

SOUTH AFRICA / JUDGMENT

Wollach N.O. and Another v Government of the Republic of South Africa and Others (LCC120/2010) [2018] ZALCC 1 (15 January 2018) [2018] ZALCC 1

COURT

Land Claims Court

BEFORE

Canca, Nongalaza

CASE / FILE NUMBER

LCC 120/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: LCC 120/2010

In the matter between:-

ABRAHAM LAMA WOLLACH N.O.

First Plaintiff

HARTEBEEKRAAL FARM (PTY) LTD

Second Plaintiff

and

THE GOVERNMENT OF THE REPUBLIC OF

First Defendant

SOUTH AFRICA

THE DEPARTMENT OF RURAL DEVELOPMENT

Second Defendant

AND LAND REFORM

THE COMMISSION ON RESTITUTION ON LAND RIGHTS Third Defendant

THE REGIONAL LAND CLAIMS COMMISSIONER

Fourth Defendant

Handed Down on: 15 January 2018

Before Canca AJ, and

Nongalaza J (Assessor)

JUDGMENT

CANCA AJ

Introduction

[1] This matter concerns the payment of just and equitable compensation arising from the dispossession of the farm, Hartebeeskraal [1] (“the farm or Hartebeeskraal”) in 1973. The farm currently forms part of the suburb, Westfleur, in the town Atlantis,

in the district of Malmesbury on the West Coast of the Western Cape.

[2] The plaintiffs contend that the second plaintiff, a company, and the owner of the farm at the time, was undercompensated when it was dispossessed of the farm. It now seeks equitable redress in accordance with the provisions of section 25(7) of the Constitution

of the Republic of South Africa, Act No 108 of 1996 (“the Constitution”), read together with the provisions of section

2(1)(c) of the Restitution of Land Rights Act, No 22 of 1994 (“the Restitution Act”).

[3] The defendants oppose the action on the basis that the compensation paid at dispossession was just and equitable.

The Parties

[4] The first plaintiff, Abraham Lama Wollach (“Wollach”) claims in his capacity as the executor of his mother, Masha Wollach’s (“Masha”) estate. Masha was the wife of the late Lazarus Wollach, from whom she inherited his 100% shareholding in the second plaintiff on his death in 1970. These shares now form part of the estate administered by Wollach.

[5] The second plaintiff, Hartebeeskraal (Proprietary) Limited (“the Company”) is the owner of the farm and was formed by Lazarus Wollach as the vehicle to purchase the farm. The Company, for reasons that are not relevant to this judgment, was placed under voluntary liquidation in 1988 but was re-registered in 2015.

[6] The first defendant, The Government of the Republic of South Africa (“the Government”), is cited in its capacity as body responsible for providing the funds from which compensation for the loss of rights in land in terms of section 35(c) of the Restitution Act is paid.

- [7] The second defendant the Department of Rural Development and Land Reform (“the Department”), is the administrative arm of the Minister of Rural Development and Land Reform, who has political oversight of the third defendant.
- [8] The Commission on Restitution of Land Rights (“the Commission”), although cited as the third defendant, is a participating party, which is constituted in terms of the Restitution Act as the entity charged, among other things, with receiving, investigating, mediating and settling disputes arising from such claims and recommending settlement of claims.
- [9] The fourth defendant, the Regional Land Claims Commissioner (“the Commissioner”), is the functionary appointed by the Commission to execute its functions in the province. The first to fourth defendants are hereinafter collectively referred to as “the State”.

Background

facts

- [10] Wollach lodged a claim for equitable redress with the Commissioner in July 1996. The claim was lodged in his own name as a descendant of the person who was dispossessed. The Commissioner found the claim to have been lodged in the prescribed manner and published it in the Government Gazette in March 1999. The Department informed Wollach in July 2003 that the claim had been validated but still needed to be researched and subjected to a historical validation.
- [11] The Commissioner informed Wollach in June 2009 that his claim had been rejected on the basis that the compensation paid at dispossession was just and equitable. Wollach then instituted this action. When the matter came before my brother, Bertelsmann J and myself in 2014, the court queried Wollach’s locus standi, given that “He was never a shareholder of the company and claims as a direct descendant of a deceased shareholder of a defunct company that was dispossessed...no individual other than the company ever held any right in or to the expropriated land”[2]. Following argument, the court, relying, inter alia, on *Meintjies v Government of the Republic of South Africa* (3052011 [2012] ZASCA 172 (28 November 2012), found that any claim which might exist in terms of the Restitution Act vested in the Company and not Wollach. Following a successful application for its re-registration, the Company was thereafter joined as a party to these proceedings.
- [12] The plaintiffs allege that the Company was under compensated by the State on dispossession of the farm. They initially alleged that the under compensation was R372 473.00 but, as the trial progressed, we were urged to determine just and equitable compensation at R351 117.00 or alternatively at R310 465.00. Using the Consumer Price Index, the plaintiffs escalated these figures to current day values of R13 013 981.00 and R11 507 235.00 respectively.

- [13] It is the State's case that the market value of the farm at dispossession was no more than R410 000.00 and that the sum of R475 627.00 paid for the farm constituted just and equitable compensation.
- [14] The plaintiffs relied on the valuation of their expert witness in computing the amounts referred to in par [12] above, who had determined the market value of the farm at R826 797.00 based on a per hectare price of R500.00. The R351 117.00 claimed is the difference between the aforesaid R826 797.00 and the compensation of R475 627.00 received by the Company. The sum of R310 465.00 claimed in the alternative (was arrived at by using a per hectare rate of R447.00), is the difference between R826 797.00 and the compensation paid at dispossession. I discuss these valuations in some detail later in the judgment.
- [15] The parties have prepared a schedule in which they set out the facts on they agree and those that remain in dispute. I have considered it expedient to quote the schedule as it conveniently sets out the background to the litigation. The relevant portions read:

"AGREED

FACTS

1. In 1998 the company, Hartebeeskraal (Proprietary) Limited ("the Company") purchased the farm situated in the District of Philadelphia, the farm being more fully described as the Remainder of the Farm Hartebeeskraal No 5, 1507.5944 hectares in extent. The aforesaid farm (hereinafter referred to as "Hartebeeskraal") was, after being acquired by the Company, used for farming dairy cattle, sheep, pigs and goats, and for the cultivation of Lucerne and hay.
 2. Up until the time of his death in 1971, the Company was controlled by its sole director, Lazarus Wollach. While he was alive, he conducted the farming operations on Hartebeeskraal assisted by his son, Abraham Lama Wollach. After his death, Abraham Lama Wollach continued the farming operations.
 3. The farm was expropriated by the erstwhile Group Areas Board, in terms of the provisions of the Group Areas Act, No. 36 of 1966, as the area in which the farm was situated had been earmarked for development as a Coloured Group Area. The farm was transferred to the Community Development Board on 5 December
1973. The amount paid to the Company for the acquisition of the farm was R475 627.00.
4. Following the expropriation of Hartebeeskraal, a special resolution that the Company be voluntarily liquidated was passed in April
1987. This was implemented, resulting in the de-registration of the Company in 1988.

5. On 24 July 1996 Abraham Lama Wollach (hereinafter referred to as “Wollach”) lodged a claim with the Regional Land Claims Commissioner for compensation arising from the expropriation of Hartebeeskraal. Wollach claimed that the amount paid to the Company in 1973 was much less than the actual value of Hartebeeskraal.
6. In due course the Regional Land Claims Commissioner confirmed that the claim had been lodged in the prescribed manner, and was not precluded by the provisions of Section 2(1) of the Restitution of Land [Rights] Act, No. 22 of 1994, and met the accepted criteria for the claim to be registered and further investigated. A notice to that effect was published in the Government Gazette in March
1999. On 24 June 2009 the Regional Land Claims Commissioner contending that just and equitable compensation had been paid for the appropriated land in 1973.
7. The matter was enrolled but postponed on several occasions. It was eventually heard by Bertelsmann J and Canca AJ in June 2014. The court gave a preliminary ruling, inter alia, holding that any claim which might exist in terms of the Land Claims Act [sic] vested in the Company and not in Wollach.
8. In May 2015 the Western Cape High Court ordered that the de-registration of the Company be set aside and that the Companies and Intellectual Properties Commission be directed to reinstate the registration of the Company. The Company thereafter brought an application to be joined to the proceedings instituted under case number LCC 120/2010. Such joinder was granted on 13 November 2015.
9. The Company thereafter applied to the Regional Land Claims Commissioner for an order in terms of Section 12(2) of the Restitution of Land Rights Act [sic], condoning the fact that the claim had originally not been lodged in the prescribed manner in as much as the claimant was reflected as Mr Wollach and not the Company. On 4 April 2016 the Regional Land Claims Commissioner granted such condonation. As a result, the Company is, to all intents and purposes, the Plaintiff in the proceedings now before the Court and in any compensation which the Honourable Court might in due course order is payable to the Company.
10. The sole remaining dispute between the parties concerns whether the compensation of R475 627.00 paid to the Company in 1973 constituted just and equitable compensation and, if not, what is the additional amount of compensation to which the Company is entitled?

FACTS

IN DISPUTE

11. What improvements had been erected on Hartebeeskraal, at the time of the expropriation.
12. The extent of the cultivated land, and the grazing land, on Hartebeeskraal.

13. Which of the sales referred to in various expert reports constitute the most relevant and reliable comparable sales, for purposes of determining whether the compensation paid to the Company in 1973 constituted just and equitable compensation.”

As is evident from the above, the issue I have to determine is whether the compensation of R475 627.00 paid to the Company at dispossession was just and equitable and, if not, what the additional compensation due to the Company is.

- [16] In addition to the abovementioned agreed facts, the parties also agreed, on the eve of the trial, to value the improvements at R73 000.00. It was further agreed that the township potential of the farm would not form part of the exercise and that the property should be valued as a farm only. This is in keeping with the Pointe Gourde principle which takes its name from the case from which it was derived, being *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)* 1947 AC 565 (PC).

The Law

- [17] To succeed in a claim for equitable redress under the Restitution Act, a claimant must surmount the hurdle imposed by the provisions of Section 2(2) of the Restitution Act.

The sub-section reads as follows:

“(2) No person shall be entitled to restitution of a right in land if –

- (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
- (b) any other consideration which is just and equitable calculated at the time of any dispossession of such right, was received in respect of such dispossession.”

In the light of the above, the Company will only succeed in this action if the court finds that the compensation at dispossession is less than that which it should have received.

- [18] The factors a court must consider when it determines whether the compensation paid to a claimant is just and equitable are set out in section 25(3) of the Constitution. The section provides that:

“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 interest 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.”

[19] A court is constitutionally bound to consider all five factors, and may only disregard a factor if that factor is not relevant. See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at par

37. And, although market value was found to be the factor most “capable of objective determination” in *Uys & Another v Msiza & Others* (1222/2016) [2017] ZASCA 130 (29 September 2017) at par [12], it is not more important than any of the other four factors in section 25(3) of the Constitution.

[20] I have taken note of the fact that the previous Government expropriated the farm in order for it to become part of the town

Atlantis in furtherance of its racially discriminatory policies. I have also noted how the farm was acquired and what it was used for. There was no evidence of any state investment and subsidy in the acquisition and capital improvement of the farm.

[21] There is no universal definition for market value. Section 12(1)(a)(i) of the Expropriation Act, defines market value as

“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 in

Schedule 8, item 31(1)(g) of the Income Tax Act, 58 of 1962, market value is defined as

“the price which could have been obtained upon the sale of the asset between a willing buyer and a willing seller dealing at arm’s

length in an open market”.

In *Bonnett v The Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) at 747 H, the court held that market value is the value a property will fetch if sold by a willing seller to a willing buyer on usual terms and conditions.

Finally, the International Valuation Standards IVS 2 par 3.1, defines market value as

“The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compensation”.

[22] Gildenhuys J, in *Former Highlands Residents; In Re Ash and Others v Department of Land Affairs* [200] 2 All SA 26 (LCC) at par [35], states that the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases “best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.” This approach was confirmed as a suitable approach in *du Toit v Minister of Transport* at par 36. And, in *Iqbal Kazi Allie NO & Another v The Department of Land Affairs & 3 Others* (LCC 13/00) [2000] (01 October 2002) ZALCC 1 at par [45], Meer AJ, as

she then was, commenting on Judge Gildenhuys' dictum, states

"In accordance with this formulation, once market value has been arrived at, the other less tangible factors mentioned at 25(3) are considered and applied thereto. The Court's approach is therefore to consider the factors set out at 25(3) (a), (b) and (e) of the Constitution as well as all relevant factors in the light of market value determined, and flowing therefrom add or subtract to the market value. Thereafter in making a decision on what is just and equitable compensation the Court pays heed to section 33 of the Restitution Act, which sets out further factors it must have regard to in considering its decision in any particular matter."

[23] Mokgoro J, commenting on the aim of financial compensation in matters of this nature, held, in *Du Toit v Minister of Transport* 2006

(1) SA 297 (CC) at par 35, that the exercise to "determine a constitutionally compliant amount of compensation" must ensure that "the compensation ultimately awarded ... is just and equitable, and reflects the necessary balance between [the] interests [of the dispossessed] and the interests of the state."

[24] When determining market value, the court assumes the function of a valuer in making its determination. *Khumalo & Others v Potgieter & Others* 2000 [2] All SA 456 (LCC) at [24]. See also *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 955H-965A.

[25] There are, generally speaking, four main methods used to determine fair market value. See *Sher and Others NNO v Administrator, Tvl*

[1990] ZASCA 77; 1990 (4) SA 545 (A) at 547J – 548B, where it was held that the methods were the following:

"(a) the comparative or market data approach;

(b) the income investment or economic approach;

(c) the land residual technique; and

(d) the cost method ..."

Wessels JA, in *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A) at 723E-F, held that the comparative approach was the one which found most favour because "...comparable sales of similar land in the area concerned at the relevant time...particularly where the sales are concluded after

objective and impersonal bargaining, afford the most satisfactory evidence of a fair market value because it demonstrates how circumstances have affected the minds of purchasers and sellers." The valuers in this matter used this method.

[26] The other three methods are, generally speaking, not applicable to agricultural land. In *White v Union Government*, 1937 CPD 225 at 228, Van Zyl JP, in an appeal from a decision of the Water Court, said the following:

“For the purpose of affixing the compensation in the case of expropriated land, the Water Court is required by sec 98(3) to look at “the fair market value of the land without improvements.”

While I agree with the view that evidence of the profit made by a farmer out of the farming of certain land might often be an element of great importance in determining the value of such land, I do not think there can be any doubt that such evidence might sometimes be misleading for the purpose of giving a value of land if the share which the particular farmer, through his skill and ability as a farmer, had in producing the profit is not taken into account.”

The evidence

[27] Six people testified in this matter. Two are laypersons and the rest testified as experts in their respective areas of expertise.

Wollach, a retired businessman, aged 78 and Mr Wilfred John Duckitt (“Duckitt”), a retired farmer, testified for the Company. Mr John Phillip van der Spuy (“van der Spuy”), a professional valuer, gave evidence on the market value of the farm. Mr Richard Clifton Abrahamse (“Abrahamse”), a professional land surveyor, testified on the disputed extent of the cultivated and grazing portions of the farm. Both testified for the plaintiffs. Mr Kenneth Albert Hodge (“Hodge”), a professional land surveyor, was called to counter Abrahamse’s evidence and Jacques Francois du Toit (“du Toit”), a professional valuer, countered van der Spuy’s testimony in support of the State’s version that the compensation was just and equitable.

[28] Wollach testified that he assisted his father in the farming operations of the Company. These operations continued until the

dispossession in 1973. He described the farming business as consisting of various operations. Some of these operations are referred to briefly under item 1 of the “AGREED FACTS” portion of the schedule in par [15] above. The main operation was a dairy which produced about 12 000 litres of milk from approximately 500 milking cows. Then there was a feedlot for about 250 sheep and 150 cattle which would be fattened for market. The Company also farmed with pigs and grew various crops most of which were used to feed the livestock, including an area of 150 hectares of wheat and 50 irrigated hectares of cash crops. He also described the various improvements on the farm and recounted the details of the negotiations which eventually resulted in the sale of the farm.

[29] During cross-examination, Ms Pillay, who appeared with Mr Joseph, for the State, questioned Wollach on why he and his father had not endeavored to obtain a higher offer through arbitration. His response was that their attorney, Mr Kessler, had advised that “fighting the might of the State” was costly and that the “likelihood of a positive outcome” was remote. He also testified that following the arbitration route would have delayed the winding up of his father’s estate. It was then decided that it would be more cost effective and

expedient to accept the Board's counter offer, so the testimony continued. The evidence, however, reveals that Wollach did not accept the Board's counter offer but, in fact, had countered it with a higher amount which the Board accepted.

[30] Duckitt, owned two farms in the district, one of which is situated next to a farm called Buffelsrivier[3], He testified that he was familiar with the farming operations on Buffelsrivier as it was owned by his paternal uncle, Wilfred Duckitt, whom he visited often. According to him, although this property adjoins Hartebeeskraal and was roughly the same size, it had no arable land and was used to graze livestock. And, although he had never personally been to Hartebeeskraal, he drove past it regularly given its proximity to the road which leads to the town of Darling where one of his farms was situated.

[31] The two land surveyors testified on the outcome of their respective computations of the extent of specific areas of Hartebeeskraal

gleaned from aerial photographs, plans and diagrams. They could not agree on the size of the arable land portions of the farm. As the property no longer existed as a farm, the land surveyors had to determine the extent of the arable land from the aforesaid

photographs, plans and diagrams. One photograph was taken in 1968 and the other, in 1977. According to Abrahamse's expert summery, arable land areas are indicated either by the fact that they are lighter in colour than non-arable land or by the fact that they are divided into distinguishable blocks which could, in most instances, be represented by geometrical lines traversing it. Based on this, Abrahamse concluded that the arable land component was 673,7630 hectares. Abrahamse and Hodge (and du Toit) agreed that one could discern the cultivated areas of the farm from the aerial photographs because of their lighter hue due to that land having been cleared of vegetation. Where the two differed was that Abrahamse, although with a degree of equivocation, identified the cultivated land as arable. Hodge, who readily acknowledged that he did not have the expertise to identify arable from non-arable land, did not believe it was possible to identify same from the aerial photographs. Hodge, using only the lighter areas as a base, arrived at a figure of 493.90 hectares. Du Toit, who agreed with Hodge that identifying arable from non-arable

land based on what appeared to be cultivated land from those dated aerial photographs, was a near impossibility. According to him,

although an area might have been cleared for cultivation, a farmer might have found the cleared portion to be of poor quality and

therefore unsuitable for cultivation.

[32] I find Hodge's evidence more plausible than that presented by Abrahamse. His testimony about the difficulty of identifying arable land from aerial photographs taken in 1968 and 1977, particularly in the light of du Toit's views on this aspect, set forth in the last sentence of the previous paragraph, is, in my view, reasonable. He also explained the difference between the figures determined by the Abrahamse and Hodge as being due to the former

having included areas such as the old Darling Road (dark areas) which ran through the farm in his calculations. And, importantly, the arable figure of 493.9 hectares determined by Hodge is closer to the figure for arable land of 497 (which was rounded off to 500) hectares determined by EPG Valuers & Property Consultants (“EPG”) on 5 December 1973 on the instructions of the Commissioner.

- [33] The difference of approximately 180 hectares between the figures for arable land determined by Abrahamse and Hodge was, according to du Toit, due to the fact that Abrahamse appeared to have determined the cultivated portion of the farm as being arable land.
- [34] Although both van der Spuy and du Toit used the comparable sales approach in their valuations, they adopted different methods in reaching their respective conclusions. The method employed by van der Spuy takes into account the agricultural activities conducted on a particular property.
- [35] Du Toit, on the other hand, does not favor that method. For him, the nature of the farming operations is a business model of a choice and not one which a market trading in agricultural land pays for. According to him, that market pays for the agricultural attributes of a farm and not the farming operations conducted on it.

Van der Spuy’s evidence

- [36] Van der Spuy, who testified that when using the comparable sales approach, “the two overriding factors” was to select sales “as similar as possible to the subject property and where the date was as close as possible to the date of valuation”, selected four transactions for this exercise. The transactions discussed hereunder were concluded in June 1973, June 1974, October 1974 and November 1975 respectively. They are, in van der Spuy’s opinion, the most comparable to Hartebeeskraal.
- [37] The first transaction is Remainder of the Farm Morning Star 141, in extent 640.819 hectare (“Morning Star”). The sale took place in June 1973 and the price was R740 000.00 which translated to approximately R1154.00 per hectare. Morning Star heads van der Spuy’s list of comparable properties as he found it the most comparable to Hartebeeskraal in terms of infrastructure, supply of water, percentage of arable land and farming operations. However, given that Morning Star is less than half its size, he reduced the per hectare market value of Hartebeeskraal by approximately 50%, in order to arrive at his conclusion that the farm’s market value at dispossession was R500.00 per hectare.
- [38] It also transpired in subsequent testimony that two of the plaintiffs’ valuers at dispossession, Margolius and Bosman,

both of whom did not testify, excluded Morning Star from a basket of comparable properties, due to its distance of approximately 20 kilometers from the farm and because the sale price was “a bit high when all the circumstances were taken into account”. This, notwithstanding the fact that Bosman had considered Morning Star “by far the most comparable to the subject property”.

[39] The second transaction is Portion 4 (portion of portion1) of the Farm Melkepost, in extent 342,6128 hectare (“Melkepost”). This property was sold in June 1974 for R440 000 which translated to R1167.00 per hectare and is situated approximately 4 kilometers from Hartebeeskraal. Although van der Spuy states that the sale was “tainted” because the purchaser “allowed only for the future development of the site” and because it had “very little infrastructure...and it was substantially smaller”, he testified that, once adjustments had been made for its township development potential and for the inferior infrastructure, Melkepost could also be considered an ideal comparator. Du Toit criticized the selection of this property as being comparable to Hartebeeskraal stating that making the adjustments van der Spuy called for would be unduly complicated and a contradiction.

[40] The third transaction, Groote Springfontyn 1, in extent 1205 hectares (“Groote Springfontyn”), was sold in October

1974. The sale price was R700 000.00 which translated to R580.00 per hectare. The evidence reveals that this property was substantially inferior to Hartebeeskraal. It had no arable land and grazing was limited to sheep. Van der Spuy conceded during cross examination that, as in the case of Melkepost, the sale price could have been influenced by the property’s development potential.

[41] The final transaction is Buffels Rivier 980, in extent 1502 hectares (“Buffels Rivier”) which was sold in November 1975 at the rate of R570.00 per hectare. This equates to a sale price of R855 000.00. In his report, van der Spuy states that “...not only was this property also sold to the Community Development Board but the operation on the farm ... was apparently similar to the infrastructure and operation on Hartebeeskraal. It is thus axiomatic that this price is a fair yardstick for Hartebeeskraal, although it took place two years after.” However, he also testified that it had neither dairy activities nor arable land and none of the other livestock activities conducted on the farm, making the last sentence of his aforementioned statement difficult to understand. According to du Toit, Buffels Rivier, unlike Hartebeeskraal, was coastal land and therefore attracted a premium due to its development potential.

[42] Based on his analysis of the aforementioned properties, van der Spuy concluded that the farm would have commanded a per hectare price of R500.00, which, according to him equated to a gross land value of R753 797.00. After adding the agreed sum of R73 000.00, in respect of improvements, he determined the farm’s market value at R826 797.00. Therefore, in his opinion, the Company was undercompensated and was not paid just and equitable compensation.

[43] I do not consider any of the Morning Star, Melkepost, Springfontyn and Buffels Rivier transactions as comparable sales, for the following reasons:

43.1 Morning Star: (a) It is less than half the size of Hartebeeskraal; (b) it is too far afield (20 kilometers) from Hartebeeskraal; (c) the sale price does not match general prices in the neighbourhood, which reduces its probative value. In addition, when regard is had to *Minister of Agriculture v Davey* 1981 (3) SA 877 (A) at 902E-903B, where it is held that truly comparable sales are those which relate to similar ground in the same area as the expropriated ground and which were concluded at about the date of expropriation, Morning Star also does not fit the profile of an acceptable comparator, given its distance from Hartebeeskraal.

43.2 Melkepost: (a) It is less than a quarter the size of Hartebeeskraal; and (b) allowance was made for its township development potential.

43.3 Groote Springfontyn: (a) It is substantially inferior to Hartebeeskraal (no arable land); and (b) the sale price could have been influenced by the property's development potential.

43.4 Buffels Rivier: (a) It is a sale to the Board, which is not always a reliable indication of market value. Sales to an expropriator are not considered arm's length transactions and ought to be treated with caution. *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 254B-H; (b) it has no arable land; and (c) it is coastal land, which gives or enhances its development potential.

It is for these reasons that I reject van der Spuy's choice of comparable properties and, as a result, his valuation.

Du Toit's Evidence

[44] According to du Toit, his firm, The Appraisal Corporation, was instructed in August 2010, to advise whether the compensation paid in this matter was just and equitable. In the execution of that mandate, Du Toit produced a report consisting of approximately 42 pages, compiled by him and a colleague.

[45] Du Toit produced a graph, reproduced below, which he alleges shows a direct relationship between the land rate payable and the extent of the transactions, disregarding all other attributes. He states that the line extending from R350, on the top left of the graph, to +/- R125 on the bottom right, shows how the land rate increases as the extent decreases. The various crosses in the graph represent the per hectare price of the land in the various transactions, according to his report. The figures in the horizontal line at the bottom relate to sizes.

NB: PLEASE CONSULT PDF FOR IMAGE

[46] Du Toit's report reveals that, having estimated the arable land portion of Hartebeeskraal at 33.0%, he relied on the following transactions to determine the arable land rate of the farm:

46.1 Portion 5 of Ronde Vley, in extent 545.5509 hectares (“Ronde Vley”). The sale took place on 31 March 1970 and the price was R72 500.00 which translates to R222.00 per hectare. The property had 75% arable land, good vegetation but was situated relatively far from Hartebeeskraal at approximately 17 kilometers north east.

46.2 Portion 20 of Zoute Rivier, in extent 298 hectares (“Zoute Rivier”). The transaction was concluded on 23 May 1970 at a purchase price of R52 050.00. This translated to R286 per hectare. 80% of its land was arable, the vegetation was good and the property, although substantially smaller, is located only 5 kilometers south east of the farm.

46.3 Portion 19 of Zoute Rivier, in extent 287 hectares, is the sister property of Zoute River, referred to above, and both sales were concluded on the same day. This property is situated approximately 7 kilometers south east and was sold for R52 800.00 which translates to R287 per hectare. The arable land portion and the vegetation component of the two properties are the same.

46.4 Portion 4 of Hartebeeskraal, in extent 171 hectares, is situated direct east of the farm. The arable land component was 80% and the vegetation better. The transaction was concluded on 22 October 1970 at a sale price of R31 200.00 which translates to R282.00 per hectare.

46.5 Remainder 7 of Klein Dassenberg (“Klein Dassenberg”), in extent 124 hectares, is situated 3 kilometers south east from Hartebeeskraal and was sold for R44 000.00 on 19 February 1973. This translates to R395.00 per hectare. The property consisted of 80% arable land, good vegetation but, unlike Hartebeeskraal, it was unimproved.

46.6 Remainder 1 of Modderfontein (“Modderfontein”), in extent 227 hectares, has 80% arable land, good vegetation is situated approximately 10 kilometers south east from Hartebeeskraal. The property was sold for R50 000.00 on 21 June 1973 which translates to R234.00 per hectare.

46.7 Remainder of Lange Kloof, in extent 599 hectares, was sold on 20 March 1974 for R190 000.00, which translates to R305.00 per hectare. It is situated 14 kilometers north east of Hartebeeskraal and comprises primarily of arable land. It has good farm improvements and vegetation.

46.8 Remainder 2 of Ronde Vley, in extent 479 hectares, sold for R61 409.00 on 29 April 1974. The sale price translates to R122.00 per hectare. This property is adjust to Ronde Vley referred to in sub-par 46.1 above as has similar characteristics.

46.9 Remainder 1 of Zoute Rivier, in extent 596 hectares, is very similar property of the ones referred to in sub-paras 46.2 and 46.3 above. The transaction was concluded on 15 April 1975 at a sale price of R210 000.00 which translates to R292.00 per hectare. It has 90% arable land, good vegetation and is situated approximately 6 kilometers from Hartebeeskraal.

- [47] These transactions have a land rate ranging from R122.00 to R395.00 per hectare and, on average, their arable portions are greater than 80%. Du Toit discounted their per hectare values when considering them as comparators. Also, these properties are, save for two sales, all within a radius of approximately 15 kilometers from Hartebeeskraal.
- [48] He also had regard to the historical valuation reports of Roux and EPG. Roux determined the arable portion of Hartebeeskraal to have been 830 hectares. Du Toit was very critical of Roux's findings and found numerous inaccuracies in his report. For instance, Roux's report reveals that Hartebeeskraal's total land extent of 1507.59 hectares comprised "sowing/crops" (arable) portion of 830 hectares and a grazing portion of 677.594 hectares. This calculation clearly ignores the rather large dune plume portion on the property which the experts agreed resulted in that portion being unsuitable for cultivation and grazing.
- [49] Taking all of the above into account, du Toit determined the value of Hartebeeskraal's arable land portion should not be more than R250.00 per hectare.
- [50] In calculating the grazing portion of the farm, which he estimated made up 67% of the farm, du Toit considered the hereinafter mentioned transactions, which in his opinion were good comparators for grazing land.

50.1 Cruywagenskraal, in extent 906 hectares, sold on 10 August 1970 for R29 000.00. The sale price translates to R51.00 per hectare. The property is situated approximately 6 kilometers north east of Hartebeeskraal, is unimproved, has good vegetation and comprised veld only.

50.2 Portion 5 of Brakkefontein, in extent 86 hectares, was sold on 7 July 1973 and is situated approximately 4 kilometers south of Hartebeeskraal. The property comprises unimproved grazing land with good vegetation. The sale price was R31 000.00 which translates to R383.00 per hectare. In his report, du Toit reveals that because the property is situated directly south of what would be the future Atlantis Industrial area, the price might have included that potential and, as a result, advised caution when dealing with this transaction.

50.3 Portion 3 of Melk Post, in extent 428 hectares, is situated direct south west of Hartebeeskraal. It comprises unimproved grazing land with similar vegetation and sold for R100 000.00 on 11 March 1974. This translates to R225.00 per hectare.

- [51] These transactions all comprised unimproved land with land rates of between R51.00, R225.00 and R383.00 respectively. They are within a radius of 6 kilometers from the farm. Based on the above, du Toit concluded that the grazing land rate of Hartebeeskraal should not exceed R50.00 per hectare.
- [52] Du Toit, in order to determine the overall inclusive land rate of Hartebeeskraal, then examined four transactions. They all have grazing and arable land as well as improvements. And, are situated within 10 kilometers from Hartebeeskraal. The transactions are the following:

52.1 Remainder Groote Post, in extent 1103 hectares, was sold on 19 September 1972 for R165 000.00. The sale price translates to R177.00 per hectare. The property is situated approximately 9 kilometers north west from the farm and comprises 70 % arable land with good vegetation. It also has good farm improvements.

52.2 Remainder Brakkefontein, in extent 1546 hectares, is situated approximately 4 kilometers south west from Hartebeeskraal. It was sold for R87 000.00 on 8 January 1973. This translates to R64.00 per hectare. The property comprises 50% arable land and has good vegetation. There are also some improvements on the property.

52.3 Remainder Burger's Post, in extent 1308 hectares, was sold on 21 December 1973 for R200 000.00. The price translates to R152.00 per hectare. The property is situated 3 kilometers north east from Hartebeeskraal, comprises 50 % arable land, good vegetation and has good improvements.

52.4 Portion 1 of Groote Post, in extent 1179, is situated approximately 10 kilometers north west from Hartebeeskraal and was sold for R200 000.00. The sale price translates to R149.00 per hectare. The property comprises 40% arable land and also has good vegetation and farm improvements.

[53] After taking into account the different aspects of the transactions and the ratios of land components of the farm, du Toit determined that an overall land rate of R150.00 per hectare inclusive of improvements should apply to Hartebeeskraal.

[54] Du Toit then used the aforementioned component values of the arable and grazing portions of the farm and the agreed value for the improvements, on the one hand, and the inclusive rate, on the other, to determine the market value. For the former, he multiplied the extent of Hartebeeskraal's arable land of 497 hectares by R250.00 (the per hectare rate) and arrived at a total of R124 250.00.

The value of the grazing portion, he found to be R50 530.00 which was also arrived at by multiplying its extent (1010.5944

hectares) with R50.00, the per hectare value, which was later agreed to be R73 000.00. The total component values come to

R247 780.00.

[55] The value calculation based on the inclusive rate, he determined by simply multiplying the total extent of Hartebeeskraal of 1507.5944 hectares by the per hectare rate of R150.00 set forth in par [53] above, which comes to a total of R226 139.00.

[56] Du Toit then concludes that Hartebeeskraal would not have fetched more than R230 000.00 on the open market had the State not made property acquisitions for the Coloured Group Area of Atlantis.

- [57] The report also reveals that du Toit re-determined the compensation rate of Hartebeeskraal in the light of Gildenhuys' views in *Onteieningsreg*, Second Edition, Butterworths, 2001, where the learned author, on page 222, states:

“ ‘n Effense ander benadering word gevolg indien die eienaar die pryse wat die eienaar in ander onteienings betaal het teendie onteienaar wil gebruik; die onteienaar kan nouliks kla indien die onteienende hom gebonde wil hou aan dieselfde waardemaatstaf wat hy in die ander onteienings gebruik het. Sodanige waardemaatstaf sal egter nie van toepassing word indien dit klaarblyklik verkeerd is nie”

- [58] Du Toit, after discarding certain transactions due to the upward effect their location would have on their value, settled on the Cruywagenskraal transaction referred to in par 50.1 above which was a sale to the Community Development Board. He then adjusted its value downwards due to, inter alia, its good access to the West Coast Road (R27) and the fact that it comprises of various smaller components. According to the report, du Toit determined a new grazing rate for Hartebeeskraal of R175.00 per hectare. He found that the other rates and values previously determined were still applicable. The grazing portion of the farm, he now determined to be R176 854.00.

- [59] The total property value, taking account of the adjusted grazing value, would be R374 104.00, arrived at as follows:

$R124\,250.00 + R176\,854.00 + R73\,000.00 = R374\,104.00.$

- [60] Du Toit, who was of the opinion that a dispossessed owner would be entitled to (a) transfer and conveyancing fees for a replacement

property and (b) moving costs, added the sum of R26 000.00 to the value of the property, as he determined that amount to be the cost of those disbursements at the time.

- [61] Du Toit, having found that the compensation due to the Company would not have been more than R386 000.00, concludes that it “received more than just and equitable compensation as at the date of dispossession and should not be entitled to an award under section 2(2) of the Restitution of Land Rights Act.”

- [62] The evidence of Wollach and Duckitt was not seriously challenged. Duckitt's testimony, as I understood it, was merely to confirm the similarities of certain physical features of Buffelsrivier with those of Hartebeeskraal and to advise that Buffelsrivier, which was roughly equal in size and suffered the same fate, was also sold in a “forced sale” to the Board. The only difference being that its price was determined by an arbitrator. And, although Wollach was vague, possibly due to his advanced age and the time lapse since the dispossession, when specificity was required during certain portions of his testimony, I have not drawn an adverse inference from his occasional lapses in memory. It was also patently clear to me that the dispossession, which coincided with the death of his father, from a heart attack and which he attributed to the dispossession, has left him scarred.

- [63] I now turn to consider the testimonies of the various experts. There is a wealth of jurisprudence which provides guidance to a court on how to evaluate expert evidence. See *Nel v Lubbe* 1999
- (3) SA 109 (W) at 111F, where the court held that, when assessing an expert's opinion regarding property values, "... the Court is not a rubber stamp for acceptance of the expert's opinion ... [it] will not blindly accept the assertion of the expert without full explanation..." See also *Haakdoornbult Boerdery CC & Others v Mphela & Others* 2007 (5) SA 596 (SCA) at para [39], which states that "Expert opinion must be fact based and the facts must justify the opinion even if the facts are difficult to establish."
- [64] It is evident from the above that, when it evaluates an expert's opinion, a court is entitled to analyze and reject, when satisfied that the opinion is not founded on a sound and logical basis, views put forward by an expert. *Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another* 2001 (3) SA 188 (SCA) at paras [36 -37], not only confirms the court's right to scrutinize and reject an expert's opinion, but also states that the right includes doing so even if the expert's opinion is based on widely preferred norms and practices in a particular industry. The court may also only accept portions of a valuer's evidence, and reject other portions.
- [65] I have already rejected the sales relied on by van der Spuy as comparators to Hartebeeskraal and, therefore, his valuation.
- [66] Mr Oosthuizen, who appeared with Mr Buurman, for the plaintiffs, leveled a number of criticisms at du Toit's testimony. Given the decision I have reached, it is unnecessary to burden this judgment with a discussion of each and every one of his criticisms.

Dealing with the ones below will suffice.

- [67] Firstly, Mr Oosthuizen criticized du Toit for expressing views that are allegedly beyond his field of expertise. Among the examples cited were (1) du Toit's views on the extent to which the water supply on the farm would have produced sufficient silage for the Company's farming needs and (2) the extent to which certain types of vegetation were suitable for grazing purposes. In support of this criticism, I was referred to the dictum of Addleson J, in *Menay v Protea Assurance Co Ltd* 1976 (1) SA 565 (ECD) 569 E-G, where the learned Judge states,

"However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic...The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field."

- [68] Secondly, du Toit's suggestion that Morning Star's purchase price was not R740 000.00 also came under attack. Mr

Oosthuizen argued that du Toit's suggestion was based on a sentence appearing in the consideration clause of the deed of

transfer which, according to du Toit appeared to indicate that the transfer duty amount was not the purchase price. This, notwithstanding that du Toit was not a conveyancer, did not have any experience in conveyancing matters and had not consulted one in order to test his theory, so the argument continued. I am not persuaded by this argument given that, generally speaking, there are exceptions.

It is not only conveyancers who are able to read and interpret title deeds.

[69] I see no merit in the first criticism. When challenged on his views on the suitability of the vegetation for grazing in that area, du Toit stated that his testimony on the subject was based on the authoritative, *Vegetation of South Africa, Lesotho & Swaziland*, published by the South African National Biodiversity Institute, the authoritative nature of which was not challenged by Mr Oosthuizen.

[70] Also, du Toit, a professionally registered valuer since approximately 1989, with vast experience in agricultural land expropriation

valuations has, in my opinion, more than adequate experience to express an opinion on whether a farm has a sufficient supply of water for its farming operations. The quantity of water on a particular agricultural property or its access thereto is an important component in the basket of factors to be considered by a valuer when determining the value of agricultural land. A valuer with du Toit's experience is therefore, in my view, entitled to express an opinion on whether agricultural property has sufficient water supply for its needs.

[71] On a conspectus of the valuers' evidence and, generally, their approach to valuing farm land and choice of comparable sales, I find du Toit's testimony more persuasive. Not only was his research more comprehensive but his report was demonstrably superior to the one compiled by van der Spuy. He also broke up the transactions he selected as comparables into component parts and determined their values separately. All of the transactions he used, save for Ronde Vley, were within a 15 kilometer radius of Hartebeeskraal. Also, du Toit's methodology as well as the transactions he selected as comparators were not put in issue by van der Spuy. Consequently, I prefer the market value computed by du Toit.

[72] The factors which I am obliged to have regard to when considering equitable redress have already been set out in earlier paragraphs of this judgment. Market value, being easily quantifiable and the factor most "capable of objective determination", is a good place to start.

- [73] Mr Oosthuizen argued strongly that I assess the per hectare market value of Hartebeeskraal at R500.00 per hectare based on that paid for Morning Star, discounted by 50% and on the price paid for Buffels Rivier. In the alternative, Mr Oosthuizen contended that the court's assessment be done at R473.00 per hectare, which he stated was the midway point between the R500.00 per hectare value referred to earlier and the per hectare price of R447.00 applicable to Ganzekraal.
- [74] After adding the agreed value of R73 000.00 for the improvements, Mr Oosthuizen submitted that the fair value of Hartebeeskraal at dispossession is either R826 767.00, based on a per hectare price of R500.00 or R 786 092.00, if the per hectare price of R473.00 was used.
- [75] I remain unpersuaded by this submission given that I have not found Morning Star comparable to Hartebeeskraal. Therefore, any adjustment made to its price is irrelevant. The alternative argument, which uses Ganzekraal's value as a benchmark, is also unsustainable. This property was not considered as a suitable comparator by the plaintiffs' own valuers. Van der Spuy did not include it in his basket of comparable properties. And, Roux, who valued the property on the instructions of the plaintiffs and did not testify, states in his report that Ganzekraal was "only used for grazing and is much undeveloped compared to the subject property...The land is mainly just sandy land and dunes. This differs excessively with [sic] the subject property where a large part of the farm was cultivated land and was used for cash crops and crops to support the vast cattle farming activities at the time of expropriation." Also, du Toit testified that he treated this property with caution because its coastal location attracts a premium due to its development potential.

Was the compensation paid at dispossession just and equitable?

- [76] The farms identified and used by du Toit as comparable property for the purposes of computing the arable land value of Hartebeeskraal,

referred to above, are, in my view, a reasonable selection of sales to use as part of the exercise of determining the farm's market value. I therefore intend following the valuation he arrived at based on those transactions.

- [77] I am enjoined by the provisions of Section 33 of the Restitution Act to take into account the factors set out therein in order to determine whether the compensation constituted equitable redress. In my view, it is the factors set out in section 33 (c), (eA), (eB), (eC) and (f) that are relevant in this case and I have duly taken them into account in arriving at my finding in this matter. The provisions of these sub-sections are:

"(c) the requirements of equity and justice;

(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;

(eC) in the case of equitable redress in the form of financial compensation, changes over time in the value of money;

- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.

In addition to the above, I have also taken into account the dictum of Moseneke DJP in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at par [124], where the learned Deputy Judge President states

“Equitable redress must be sufficient to make up for what was taken away at the time of dispossession.”

[78] Although not raised pointedly during his testimony, it is reasonable to conclude from an overview of all the evidence, that the farming operations of the Company were successful and, possibly, profitable. To have been dislocated from that business and way of life, for reasons of facilitating the then Government’s racially discriminatory laws, must have been emotionally draining on Wollach. I sympathize with Mr Wollach but restitution is sought by the Company. Also, a universitas cannot suffer emotional pain. See *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T).

[79] For all the reasons already stated, I am not persuaded that the Company was under - compensated for the dispossession of its farm, Hartebeeskraal. The amount paid at dispossession was, in my view, just and equitable.

[80] It is the practice of this court not to make an order as to costs in constitutional litigation such as this, save in special

circumstances. I have not found any special circumstances and, as a result, do not intend making an order as to costs.

[81] In the result, I order as follows:

1. The plaintiffs’ claim is dismissed.
2. No order as to costs.

MP Canca

Acting Judge, Land Claims Court

I agree.

J Nongalaza

Assessor

Appearances:

For the plaintiffs:

Advocate AC Oosthuizen SC

Advocate J Buurman

Instructed by: Charnock

& Wessels, Green Point.

For the defendants:

Advocates K Pillay and B Joseph

Instructed by:

The State Attorney, Cape Town.

- [1] The title deed description of the property is Remainder Hartebeeskraal No.5, Cape Division, in extent 1507.5944ha.
- [2] See *Abraham Lama Wollach v The Government of the Republic of South Africa & 3 Others* (LCC 120/2010) [10 June 2014] at par [13].
- [3] Buffelsrivier is one of the farms the plaintiffs contend is comparable to the farm for the purpose of assessing its market value.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCC/2018/1.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-restitution-of-land-rights-act-alcc-2018-lcc120-2010>

Prepared on 11 October 2026 · Esheria