

SOUTH AFRICA / JUDGMENT

Solid Base Trading 121 CC (Pty) Ltd v City of Matlosana Local Municipality (1741/2015) [2017] ZAGPPHC 1155 (8 November 2017) [2017] ZAGPPHC 1155

COURT

North Gauteng High Court, Pretoria

BEFORE

S.A.M. Baqwa

CASE / FILE NUMBER

1741/2015

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 1741/2015

8/11/2017

(1)

NOT REPORTABLE.

(2)

NOT OF INTEREST TO OTHER JUDGES.

(3)

REVISED.

In

the matter between:

SOLID
BASE TRADING 121 CC (PTY)
LTD
Plaintiff
and
CITY OF
MATLOSANA LOCAL
MUNICIPALITY
Defendant

JUDGMENT

Baqwa J

- [1] In terms of section 7 read with section 5 and 26(1) of the Expropriation Act 63 of 1975 ('the Act') read with section 79(24)a() (i) of the Local Government Ordinance 17 of 1939 (Transvaal), the defendant, by way of Notice of Expropriation dated 26 November 2014, expropriated a portion of the plaintiff's property measuring approximately 9,7946 hectares with effect from 5 December 2014.
- [2] This action has been instituted on the ground that the defendants obliged on the basis of such expropriation to compensate the plaintiff in terms of section 26(1) read with section 12 of the Act read with

section 25(2)(b) of the Constitution.

The Parties

- [3] The plaintiff is Solid Base Trading 121 CC, a close corporation with registration number 2011/031577/23 of number 55 Buffeldoorn Avenue, Wilkoppies, Klerksdorp, North West Province.
- [4] The defendant is the City of Matlosana Local Municipality, established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998 with its principal offices situated at corner Braamfontein and O.R. Tambo streets, Klerksdorp, North West Province.

Background

- [5] The plaintiff was the registered owner of the property known as Portion 36 of the Farm Palmietfontein 403, Registration Division IP, North West Province, measuring 126.0386 hectares ("the plaintiffs property"), held in ownership by virtue of a Deed of Transfer T78224/2011.
- [6] Prior to the aforesaid expropriation, the defendant had entered into an agreement as the seller of an immovable property with Isago @ N12 (Pty) Limited (the developer) as purchaser.
- [7] The bilateral agreement of sale between the defendant and the developer shows:
- 7.1 That during 2007 the defendant and the developer embarked upon a project known as the N12 Corridor Urban Development Proposal and that certain parcels of land were sold by the defendant to the developer for that purpose.
- 7.2 That the project required an access road from Doornkruin to the land in question.

7.3 That the required access road ran over the property of the then land owner (plaintiff herein) linking Doornkruin with the shopping centre that was to be developed and that in the first phase of the development, bulk services with respect to roads as well as electricity were required.

[8] In order to facilitate the above requirements, a trilateral Agreement of Sale was entered into between the plaintiff, the defendant and the developer from which it is recorded:

8.1 That for the purposes of the project mentioned in the first agreement an extension of certain bulk municipal services was required, which in turn required that the appropriate servitudes and other land rights be acquired and registered to accommodate the said services.

8.2 That the Gumtree Electrical Substation was required for the project and that Eskom required the developer to provide a servitude for the erection of electrical cables from the substation to a point on the North-Western boundary of the land of the plaintiff.

8.3 That at the same time the defendant intended expanding its roads network along the same route as the electrical servitude and that for this purpose it also required portion of the plaintiffs land.

8.4 The defendant recorded its intention to utilise the affected land for the servitudes of electricity and a road.

8.5 That occupation of the land in question would be given after the signing of the agreement which was signed on 27 June 2013 and after the payment of the first instalment which was in July 2013.

8.6 That the plaintiff would cooperate by providing the necessary signatures in effecting the above. It was also recorded that the plaintiff would receive full compensation for the land in the sum of R1 500 000.00 excluding Value Added Tax.

[9] Subsequent to the trilateral agreement a perpetual servitude was registered in favour of Eskom on 3 July 2014. The servitude was in respect of electrical power transmission and ancillary rights which included

the right to lease any portion of the servitude area to any third party. The servitude also imposed number of restrictions upon the plaintiff.

[10] The defendant failed to pay the balance of the purchase price of R750 000.00 as a result of which the plaintiff issued a letter of demand in which it was indicated that the plaintiff intended to cancel the agreement as a result of the defendant's breach.

[11] The defendant responded by way of letter dated 6 November 2014 stating that as a result of the cancellation of the Agreement of Sale it was left with no alternative but to expropriate the land. On 2,4 November 2014 the defendant's council issued a resolution confirming that the defendant was proceeding with the expropriation of the plaintiff's

land.

[12] It is common cause that the defendant subsequently issued a Notice of Expropriation dated 26 November 2014 in which it was recorded that the land was needed for public purposes, namely the construction and the use as a road to link the N12 National road with Buffeldoorn Road and for accommodating the high voltage cables.

[13] The plaintiff's land was expropriated on 5 December 2014 in terms of the Expropriation Act 63 of 1975 ("the Act").

The Main Issue

[14] The main issue to be decided by this Court is the amount to be awarded to the plaintiff as compensation for the expropriated land which had since become effected by the registration of the Eskom servitude and to issue an appropriate costs order.

The Law

[15] The framework under which compensation is to be determined and the heads of compensation are contained in section 12(1)(a) of the Act. The section refers to an amount not exceeding the aggregate of the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer, that is the market value thereof and an amount to make good any actual financial loss caused by the expropriation.

[16] Section 12(5)(f) of the Act contains a special rule regarding the evaluation of property:

"(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."

[17] Section 25(3) of the Constitution provides as follows:

"(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."

In the matter of *Du Toit v Minister of Transport* 2005 (11) BCCR 1053 (CC) the explanation by the Constitutional Court of the interaction between section 12 of the Expropriation Act and section 25(3) of the Constitution is summarised as follows in the headnote of the case:

"In dealing with the appeal the Court observed that every act of expropriation including the compensation payable following the expropriation, had to comply with the Constitution, including its spirit, purport and objects generally and section 25 in particular."

Application of the Law to the Facts

- [18] It is common cause that the registration of a servitude over the plaintiff's erstwhile property in favour of Eskom resulted in the depreciation in value of the land which was subsequently appropriated.
- [19] The plaintiff submits that having regard to section 12(5)(f) of the Act, the depreciation brought about by the registration of the Eskom servitude is not to be taken into account in determining the fair market value of the property.
- [20] On the contrary, the defendant submits that in determining the fair market value at the date of expropriation the property must be valued as encumbered by the servitude.
- [21] It is common cause between the parties and it was also supported by the evidence of an expert valuer (Griffiths), who was called to testify by the defendant, that the value of the land in question if the servitude was disregarded was R150 000.00 per hectare. It was also common cause and supported by Griffiths that the value of the portion of land encumbered by the Eskom servitude was R75 000.00 per hectare.
- [22] It was common cause that the expropriated land measures 9, 7948 hectares and that the portion of land not subject to the Eskom servitudes and which was intended to be used for the construction of an access road is 3, 6994 hectares.
- [23] Having regard to the existence of the Eskom servitude as submitted by the defendant the market value of the property as contemplated in section 12(1)(a)(i) of the Act is R1 102 000.00. If the property is valued with disregard of the Eskom servitude as submitted by the plaintiff, the value of the property as contemplated in section 12(1)(a)(i) of the Act is R1 469 220.00 (i.e. R150 000 x 9, 7948).
- [24] When taking into account the provisions of section 12(1)(a)(i) of the Act, the amount to be paid to the plaintiff for the expropriated property "shall not exceed the amount which the property would have realised if sold on the open market by a willing seller to a willing buyer". That would amount to R1 469 220.00 being the property value with disregard to the servitude or R1 012 000.00 with regard to the servitude.
- [25] The distinguishing factor between the two approaches is that the defendant expropriated the land measuring 9, 7948 hectares, which was already subject to the Eskom servitude which was registered over 6, 0951 hectares and did not expropriate the Eskom servitude. Arguably, the defendant could have expropriated a right of way over an area of 3, 3993

hectares running parallel to the Eskom servitude but did not do so, but expropriated the land subject to the Eskom servitude. If this is accepted as the true position, the right of ownership which was transferred to the defendant was the right of ownership in the identified 9, 7948 hectares of land subject to the Eskom servitude.

- [26] In the circumstances the open market value of the land which the defendant acquired subject to the Eskom servitude was the sum of R1 102 000.00.
- [27] In order to understand the cause of the " depreciation" of the plaintiff's land; one needs to delve into the events that immediately preceded it.
- [28] What led to the expropriation was that the plaintiff validly cancelled the purchase and sale agreement on the grounds that the second tranche in regard to the purchase price of R750 000.00 was not paid on the due date nor was it paid after demand for payment thereof. After cancellation, the plaintiff demanded that the Eskom servitude be cancelled and that Eskom remove the power lines already constructed over the property. The plaintiff threatened to bring an urgent court application to either evict Eskom or interdict it and procure cancellation of the servitude.
- [29] Further, the cancellation meant that the defendant would not be able to take transfer of the subdivided piece of land and would thus not be able to construct a road on it.
- [30] On the other hand the expropriation would result in the defendant becoming owner of the land over which an Eskom servitude had already been registered. It also resulted in the plaintiff's inability to evict Eskom or to insist on cancellation of the Eskom servitude.
- [31] It cannot be gainsaid that the basis for the expropriation of the property was to vest the defendant with ownership of the subject land to enable the defendant to construct the road and receive high voltage electricity supply to the Gumtree Substation through the servitude already registered in favour of Eskom. It cannot therefore be argued that the reason behind the expropriation was to procure a servitude in favour of Eskom.
- [32] That being the case, it can be accepted as fact that the value of the expropriated property was depreciated prior to the Notice of Expropriation as a result of the registration of the Eskom servitude. Logically therefore, the registration of the servitude could not be said in terms of section 12(5)(f) to have been "due to due to the purpose for which or in connection with which the property is being expropriated or is to be used'. This view is bolstered by the fact that the servitude was registered in favour of and for the sole use of Eskom and not the defendant as the latter would receive electricity supply from Eskom at the Gumtree Substation on an adjacent piece of land.
- [33] A further fact for consideration in this regard in relation to section 12(5)(f) is that the depreciation resulting from the registration of the servitude could not be said to be "a consequence of any act which the Municipality already carried out or performed in connection with the purpose for which the property is being expropriated or is to be used' but is a result of acts performed by the plaintiff when he signed legal documents to enable

registration of the servitude in terms of the Agreement of Sale. This was accompanied by the act of acceptance of the servitude and the concurrent payment of the sum of R750 000.00 in terms of the trilateral agreement.

- [34] By way of contrast and to further elucidate the above, reference may be made to the matter of *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) where the meaning of section 12(5)(f) was considered. In that matter the expropriated property was situated in an area designated by provincial authorities as a nature conservation area. The area was zoned as a conservation reserve before expropriation of the property by the local authority. The affected party argued that the nature conservation policy and zoning, which had had a negative

impact on a negotiated price between a willing buyer and willing seller should be disregarded in terms of section 12(5)(f). The Court held that the act of the local authority in zoning the property as conservation reserve created a legally enforceable encumbrance which resulted in an inhibiting effect on the marketing of the property resulting in the depreciation of the value of the property.

- [35] The property was expropriated for purposes of nature conservation and the Court held that the zoning and the purpose of the expropriation were linked and that the diminution in value was due to the zoning and that it had to be disregarded in terms of section 12(5)(f). At page 679 the Court said the following:

"The rationale for the section is plain: Any appreciation or depreciation in the value of the property which, broadly speaking, is a by-product or spin-off of the expropriation, is to be ignored".

- [36] Section 12(5)(f) was further discussed in the matter of *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA). At pages 106 to 107 the Court considered a possible double compensation for an expropriated property as follows:

"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 section 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 be disregarded even if the owner had previously been compensated for such depreciation...."

After considering established principles of interpretation of statutes the Court further stated as follows:

"Considered against the principles set out above, it may well be that in construing section 12(5)(f) its language falls to be modified so as to avoid the payout 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 ..."

[37] In *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007

(1) SA the Court also considered the meaning and effect of section 12(5)(f) of the Expropriation Act and at paragraph 19 stated as follows:

"[19] Compensation for expropriation is, by virtue of the provisions of section 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. The problem is, however, that, apart from State investment, the market value of the property is the only factor listed in section 25(3) that is capable of quantification. As Currie and De Waal point out:

"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."

Just and Equitable Compensation

[38] It is evident from the evidence and report of Griffiths that the servitude over an area of 6,0951 hectares negatively impacted the land in that its value was reduced to half of what it had been before namely R75 000.00 per hectare. Its total value post expropriation was R457 132.50.

[39] It is common cause that prior to registration of the servitude and as a consequence of the trilateral agreement, the plaintiff had received an amount of R750 000.00 from the developer. This amount was larger than the value to which the land had been reduced by the registration of a servitude.

- [40] A total of R1 500 000.00 was payable to the plaintiff in terms of the trilateral agreement but as at the time of cancellation of the agreement the plaintiff had only received R750 000.00 of the purchase price which he tendered to pay back against the removal of the servitude and ,power lines . The plaintiff testified that the sum of R750 000.00 had not yet been repaid to the developer nor had the latter taken any steps to recover the money.
- [41] If the plaintiff is awarded the sum of R1 500 000.00 as claimed as being the market value of the expropriated property with the servitude being disregarded, the result would be that the plaintiff would in real terms receive an amount of R2 219 220.00; being R750 000.00 plus R1469220.00 (9, 7948 x R150 000.00). That would effectively put the plaintiff in a better position than that which he would have been had he remained the owner without a servitude and without an expropriation. That result in my view would not be just and equitable as required by the Constitution.
- [42] If compensation is determined in the amount of R1 012 000.00 as submitted by the defendant, the plaintiff would receive an actual amount of R1 762 000.00 which is R1 012 000.00 plus R750 000.00 paid to him by the developer in terms of the trilateral agreement. This would be more than the value of the land as originally possessed by the plaintiff.
- [43] The plaintiff's counsel submits in his closing argument that the R750 000.00 still in the possession of the defendant ought not to be taken into account in the assessment of compensation to the plaintiff as there is no guarantee that the developer (Isago) would not reclaim that amount. The record will show that through a submission by the defendant's counsel the defendant indemnifies the plaintiff against a claim for the amount of R750 000.00.
- [44] In the circumstances it is not speculative to assume that the plaintiff stands to receive an amount of R1 762 000.00 if the R1 012 000.00 is awarded.
- [45] Furthermore, this Court has to take into account also that the plaintiff was paid R444 000.00 by the defendant on 30 April 2015 as part of the compensation for expropriation of the land.

Costs

- [46] I have considered submissions by counsel regarding the award of costs and the submissions vary from an award for costs to either party or making no order for costs. In the event of the plaintiff being awarded costs the plaintiff also seeks costs for the services of Kruger, van der Schyff, Norman Griffiths (valuers) and Moedi Consultants being experts employed by him in an endeavour to prosecute his claim.

[47] It is trite that a successful party is only entitled to an award of those costs reasonably and necessarily incurred in respect of a claim. In casu, there was no evidence from which the Court could infer that such costs were reasonably incurred. On the other hand, the plaintiff seemed to distance himself from the manner in which they were incurred. Further, no expert summaries were delivered in respect of the experts with regard to whom costs are claimed.

[48] Having heard the evidence and the submissions by counsel I have decided to adopt the approach advocated in the Kersay Investments case (supra), namely that the words of section 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. I have opted for an approach that takes into account, previous depreciation whilst not ignoring previous compensation and the market

value of the property in question. In effect, the market value remains the pivot around which the assessment has to be done. In

making the assessment however, I have also kept in mind the cautionary in Helderberg Park (supra) that the amount of compensation must be Just and equitable reflecting an equitable balance between the public interest and the interests of those affected'. In other words, the affected person ought not to be out of pocket due to the furtherance of public interests whilst the public interests ought not on the other hand to be hindered due to the protection of private interests. It is a delicate balancing act.

[49] In the result I have attempted to apply the upward and downward adjustment method referred to in Helderberg Park as best I could to merge the legal prescripts into the factual matrix presented by the parties in casu in the order which I make below.

ORDER

An award is made as follows:

49.1 In terms of the provisions of section 12(1)(a)(i) of the Expropriation Act 63 of 1975 compensation is awarded in the amount of R1 762 000.00 (being R1 012 000.00 plus R750 000.00) less the amount of R444 000.00 already paid leaving a balance of R1 318 000.00;

49.2 In terms of the provisions of section 12(2) of the Expropriation Act 63 of 1975, an amount of R46 200.00;

49.3 Value Added Tax at the rate of 14% on the aforementioned amounts of R1 318 000.00;

49.4 In terms of the provisions of section 12(3)(a) of the Expropriation Act 63 of 1975, interest on the amount 1 1 of R1 364 200.00 plus VAT (R1 318 000.00 plus R46 200.00) at the rate of 9% per annum from 5 December 2014 to 30 April 2015, and on the amount of R964 000.00 plus VAT from 1 May 2015 to date of payment.

49.5 The defendant is ordered to pay the costs of the proceedings excluding the expenses of the three expert consultants (R. Kruger, 8. van der Schyff and N. Griffiths) and such costs to include the costs of two counsel to the extent that that two counsel were employed.

S.A.M, BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

21, 22 & 24 August 2017

Delivered on:

08 November 2017

For the Plaintiff: Advocate M. M . Oosthuizen SC

Instructed by:

Lezanne Swanepoel Attorneys

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