IN THE SABWIL HUMAN RIGHTS COURT

(HELD AT THULAMELA CHAMBERS, SANDTON)

CASE NO: 1312/2017

In the matter between:

BAKWENA BA MARE	Applicant
and	
GRANTHAM, MARY	1st Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF RURAL AND LAND REFORM	2nd Respondent
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	3rd Respondent

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FILING SHEET

KINDLY TAKE NOTICE that the First Respondent hereby delivers its heads of argument in the above matter for service and filing.

DATED AT **SANDTON** ON THIS **08th** DAY OF **DECEMBER 2017**.

_____

JUSTICE FOR ALL INC.
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TO**: THE REGISTRAR**

THE SABWIL HUMAN RIGHTS COURT
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AND TO:

Attorneys of the Department of Rural and Land Reform

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FIRST RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. On 03 November 2017, Bakwena Ba Mare ("**Bakwena Ba Mare**" or the "**Applicant**") applied to the SABWil Human Rights Court (the "**Honourable Court**") to resolve a deadlock between the Department of Rural and Land Reform (the "**Department**" or the "**Second Respondent**") and Ms Mary Grantham ("**Ms Grantham**" or the "**First Respondent**") in respect of compensation payable by the Department to Ms Grantham for the expropriation of land, the Downton Farm, a 97 hectare farm bordering Buccleuch and across the highway from the Waterfall Estate and the Mall of Africa (the "**Downton Farm**" or the "**Land**"), belonging to Ms Grantham.

2. Section 25(2) of the Constitution of the Republic of South Africa, 1996 (the "**Constitution**"), provides for the expropriation of property if two requirements are met:

   2.1. the property must be expropriated for a public purpose or in the public interest; and

   2.2. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3. Bakwena Ba Mare successfully applied in terms of the Restitution of Land Rights Act 22 of 1994 (the "**Restitution of Land Rights Act**") for the restitution of the Land. Whilst Ms Grantham has been amenable to the restitution and, as such, had no difficulty with the Department expropriating the Land, the amount offered by the Department is so insignificant that it is not just and equitable in the circumstances. Ms Grantham is accordingly unable to capitulate to the Department's land restitution and land reform course insofar as the Land is concerned.

4. Section 25(3) of the Constitution requires the amount of the compensation and the time and manner of payment to 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 (amongst others) (i) the current use of the property; (ii) the history of the acquisition and use of the property; and the market value of the property.

5. The First Respondent posits that the amount of R940 0000 (nine hundred and forty thousand), being the amount that the Department is prepared to offer fails to comply with section 25(3) of the Constitution in that it abrogates the fundamental basis of the compensatory incentive of section 25(2) – in that it is not just and equitable, having regard to the process (which is at an advanced stage and significant investments expended thereon) to rezone the Land and to develop it accordingly.

6. The First Respondent thus invites the Honourable Court to rule in her favour. In particular, Ms Grantham prays that this Honourable Court directs the Department to pay the amount of R15 791 388 (fifteen million seven hundred and ninety one and three hundred and eighty eight rands) (the "**true value**"), being the true value of the Land. In the event that the Honourable Court refuses to order the Department to pay the true value of the Land, Ms Grantham then prays for any amount not less than R10 000 0000 (ten million rands) for the Land (albeit not the true value of the Land but would be reasonable nonetheless).

JUST AND EQUITABLE COMPENSATION

7. Section 25 of the Constitution reads, in relevant part, as follows:

> "(2) *Property may be expropriated only in terms of law of general application -*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
>
> *(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -*
>
> *(a) the current use of the property;*

(b) the history of the acquisition and use of the property;

(c) ***the market value of the property****;*

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

The starting point

8. The point of departure for the determination of compensation is justice and equity.[1] This means that the compensation award has to fulfil the requirements of the Bill of Rights, reflecting an equitable balance between the public interest and the interests of those affected having regard to 'all relevant circumstances' of which the market value of the property is listed as but one of five.[2]

9. The duty to compensate implies that the owner of the expropriated property may not be in a better or worse position as a result of expropriation. The status *quo ante* must be restored by means of a money award and "the equivalent in value must be given to take the place of the property lost"[3]

10. The Constitutional Court in *Du Toit*[4] held that compensation is determined in a two-pronged stage. First, the court must establish the amount of compensation according to the provisions of section 12 of the Expropriation Act 63 of 1975 and then it has to consider whether that amount is just and equitable under section 25(3) of the Bill of Rights and make any necessary adjustment.

11. Justice and equity in the particular context and circumstances of this case demand that Ms Grantham be left in a position she would be in but for the expropriation. In this regard, the

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[1] *Msiza v Director-General for the Department of Rural Development And Land Reform & Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) ("***Msiza***") paragraph 49.
[2] *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2006] SCA 93 RSA ("***Helderberg***") paragraph 19.
[3] *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 242H-243A per Ogilvie Thompson JA.
[4] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) paragraph 26-37 per Mokgoro J.

First Respondent posits that the Land has not been merely earmarked for commercial development. Indeed, it is true that the process for rezoning and developing the Land is well under way. In addition, a special purpose vehicle has been set up for the development and has accumulated substantial loans of which Ms Grantham is the surety. To this end, the Department's absolute ignorance of this context and these circumstances is a veritable slaughter of the Constitution. The First Respondent posits that this lowers the prestige of the 'just and equitable' principle enunciated in the Constitution. In line with section 12(1)(a)(i) of the Restitution Act, Ms Grantham posits that the true value of the Land is the amount which the property would have realised if sold on the date of the notice in the open market by a willing seller, herself, to a willing buyer.

Market value and its weight

12. As already mentioned above, 'market value' serves as a starting point for the determination of compensation because it is quantifiable.[5] Gildenhuys J established a two-pronged method:[6]

12.1. First, the market value of the affected land; and

12.2. Second, after deciding the market value, the remaining factors would be applicable.

13. Thus, market value would serve as the starting point for the determination of compensation, which would then be adjusted either upward or downward depending upon the application of

[5] *Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) ("***Ash***").
[6] This two-step approach has received endorsement. The Constitutional Court in *Du Toit v Minister of Transport* 2006 (1) SA 297, para 25-28, adopted the method. In *Khumalo and Kookfontein and Baphiring Community v Uys and Others* 2007 (5) SA 585 (LCC) ("***Khumalo***") the Land Claims Court, para 23, also accepted the method. The Supreme Court of Appeal in *Abrams v Allie NO* 2004 (9) BCLR 914 (SCA), at para 15, and in *Helderberg*.

the other factors which would thus strike an equitable balance between the public and private interest.[7] This makes market value pivotal to the determination of compensation.[8]

14. It is important to note that the International Valuation Standards document defines 'market value' as "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in the arms-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."

15. The market value of the Land is R15 791 388 (fifteen million seven hundred and ninety one, three hundred and eighty eight). The Downton Farm's profile is rich and certainly justifies this value as, in addition to the advanced processes in place to develop it, it is located in close proximity to the Mall of Africa, the Buccleuch suburb and the Waterfall Estate – these are highly developed places and, as such, this adds an enormous value to the Land. The First Respondent thus argues that the true value is the base from which to compute a 'just and equitable' compensation.

The method

16. The so-called "comparable sales method" is the appropriate method to determine the value of the property. This method effectively uses the values of properties which share substantially similar attributes to the property in question to arrive at a value. These attributes include the size of the property, the location of the property, and the use of the property. Historical figures, subject to necessary variations, are then taken into consideration and a figure is arrived at.[9]

17. In light of the foregoing, a 97 hectare farm with a high profile (owing to its geographic location, close proximity to many amenities of life, availability of public transport i.e. gautrain and close to main public roads, surrounded by prestigious of high-end value properties) would, market

[7] *Khumalo* (paragraph [52]), citing *Ash* paragraph 34 at 40c-e.
[8] Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5 ed 556.
[9] *Msiza* paragraph 44.2.

research and publicly available statistics show, cost at most R480 000/ha at full production and, at the very least R130 000/ha. This, the First Respondent posits, is further evidence that the value of the Land is the true value as defined above and that any compensation less than the true value, such as the R940 000 (nine hundred and forty thousand) offered by the Department, smacks of totalitarianism.

Factors to consider

18. *Current use of the property*

18.1. Whilst Ms Grantham concedes that the Constitution expressly refers to the "*current use of the property*", and that this has to be distinguished not only from the historical use of the property, but also from the future use of the property, the Constitution (and indeed, the Legislature) could not have been intended to exclude developments that are well underway or at a very advanced stage such that they could not be ignored for purposes of computing the value of the property – the First Respondent posits that this is just and equitable and goes beyond mere speculation of value associated with any 'future use' or 'potential development' in the strict sense. Therefore, having regard to this and the fact that the Land is almost a full scale commercial area contrary to the Department's submission in this regard, an upward adjustment is just and equitable in the circumstances.

19. *The history of the acquisition and use of the property*

19.1. The 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.[10] The First Respondent submits that she has no benefit of the intimate knowledge of the full historical context of the Land, but does know that her family, the Granthams, acquired the land lawfully from the government.

[10] *Msiza* paragraph 53.

19.2. In addition, as already stated above, the peculiar circumstances of the case justify a proper consideration of the processes already underway to develop the Land significantly. As such, to consider strictly that the Land "…*is still marked as agricultural land*…" would be to elevate form over substance.

20. *The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property*

20.1. As in *Khumalo*,[11] this factor is not relevant in the present circumstances. This factor will only be relevant in cases where the owner's acquisition of the property and capital improvement of the property was made with the assistance of direct subsidies of the apartheid state. This factor was included in section 25(3) of the Constitution to ensure that the State does not compensate an owner for improvements made to the property with apartheid state subsidies.[12] The First Respondent submits that this does not apply in the present case.

21. *The purpose of the expropriation*

21.1. Whilst the First Respondent concedes that the purpose of the expropriation should be given due weight, it ought not detract the duty of the Department to give a just and equitable compensation to the affected as contemplated by the Constitution.

Personal circumstances

22. It should be emphasised that the Constitution requires compensation to be just and equitable and to reflect an equitable balance between the public interest and the interests of those affected by the expropriation. By making specific reference to the "interests" of those affected, the First Respondent submits that this Honourable Court is not confined to factors pertaining

[11] At paragraph 93.
[12] See P J Badenhorst "*Compensation for Purposes of the Property Clause in the New South African Constitution*" (1998) 31 De Jure 251,262; A J van der Walt Constitutional Property Law (2005) 276; M Everingham & C Janneke "*Land Restitution and Democratic Citizenship in South Africa*" (2006) 32 Journal of Southern African Studies 545, 554; A Claasens "*Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation*" (1993) 9 SAJHR 422, 424.

to the Land in adjudicating this matter. The First Respondent respectfully submits that this Honourable Court should also take into account her circumstances. Having said this, Ms Grantham's entire life and funds have been invested in the Land. In addition, Ms Grantham has never had a career and in fact, the development of the Land was motivated primarily by the need to have a means of living and derive value therefrom. Thus, it is true that turning a blind eye on these aspects would do injustice to the provision enshrined in section 25(3) of the Constitution.

***Pointe Gourde* Principle**

23. The First Respondent notes that the *Pointe Gourde* principle[13] does not apply in this matter. The essence of this principle, as echoed by section 12(5)(f) of the Expropriation Act, is that any enhancement or depreciation in the value of property either before or after expropriation which may stem from the purpose for which it is being expropriated, or which is a consequence of any act which the state may perform or already has performed or intends to perform in connection with such purpose, must not be taken into account in determining compensation.

24. The foregoing principle thus requires a *causal nexus* between the purpose of the expropriation and any appreciation or depreciation in the value of the property. The First Respondent submits that such *causal nexus* does not exist in this matter as there has been no depreciation or appreciation in the value of the Land as a result of the purpose of the expropriation.

25. **RELIEF**

25.1. Ms Grantham seeks an order directing the Department to pay the true value of the Land, being the amount of R15 791 388 (fifteen million seven hundred and ninety one

[13] This principle stems from the Privy Council case, *Pointe Gourde Quarrying and Transport Co Ltd v Sub-intendent of Crown Lands* [1947] AC 565.

and three hundred and eighty eight rands) which is just and equitable in terms of the Constitution.

25.2. In the alternative, Ms Grantham seeks an order directing the Department to pay an amount of not less than R10 000 000 (ten million) for the Land.

SPHESIHLE NXUMALO SC

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08 December 2017

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