IN THE SABWIL HUMAN RIGHTS COURT

(THULAMELA CHAMBERS, SANDTON)

Case no: 1312/2017

In the matter between:

BAKWENA BA MARE Applicant

and

GRANTHAM, MARY First Respondent

DIRECTOR-GENERAL-
DEPARTMENT OF RURAL AND LAND REFORM Second Respondent

MINISTER FOR RURAL DEVELOPMENT
AND LAND REFORM Third Respondent

FILING NOTICE: THE SECOND AND THIRD RESPONDENTS' HEADS OF ARGUMENT

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DATED AT JOHANNESBURG THIS 19th DAY OF NOVEMBER 2017

COUNSEL FOR THE SECOND AND THIRD RESPONDENT

VEROSCHKKA MOTIMELE SC

BOITUMELO SEKGALA

TO: THE REGISTRAR OF THE ABOVEMENTIONED HONOURABLE COURT, SANDTON

AND TO: COUNSEL FOR THE APPLICANT

AND TO: COUNSEL FOR THE FIRST RESPONDENT

AND TO: THE STATE ATTORNEY

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BACKGROUND FACTS

1. The applicant is awarded restitution of land in terms of the Restitution of Land Rights Act 22 of 1994 for land around Buccleuch and Midrand. A significant portion of the land is owned by the first respondent, specifically, the Downton Farm, a 97 hectare farm bordering Buccleuch and across the highway from the Waterfall Estate and the Mall of Africa.

2. Subsequent to the award, the second respondent and the first respondent reached a deadlock in terms of the appropriate amount for compensation for the expropriation of the land.

3. The applicant places the discord before the above honourable court and the matter has been set down for hearing on 13 December 2017 – limited only to the appropriate value for the just and equitable compensation for the land awarded to the applicant in terms of the Act taking into account the spirit, purport and objects of the Constitution and sections 25(2) an (3) thereof.

THE APPROPRIATE METHOD TO DETERMINE THE VALUE OF PROPERTY

4. The second and third respondents submit that the two-stage approach is appropriate method to determine a constitutionally compliant amount of compensation. This approach as set out in laid down in *Re:* ***Ash v Department of Land Affairs***[1] entails that:

> *"[T]he 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."*[2]

5. Because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then other factors are considered to arrive at a final determination.[3]

6. If, after having regard to all relevant factors, the compensation awarded is just and equitable and it reflects an equitable balance between the public and the private interests, the constitutional standards as envisaged in section 25(3) would have been met.[4] The approach permits the court to give cognisance to the imperative nature of section 25(3) as required by section 39(2) of the Constitution.[5]

7. The second and third respondents submit that the land is valued by the City of Johannesburg at R940 000.00 in light of its current use. As it stands, the land is zoned as agricultural land. The land remains a successful farming operation that in recent days operated as a craft beer brewery.

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[1] 2000 2 All SA 26 (LCC), hereinafter *Ash*.
[2] *Ash* at para 35.
[3] *Uys & Msiza & others* (1222/2016) [2017] ZASCA 130 (29 September 2017) at para 12, hereinafter *Uys*.
[4] *Du Toit v Minister of* Transport 2006 1 SA 297 (CC) at para 34, hereinafter *Du Toit*.
[5] See *Du Toit* at para 36.

THE MARKET VALUE OF THE PROPERTY RELATIVE TO OTHER FACTORS

8. It is respectfully submitted that market value is simply one of the considerations to be borne in mind when the court assesses just and equitable compensation.[6] Though not a preeminent factor, market value still plays a central role in the calculation of compensation.[7]

9. The second and third respondents submit that market value is regularly used as an entry point to the analysis as it is the most tangible factor in all of the factors listed in section 25(3).[8] In other words, market value is the starting point of the calculation of compensation, where after the remaining factors in section 25(3) are utilised to adjust the compensation amount upwards or downwards.[9]

10. The Constitution therefore does not foreshadow which of the circumstances provided in the open-ended list will be more significant or relevant.[10]

PROPOSED STARTING POINT FOR THE COMPENSATION ANALYSIS

11. The second and third respondents submit that the departure point for the determination of compensation is justice and equity.[11] Therefore, the starting point, accordingly, is an examination of section 25 of the Constitution itself.[12]

12. The factors in section 25(3) seem to be specifically aimed at making land reform more affordable.[13] The second and third respondents submit that the R940 000.00 valuation of the land by the City of Johannesburg is just and equitable,

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[6] *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) at para 29, hereinafter *Msiza*.
[7] E du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' (2014) 17 *PER* 798 at 821.
[8] *Msiza* at para 30.
[9] E du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' at 821.
[10] *Du Toit* at para 34.
[11] *Msiza* at para 29.
[12] *Msiza* at 24.
[13] E du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' at 821.

firstly, based on the current use of the land and, secondly, based on the historical context of the land.

13. The appropriateness of determining the value of the land based on its current use was affirmed in ***Msiza*** where the court held that *'market value of the land can only be determined by reference to … its current use.'*[14] The land is zoned as agricultural land and, to date, as previously stated, is a successful farming operation and operates as a craft brewery manufacturer.

14. In considering the second determination, it is respectfully submitted that '[t]he requirement to consider the history of the acquisition and use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination.'[15]

15. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates.[16]

16. It is respectfully submitted that the first respondent benefitted from the removal of a community residing on the farm. Undeniably, the umbilical cord that joins any particular community and its ancestral land is strong and it is a highly emotional element that has to be respected.[17]

17. The Constitution is a document committed to social transformation. It insists that the deep injustices of our past characterised by racial dispossession and exclusion be addressed and reversed.[18] In such an instance, it would indeed be unfair to pay

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[14] *Msiza* at para 46.
[15] *Msiza* at para 53.
[16] *Msiza* at para 53.
[17] *Mphela and Others v Haakoornbult Boerdery and Others* [2008] ZACC 5 at para 32, hereinafter *Mphela*. See also *Khosis Community, Lohatla, and Others v Minister of Defence and Others 2004 (5) SA 494 (SCA) at paras 30-31.*
[18] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 49.

full market value in compensation as this would enable the owner to benefit twice from apartheid.[19] Given such a history, it is respectfully submitted that the R940 000.00 valuation is just and equitable.

18. One other factor to be taken into account is the fact that the land was expropriated for land reform purposes[20] as provided for in section 25(2)[21] of the Constitution. The purpose of expropriation should be given due weight as well as the history and manner of acquisition.[22]

19. The purpose of expropriation is to acquire the land for restitution to the applicants. It constitutes land reform. In this regard, section 25(8) of the Constitution must be considered.[23] The section provides that:

> *"(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."*

20. The Supreme Court of Appeal in *Uys* held that:

> *"[T]he object of the compensation is land reform the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform"*[24] (Our emphasis)

CONSIDERATION OF THE OWNER'S PERSONAL CIRCUMSTANCES

21. It is respectfully submitted that the personal circumstances of the owner play no role when considering the value of the land. This must be done without regard to

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[19] *Msiza* at para 53.
[20] Section 25(3)(e) of the Constitution.
[21] 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.
[22] *Msiza* at para 72.
[23] *Mphela* at para 71.
[24] *Uys* at para 23.

the particular seller, since no method of calculation should include subjective considerations.[25]

22. The purposes behind the determination of just and equitable compensation must be to serve the broader public interest which underlies the provisions of section 25.[26] Any subjective value which the property may have had for their owners when dispossession took place, cannot affect their market value. Market value of the dispossession must be objectively determined.[27]

23. The honourable court in ***Pienaar v Minister van Laandbou***[28] stated that market value is an objective concept that should be determined not by looking at the personal circumstances of the owner, but by looking at the property itself.[29]

24. The second and third respondents therefore submit that value should be determined with reference to the land itself. The honourable court in *Pienaar* held that personal circumstances of the owner should not have an influence, since it will be valued differently in the hands of different owners.[30]

OTHER RELEVANT CRITERIA INCLUDING THE APPLICATION OF THE POINTE GOURDE PRINCIPLE

25. The second and third respondents submit that the Pointe Gourde principle applies in the matter. The principle entails that 'compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'[31]

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[25] See E du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' at 806.
[26] *Msiza* at para 29.
[27] *Ash* at para 76.
[28] 1972 1 SA 14 (A), hereinafter *Pienaar*.
[29] See also E du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' at 806.
[30] *Pienaar* at para 20.
[31] *Pointe Gourde Quarrying and Transport Co Ltd v. Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565. See also *Uys* at para 18 and City of Cape Town v Helderberg Park Development (Pty) Ltd (429/05) [2006] ZASCA 91; [2007] 1 All SA 517 (SCA); 2007 (1) SA 1 (SCA) para 28.

26. The second and third respondents submit that the value of the land in question was increased by the first respondent because of the scheme of the acquisition which is the acquisition of land for land reform purposes.

27. The main reasons why the first respondent increased the value of the land are, firstly because the community would apparently benefit from the awarding of the land and, secondly, because the value of the land will increase to R500 000 000.00 in less than a decade.

28. It is a rule that in assessing compensation, any increase or decrease in the market value of the dispossessed land arising from the carrying out, or the proposal to carry out, the purpose for which the land was dispossessed must be disregarded.[32]

29. In order to apply the Pointe Gourde principle it is necessary, first, to identify the scheme and secondly the consequences.[33] The valuer must then value the land by imagining the state of affairs, usually called 'the no-scheme world', which would have existed if there had been no scheme.[34]

30. The second and third respondents submit that, had the restitution of land not taken place, there is still no evidence that the said future development potential of the land would have been realised. It is respectfully submitted that the first respondent erred in contending that the value of the piece of land is R15 791 388.00. The valuation of the land by the first respondent is frivolous on various grounds:

    30.1. Firstly, the valuation is an unqualified estimation. The second and third respondents submit that no expert valuation of the land was provided to support the contended value of the land as suggested by the First Respondent.

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[32] *Ash* at para 36.
[33] *Ash* at para 37, see also *Wards Construction (Medway) Ltd v Barclays Bank PLC and Kent County Counted* 68 (1994) Property and Compensation Reports (CA, England) at 391.
[34] *Ash* at para 37.

30.2. Secondly, the fact that development is underway does not necessarily mean that the land is now zoned as commercial land. In *Pienaar* the court held that '[t]he fact that the necessary subdivision and consolidation are likely to be approved and conveyed in the near future without any difficulty is relevant when considering whether the appellant's scheme is feasible'.[35] The second and third respondents submit that there is no explicit guarantee that the permits for the rezoning of the land will be approved.

30.3. In the absence of the said permits and the realisation of the future potential, the land still remains classified as agricultural and there is no justification as to why the land should be valued at R15 791 388.00 based on its current use. In *Davis v Pietermaritzburg City Council*[36] it was held that 'the property must not be valued as though the potentiality had been realized and the development taken place.'[37] The court further stated that:

"It is to be observed that if this argument is correct it would mean in effect that in such a case the owner of the property expropriated would be compensated not for the market value of the property on the date of the notice of expropriation with its then existing potentiality for development, but for the present value of what would have accrued to him had the potential been realized and the development carried out. This seems to me to be contrary to principle and likely to lead to anomalies which could not have been intended by the Legislature."[38] (Our emphasis)

31. The purpose of compensation is to place in the hands of the expropriated owner the full money equivalent to the expropriated property.[39] The second and third respondents submit that the valuation proposed by the first respondent should be disregarded as it is prejudicial to the second and third respondents and there is no reasonable or sound justification as to why the court should depart from the R940

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[35] At p 25 E-G.
[36] 1989 (3) SA 765, hereinafter *Davis*.
[37] *Davis* at p 9.
[38] *Davis* at p 12.
[39] *Mhlanganisweni Community v Minister of Rural Development and Land* Reform 2012 ZALCC 7 (19 April 2012) at para 51, hereinafter *Mhlanganisweni Community*.

000.00 expertly set by the City of Johannesburg. In considering a similar dispute, the honourable court in *Msiza* held that:

> *"Applying the approach advanced by the landowner could distort the real value of the land and produce outcomes which are dissonant to the purpose behind compensation. That approach could also create perverse incentives for landowners to artificially raise the potential value of their land, if they knew that by simple device of generating interest in the land, its market value could significantly be altered."*[40]

32. It is respectfully submitted that the reasons adduced for the increase in the value of the land are mere speculations as no evidence has been furnished to prove that such an occurrence might ensue.

33. The second and third respondents submit further that there was a known impediment to the development potential of the land, owing to the awarding of land to the Applicant. This further justifies the departure from the R15 791 388.00 set by the First Respondent. The honourable court in *Uys* held that:

> *"[I]f the purchaser had knowledge of the impediment at the time of the sale to him, that knowledge would have been reflected in the price paid at the time of purchase. Hence the 'purchaser … had the benefit of that depreciation; to disregard the depreciation in his capacity as seller would be to benefit him in a manner clearly not intended by the section.'"*[41] (Our emphasis)

RELIEF CLAIMED

34. In the premises, the second and third respondents respectfully pray that it may please this honourable court to grant an order in the terms set out as follows:

    34.1. That the value for just and equitable compensation to the applicant is R940 000.00.

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[40] *Msiza* at para 47.
[41] *Uys* at para 20. See also *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 678 B-C at 681.

34.2. That the value R15 791 388.00 valuation by the first respondent, along with the minimum R10 000 000.00 valuation by the first respondent be wholly disregarded.

34.3. That ownership transfer of the land take place within reasonable time as determined by this honourable court.

34.4. That each party be ordered to pay its own costs in accordance with the *Biowatch* principle.

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Second and Third Respondents' List of Authorities

Biowatch Trust v Registrar, Genetic Resources [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)

Niekara Harrielall v University of KwaZulu-Natal [2017] ZACC 38.

City of Cape Town v Helderberg Park Development (Pty) Ltd (429/05) [2006] ZASCA 91; [2007] 1 All SA 517 (SCA); 2007 (1) SA 1 (SCA)

Davis v Pietermaritzburg City Council 1989 (3) SA 765

Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs 2000 2 All SA 26 (LCC)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)

Khosis Community, Lohatla, and Others v Minister of Defence and Others 2004 (5) SA 494 (SCA)

Mhlanganisweni Community v Minister of Rural Development and Land Reform 2012 ZALCC 7 (19 April 2012)

Mphela and Others v Haakoornbult Boerdery and Others [2008] ZACC 5

Msiza v Director-General, Department of Rural Development and Land Reform and Others[1] 2016 (5) SA 513 (LCC)

Niekara Harrielall v University of KwaZulu-Natal [2017] ZACC 38

Pienaar v Minister van Laandbou 1972 1 SA 14 (A)

Pointe Gourde Quarrying and Transport Co Ltd v. Sub-Intendent of Crown Lands (Trinidad) [1947] AC 565

Port Edward Town Board v Kay 1996 (3) SA 664 (A) 678 B-C

Uys & Msiza & others (1222/2016) [2017] ZASCA 130 (29 September 2017)

Wards Construction (Medway) Ltd v Barclays Bank PLC and Kent County Counted 68 (1994) Property and Compensation Reports (CA, England)