under s 25(3) of the Bill of Rights and make any necessary adjustment.

[2] Sec 25(2) and (3) provide:
(2) Property may be expropriated only in terms of law of general application—
(a) for a public purpose or in the public interest; and
(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 the 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.

[3] *Former Highlands Residents concerning the Area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria: In re Sonny and others v Department of Land Affairs* [2000] 1 All SA 157 (LCC) per Gildenhuys J.

[4] Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5 ed 556.

[5] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 26-37 per Mokgoro J.

[21] Section 12(1) of the Act makes it clear that what has to be determined is the amount of 'compensation' to be paid for the taking of the property. This may not exceed the market value of the property (for present purposes the issue of actual financial loss is discounted). The duty to compensate implies that the owner of the expropriated property may not be in a better or worse position as a result of the act of expropriation. The status *quo ante* must be restored by means of a money award and 'the equivalent in value [must] be given to take the place of the property lost.'[6] That is why it has often been held that the value of a property is its value in the owner's hands and not in the hands of the expropriator. For instance, in *Stebbing v The Metropolitan Board of Works* (1870) LR 6 QB 37, 42 Cockburn CJ said:[7]

'When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it.'

VALUATION WHEN A PORTION IS EXPROPRIATED

[22] In this case a portion of a larger property was expropriated. There appear to be four possible methods of determining the market value of the expropriated portion in such an event[8] but in this discussion I intend to deal only with those that are remotely relevant. The main method is the 'before and after' method which has been described in these terms:[9]

'The expropriated portion may be valued as the difference between the value of the whole before the expropriation and the value of the remainder after the expropriation. This

[6] *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 242H-243A per Ogilvie Thompson JA.
[7] Recently quoted in *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 2 All ER 915 (HL) para 20.
[8] Gildenhuys and Grobler 'Expropriation' in 10(1) *Lawsa* (re-issue) para 205.
[9] Gildenhuys and Grobler 'Expropriation' in 10(1) *Lawsa* (re-issue) para 205.

method is known as the before and after method of valuation. One valuation is made of the whole property as it was immediately before expropriation, and another of the remainder as it is immediately after expropriation. The difference between the two valuations is the value of the expropriated portion. Such a valuation includes the diminution in value of the remainder.'

This method has received judicial recognition.[10]

[23] It has been recognised that this method may not necessarily be the appropriate method to adopt. It may, for instance, be more appropriate to use a per unit valuation, eg, per hectare for a farm.[11] But this alternative method will in the present instance make no difference to the conclusion. From the facts recited it is apparent that if one were to determine the market value taking into account the most profitable likely legal use of the expropriated property one would arrive ineluctably at a negligible value. Phase 3 is worth more or less the same with or without the expropriated strip and Helderberg has lost little in measurable terms because of the expropriation. In the light of the conditions imposed the canal is a given and it has little commercial worth to the owner. It is consequently not surprising to note that the expert witnesses were agreed that, applying these measurements, Helderberg was not entitled to any compensation.

POINTE GOURDE AND SECTION 12(5)(f)

[24] Helderberg sought to avoid this conclusion by relying on the provisions of s 12(5)(f). Subsection (5) contains a number of so-called disregards, ie, factors that have to be disregarded in determining the compensation payable under s 12(1).[12] These were developed over time and

[10] *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 255E-F per Berker JP; *Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal* 1991 (1) SA 321 (T) 329B-G per Hartzenberg J, Goldstein and Streicher JJ concurring.

[11] *Mooikloof Estates (Edms) Bpk v Premier, Gauteng* 2000 (3) SA 463 (T) 472B-473C per Van Dijkhorst J.

[12] Section 12(5) reads:

'In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely—

(a) no allowance shall be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;

(b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;

(c) 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;

(d) improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;

(e) no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;

(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

reflect an attempt to codify principles developed by courts over many years, especially in England.[13] A conspectus of them reveals that they are intended to ensure that the expropriated owner does not derive any advantage (or suffer any disadvantage) from the expropriation, and is only entitled to compensation.[14]

[25] The relevant part of disregard (f) is in these terms:

'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 . . . shall not be taken into account [in determining the amount of compensation]'.

[26] Disregard (f), it is generally accepted, has it origin in the *Pointe Gourde* judgment by the Privy Council[15] where Lord MacDermott said that it –

'is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

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;

(g) . . . . . .

(h) account shall also be taken of—

(i) any benefit which will ensure [enure?] to the person to be compensated from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate him in whole or in part for any financial loss which he will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;

(ii) any benefit which will ensure [enure?] to such person in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;

(iii) . . . . . .

(iv) any relevant quantity of water to which the person to be compensated is entitled, or which is likely to be granted to him, in terms of the provisions of the Water Act, 1956 (Act No. 54 of 1956), or any other law.'

[13] For a discussion of the origin and development of disregards, especially (f) see *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) 522F-524F per Van Dijkhorst J; *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 2 All ER 915 (HL).

[14] *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 679B-C per Nienaber and Plewman JJ; *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) 106G-I per Scott JA.

[15] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (PC). The facts were similar to those in *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA).

That the principle also applies in the reverse (in the sense that an authority cannot by its own project destroy the potential of land and then expropriate it on the basis that it did not have that potential) was recognized in *Melwood*.[16] Although the rule creates problems and doubt has been cast on its general applicability and on whether it should have been used at all in *Pointe Gourde* (which is in any event not a typical example of the application of the rule) legislatures in many countries whose expropriation principles are derived from English examples have attempted to formulate the principle in legislative jargon, and not always happily.[17] Much emphasis has been placed in some other jurisdictions on identifying the underlying 'scheme' in order to determine whether the disregard applies,[18] but counsel correctly pointed out that para (f) of our Act does not refer to a 'scheme' and that we should not be misled by relying on those authorities.[19]

[27] On the other hand, although this Court has said in *Kersay*[20] that disregard (f) must be interpreted literally, that was said in relation to an expropriation that occurred in 1990. The provision must, in the light of s 39(1) of the Bill of Rights, be interpreted in such a manner as to promote the spirit, purport and objects of the Constitution which, for present purposes, is the requirement that compensation must be just and equitable. The postulate in *Kersay* that double compensation is possible by virtue of disregard (f)

[16] *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 (PC), 19 ALR 453. The principle does not only apply in common-law countries. For Holland see JEFM den Drijver-van Eijckevorsel *Onteigening* 2 ed 69.

[17] See in general *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 2 All ER 915 (HL); *Perry v Roads and Traffic Authority of New South Wales* [1999] NSWLEC 109; *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149; Jeremy Rowan-Robinson and CM Brand *Compulsory Purchase and Compensation* (1995) 158-163

[18] But this is not always so: Douglas Brown *Land Acquisition* 4 ed 113 for Australia and Eric CE Todd *The Law of Expropriation and Compensation in Canada* 2 ed 160.

[19] There are even in *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) 522F-524F many references to the 'scheme'.

[20] *Randburg Town Council v Kerksay Invetsments (Pty) Ltd* 1998 (1) SA 98 (SCA) 107A-108B.

cannot, in the light of the Constitution, be correct.

[28] The purpose of disregard (f) is in the present context (as the High Court of Australia put it) –

'to ensure that a resuming [expropriating] authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption [expropriation] on the basis that the destroyed potential had never existed . . . The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption . . .'.[21]

Van Dijkhorst J explained:[22]

'It goes against the grain that the council can by setting its sights on a property for future acquisition, freeze its use when all its neighbours are rezoned with concomitant enhancement in their values, and then later argue that there was no depreciation as there had not been any enhancement. Surely that would not be a disregarding of the scheme underlying the later expropriation. It is in fact an enforcement of such scheme.'

APPLICABILITY OF DISREGARD (f) TO THE FACTS

[29] Reverting to para (f), the question is whether there was, before the date of expropriation, a depreciation of the value of the strip of land 'due to the purpose' for which (or in connection with which) the property was expropriated. I think not. Part of the land never had deveopment potential because part of it was river. The relocation of the river to the border of Phase

[21] *Queensland v Murphy* (1990) 95 ALR 493 (HC) 496. See also *Housing Commission (NSW) v San Sebastian Pty Ltd* (1978) 140 CLR 196 (HC of Australia).
[22] *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) 524F-H. Cf *Durr v Cape Divisional Council* 1986 (2) SA 385 (C) per Van den Heever J; *Jelson Ltd v Blaby District Council* [1978] 1 All ER 548 (CA).

3 was done by the owner of the property, albeit with the concurrence of the local authority, in order to make the remainder of the land useful for development purposes. At the time when the conditions were imposed by the local authority it was not done in order to freeze development of the strip but in order to enhance the utility and the value of the whole of the property. Without acceptance of the local authority's conditions the land would have remained agricultural. There was accordingly never a depreciation of the value of the expropriated strip. Irrespective of whether the strip was expropriated, a portion of the land had no development potential. There was, accordingly, no causal link between the imposition of the condition, the value of the property and the expropriation.[23] The English Court of Appeal, I may mention, came to a similar conclusion in a similar case, albeit on a statute that had the 'scheme' requirement, by holding that the value of the strip was not due to any scheme but simply to a condition on the planning permission.[24]

[30] Helderberg's argument, in the end, was that we have to assume that the local authority, absent the requirement of canalisation, would have awarded proportionally greater developmental rights to Helderberg. In other words, the local authority would have granted in respect of the strip developmental rights comprising general residential of 5,6 per cent of the expropriated 1,037 ha and commercial and industrial rights in respect of the balance of the area. On this assumption Helderberg's expert witness based her valuation of R1 386 260,92. The underlying assumption fails in two major respects. First, there is the total lack of evidence to support it and, secondly, developmental rights could not have been given in respect of the

[23] Cf *Van Zyl v Stadsraad van Ermelo* 1979 (3) SA 549 (A) 571G-572F on the causal link. Also Douglas Brown *Land Acquisition* 4 ed 114-117 for Australia and Eric CE Todd *The Law of Expropriation and Compensation in Canada* 2 ed 165-166

[24] *Birmingham District Council v Morris and Jacombs Ltd* (1977) 33 P & CR 27.

whole of the property once the owner chose to locate the canal on Phase 3.

IS THE ASSESSMENT JUST AND EQUITABLE?

[31] That brings me to a consideration of the question of what would be fair and equitable compensation in the circumstances of the case. The local authority's evidence and argument was that an amount calculated according to the agricultural value of the strip (which was R20 per sq m or R207 400 according to the uncontested evidence) would be appropriate.

[32] Are there any relevant circumstances that justify an upward adjustment? Helderberg's counsel could not point to any when asked during the argument. In fact, if one simply limits oneself to the considerations listed in s 25(3) of the Bill of Rights, they point in the other direction. The strip's use current at the time of expropriation was to deal with stormwater and that will remain its use and this was the main purpose of the expropriation. As such the strip had little (if any) commercial value to the owner, so little that the owner was prepared to register a servitude in favour of the local authority free of charge. The strip has also little commercial value to the local authority. But, more importantly, when Helderberg purchased Phase 3 it bought a piece of land with a strip designated for canalisation and thereby sterilised. The sterilisation was a condition for the grant of very valuable rights to Phase 3 as a whole. Helderberg paid about R1,6m during 1995 for 32,5 ha and it wishes to recoup in the year 2000 some R1,4m for 1,037 ha of useless land. The price it paid for the whole had to be based on the fact that the strip had no commercial value. In other words, the history of the acquisition and use of the property does not justify any adjustment. In fact, a downward adjustment could be justified but since none was suggested and the local authority is acquiring ownership (instead of a servitude) of a piece

of land which might affect the open public space requirements on the smaller Phase 3 and the building lines (matters which were mentioned but not investigated or quantified), I am prepared to accept that the amount proposed by the local authority would be fair and equitable in the circumstances of the case. I am not thereby suggesting that an owner should be entitled to compensation if the expropriated property has no value merely because there was an expropriation.[25]

CONCLUSION

[33] It is not necessary to deal in any detail with the High Court's assessment of the compensation because it did not take into account the constitutional requirements and did not perform the two-stage inquiry as laid down by the Constitutional Court in *Du Toit*.[26] In fairness it must be mentioned that *Du Toit* postdates the High Court judgment. In addition, the High Court erred in my view in holding that disregard (f) applied in the circumstances of the case.

[34] The net effect of the foregoing is that Helderberg's compensation is fixed at R207 400. To this has to be added a *solatium* in terms of s 12(2) which, in the circumstances, amounts to R15 370.[27] Because the local authority had paid more than the total of these amounts the issue of interest

[25] Cf *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA) para 8.

[26] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

[27] Section 12(2):
'Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to—
(a) ten per cent of such total amount, if it does not exceed R100 000; plus
(b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus
(c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus
(d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.'

does not appear to arise. That leaves the question of costs, which have to be assessed in terms of s 15(2) and (3) of the Act.[28] In this case the local authority's offer in respect of the land itself a few months prior to litigation was R240 000. This is more than the amount ultimately assessed. It follows that Helderberg has to pay the costs of the trial under s 15(2)(b) and the costs of the appeal.

ORDER

[35] The appeal is upheld with costs and the order of the High Court is set aside and substituted by the following:

(a) It is declared that the plaintiff is entitled to compensation of R207 400 in terms of s 12(1)(a)(i) of the Expropriation Act 63 of 1975.

(b) It is declared that the plaintiff is entitled to payment of R15 370 in terms of s 12(2) of the Act.

(c) The plaintiff is ordered to repay the sum of R82 130 to the defendant.

(d) The plaintiff is ordered to pay the defendant's costs, including the qualifying fees of Mr D White, in respect of the claim and counterclaim.

[28] Section 15:

'(2) If the compensation awarded by the court in any proceedings contemplated in section 14 (1)—

(a) is equal to or exceeds the amount last claimed by the owner one month prior to the date for which the proceedings were for the first time placed on the roll, costs shall be awarded against the Minister;

(b) is equal to or less than the amount last offered by the Minister one month prior to the date contemplated in paragraph (a), costs shall be awarded against the owner in question;

(c) is less than the amount last so claimed by the owner in question, but exceeds the amount last so offered by the Minister, so much of the costs of the owner shall be awarded against the Minister as bears to such costs the same proportion as the difference between the compensation so awarded and the amount so offered, bears to the difference between the amount of compensation so awarded and the amount so claimed.

(3) Notwithstanding the provisions of subsection (2), the court shall in its discretion decide as to the costs —

(a) in a case not mentioned in subsection (2);

(b) if any party did not within a reasonable time comply with reasonable requests under section 10 (7);

(c) if any party abused the provisions of section 10 (7); or

(d) if, in the opinion of the court, the conduct of any party during or prior to the proceedings, justifies a deviation from subsection (2).'

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L T C HARMS

JUDGE OF APPEAL

AGREE:
MTHIYANE JA
NUGENT JA
CONRADIE JA
THERON AJA