

IN THE **SABWIL HUMAN RIGHTS COURT**

THULAMELA CHAMBERS, SANDTON

Case no: 1312/2017

In the matter between:

BAKWENA BA MARE

Applicant

and

GRANTHAM, MARY

1st Respondent

**DIRECTOR-GENERAL- DEPARTMENT OF RURAL
AND LAND REFORM**

2nd Respondent

MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM

3rd Respondent

FIRST RESPONDENT'S FILING SHEET

The following document is hereby filed:

Attached hereto is the respondent's Heads of Argument, presented for filing by

COUNSEL FOR THE FIRST RESPONDENT:

Mr L. Siphuma (SC)

Ms D. Modise (Junior Counsel)

Dated at Johannesburg 8th December 2017

TO: THE REGISTRAR
HUMAN RIGHTS COURT
THULAMELA CHAMBERS, SANDTON

AND TO: THE PRESIDING OFFICERS OF THE ABOVEMENTIONED HONOURABLE
COURT, JOHANNESBURG

AND TO: COUNSEL FOR THE APPLICANT

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FIRST RESPONDENT'S HEADS OF ARGUMENT

1. INTRODUCTION

1.1 The question presented before this court, concerns a determination of just and equitable compensation, in terms of section 25 of the constitution that is due to the first respondent. The applicant successfully applied for restitution of land in terms of the restitution of land rights Act concerning a portion of land privately-owned. The Downton Farm, a 97 hectares farm bordering Buccleuch and across the highway from the Waterfall Estate and the Mall of Africa.

1.2 SUMMARY OF THE FACTS

Ms Grantham, the first respondent is a 50-year-old widow, the last surviving spouse of Earl Grantham. She inherited the Downton Farm from him. The farm is Ms Grantham's only asset. After being widowed at the age of thirty she moved back on the farm. She is currently the owner and under the employ of the Downton Farm.

1.3 SUMMARY OF ARGUMENT

Ms Grantham contends that the calculation of R940 000.00 fails to take into consideration the current process underway to rezone the land as commercial property and plans to develop it properly. She states that the true value of the land is R15 791 388.00 and is prepared to accept no less than R10 000 000.00 for the land. The Department insists that the proper calculation of the land must be based on its current use and Ms Grantham is not in agreement with this. Ms Grantham holds the contention that process for rezoning and developing the property has commenced as many of the permits have already been filed and are awaiting approval. Another matter of concern is that a special purpose vehicle which the Downton Development Corporation has taken a loan to purchase, Ms Grantham stands surety for the loans.

1.4 LIST OF ABBREVIATIONS

i.	SABWiL Human Rights Court	- SHRC
ii.	Downton farm	- DF
iii.	Downton Development Corporation	- DDC
iv.	Department of Rural and Land Reform	- DRLR
v.	Bakwena Ba Mare	- BBM
vi.	Restitution of Land Rights Act	- RLRA
vii.	Land Claims Court	- LCC

2. Pleadings

- 2.1 The first respondent pleads that when the court makes a determination which is just and equitable takes into account the spirit, purport and objects of the Constitution and sections 25(2) and (3) thereof.
- 2.2 We plead that the court applies itself to the matter and does not confine itself to factors pertaining to the land in making a determination on the appropriate compensation payable to the owner of the land.
- 2.3 We plead with the court to find the application of the *Pointe Gourde Principle* inapplicable.
- 2.4 We plead that the court takes into consideration the current process underway to rezone the land as commercial property and the plans underway to develop it when finding an appropriate amount to compensate the first respondent.

3. Constitutional framework

- 3.1 The dispute before this Court satisfies the requirements for an expropriation as laid out in the Constitution. Section 25(2) of the Constitution sets out three criteria for an expropriation: namely that it must be (1) carried out in terms of a law of general application; (2) that it must be in the public interest or for a public purpose; and (3) that just and equitable compensation be provided.
- 3.2 Since the requirement for an expropriation is found in sections 25(2) and (3) of the Constitution. Read together, these sections require that the time and manner of payment of compensation must be just and equitable, reflecting “an equitable balance between the public interest and the interests of those affected”.
- 3.3 The biggest Question before the court is the determination of what is just and equitable compensation to the first respondent. Section 25(3) of the Constitution provides 5 factors concerning the amount of compensation and the time and manner of payment which just and equitable, reflecting an equitable balance between the public interests and interests of those affected, and 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 expropriation¹
- 3.4 The five factors specifically listed in the Constitution can assist the court in arriving at a conclusion but they are by no means conclusive.
- 3.5 The word “including” indicates that the list which follows may be used in arriving at a just and equitable amount as long as they are relevant given the circumstances.
- 3.6 It is therefore our submission that there are more relevant factors that the court ought to consider in this regard.
- 3.7 The respondent stands surety for DDC in pursuit of the developments that are underway.
- 3.8 The respondent is entirely dependent on DF as she is under the employ of DF and with DF being her only asset. The net effect would be that her means of survival and her entire net worth would be eliminated. This is because she would remain liable as surety for the debts of the Downton Development Corporation, which would draw almost all of the compensation awarded by the state
- 3.9 Overlooking these significant factors would be a grave injustice to the first respondent. The court ought not to confine itself only to factors provided in the constitution but look further into these circumstances that .

¹ Section 25(3) Constitution.

4. Application of section 25(3)

4.1 The current use of the property

The first respondent and her family have used the affected land for agricultural purposes. The Department alleges that at present the land is zoned as agricultural land and is prepared to pay an amount according to the only current use of the land by an amount of R940 000.00. MS Grantham puts that this calculation fails to take into consideration the current process underway to rezone the land as commercial property and the plans to develop it accordingly. We respectively put it before the court, which has the powers to determine an appropriate amount, which is just and equitable to take into account the current process which is underway to rezone the land as commercial property and also all the plans to develop it accordingly.

4.2 The history of the acquisition and use of the property

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. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. The Grantham family first acquired the land in 1920. a history of the manner of acquisition by the first respondent, Mary Grantham, as the last surviving daughter of Earl Grantham, it is quite clear that she inherited the Downton Farm from her father. Many years ago, the first respondent after losing her husband whom she fully depended on at the age of thirty she moved back home with her father and began to work together with him on the farm. Gradually she took over the entire operation at the farm. Mr Grantham, while catering for his other two surviving daughters, made a specific provision in his will that the farm and all its assets be inherited by Mary Grantham alone.

4.3 The Market value of the property

This is one of the considerations to be borne in mind when a Court assesses just and equitable compensation. It is no doubt that the Department insists that the proper calculation of the land must be based on its current use. Based on the current use it is marked as agricultural land, and has been valued by the City of Johannesburg at R940 000.00 for which the department is standing to that amount for compensation. We do not dispute on that but we say only if the affected land is not under any process to rezone it then that would be the correct way to calculate its market value. In the case before the court, this is in its true sense an incorrect procedure to calculate the said land. We respectively submit that the value of the property should be looked at based on its current use and the future use especially as their steps taken by the owner who is to be compensated for upgrading or rezoning such land. In this case taking into account the developments to be on its way to rezone the land an upward adjustment to the price the department is willing to pay is what our submissions brings to an end. The true value of the land is therefore R15 791 388.00, this is according to the valuer's called upon by the first respondent who examined the land taking into account the process to rezone it. The amount so willing to be paid by the department would put her under injustice as she would remain liable as surety for the debts of the Downton Development Corporation, which would draw almost all of the compensation awarded by the state. On the other hand, the Community would benefit from the award of land that is in prime position for future development and, if properly developed, in less than a decade shall be worth at least half a billion (R500 000 000.00) Rand

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

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 stat. 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 property with apartheid state subsidies.

4.5 The purpose of the expropriation

The central principle of section 25(3) is that compensation must reflect an equitable balance between the public interest and the interests of those affected. This is established by considering each of the factors in turn. Section 25(3)(e) makes it clear that the purpose of the expropriation must be considered when determining the amount of compensation. The most practical and compelling interpretation is that when factor (e) is read in conjunction with section 25(7) of the Constitution, which directs the state to promote land restitution on compensation, this would support the interpretation that compensation must be just and equitable which will mean that it will have to take into account the development underway. Coming to the Expropriation Act, 1975. In **Du Toit v Minister of Transport 2006 (1) SA 297 (CC)** the Constitutional Court had to consider the question whether the Expropriation Act was still valid in light of the new principles for just and equitable compensation set out in section 25(3) of the Constitution. Mokgoro J writing for the majority found that the “construction of the relevant provisions of the Expropriation Act and section 25(3) is different but does not give rise to inconsistency”. While noting that it would have been preferable for the legislature to have brought the Expropriation Act in line with the Constitution. To this end, Mokgoro J held that a Court may first determine the market value of the affected land then balances this amount against the remaining factors contained in section 25(3) of the Constitution.

5. Compensation

5.1 The compensation formula requires compensation to be just and equitable in its amount, timing and in the manner of payment. The formula was considered in the matter Former **Highlands Residents in re Ash v Department of Land Affairs**.²

5.2 In **Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) [2012] ZALCC 7 (19 April 2012)** Compensation, to be just and equitable, must recompense.³

5.3 The word "compensation", as stated by Southwood (*The Compulsory Acquisition of Rights, 25*) "has a strong connotation of equality between what is given and what was lost." Harms ADP held in **Haakdoornbult Boerdery CC and Others v Mpheia and Others 2007 (5) SA 596 (SCA), par [48], at 610I-611A:**

*"The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation."*⁴

² Highland Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) [2012] ZALCC 7s Residents in re Ash v Department of Land Affairs.

³ Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009)

⁴ Haakdoornbult Boerdery CC and Others v Mpheia and Others 2007 (5) SA 596 (SCA), par [48],

5.4 The purpose of compensation is to place in the hands of the expropriated owner the full money equivalent of the expropriated property. See the Australian High Court decision of *Nelungaioo Pty Ltd v Commonwealth* [1947] HCA 58; (1948) 75 CLR 495, where it was held (at 571):

*"Compensation prima facie means recompense for loss, and where an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him."*⁵

5.5 In the *British decision of Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated)*, [1970] AC 874, Lord Morris of Borth-Y-Gest said (at 904): "The word 'compensation' would be a mockery if what was paid was something that did not compensate.". The above *dictum* was quoted with approval by Le Grange J in *Sandton Town Council v Erf 89 Sandown Extention 2 (Pty) Ltd* 1986 (4) SA 576 (W) at 579I.

6. Just and equitable compensation

6.1 The five factors specifically listed in the Constitution can assist the court in arriving at a conclusion but they are by no means conclusive.

6.2 The word "including" indicates that the list which follows may be used in arriving at a just and equitable amount as long as they are relevant given the circumstances.

6.3 Balancing the rights and interests of affected parties is by its very nature a normative exercise that requires value judgement. It is thus appropriate that the constitution has entrusted the courts with this function in the event that the parties cannot reach an agreement on their own.

6.4 The land Claims Court pointed out that, apart from part (d) dealing with the extent of state investment and subsidy, market value is the only factor under section 25(3) that is objectively quantifiable. This has resulted in making market value pivotal to the determination of compensation.

6.5 Currie De Waal "once the market value has been determined, the court can then attempt to strike an equitable balance between public and public interests⁶. The interests of the expropriate may for example, lift the compensation to above market value. Similarly the public interest may reduce the compensation to an amount that is less than market value.⁷

6.6 This is affirmed In the case *Khumalo v Potgieter* where the court held "the equitable balance required by the Constitution for the determination of just and equitable compensation will in most

⁵ *Nelungaioo Pty Ltd v Commonwealth* [1947] HCA 58; (1948) 75 CLR 495

⁶ Currie De Waal

⁷ Highlands. [34]

cases best be achieved by first determining the market value of the property thereafter subtracting from or adding to the amount of market value, as other relevant circumstances may require”.⁸

7. Pointe Gourde

7. 1 There are two primary purposes of the valuation. Firstly, it is primarily to ensure that sellers are not overpaid for their land, and that state resources deployed on behalf of beneficiaries are used efficiently. Secondly, it is to determine an amount of compensation to the owner that is just and equitable⁹ according to the provisions of the Constitution.
7. 2 This principle is incorporated in S12(5)(f) of the Expropriation Act 63 of 1975⁹: ‘[in calculating market value] any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or in connection with such purpose shall not be taken into account’.¹⁰
7. 3 Compensation for expropriation is by virtue of the provisions of s 25(2) and (3) of the Bill of Rights a constitutional issue. This means that the compensation award has to fulfil the requirements of the Bill of Rights, more in particular the amount of compensation must be ‘just and equitable, reflecting an equitable balance between the public interest and the interests of those affected’ having regard to ‘all relevant circumstances’ of which the market value of the property is listed as but one of five.
7. 4 The problem is, however, that apart from state investment, the market value of the property is the only factor listed in s 25(3) that is capable of quantification.¹¹ As Currie and de Waal point out.¹²
7. 5 In *Stebbing v The Metropolitan Board of Works (1870) LR 6 QB 37, 42* Cockburn CJ said: ‘When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it’.¹³
7. 6 In answering the question asked by the court regarding the Point Gourde principle, the respondent refers this honourable court to the case of Khumalo, which it was held that the principle should not be applied in section 25(3) as a whole. When regard is had to the origins of the Point Gourde principle, it is clear that the principle was developed in a jurisdiction where the market value was the only applicable tool for determination of compensation.
7. 7 We contend that the status quo cannot be maintained in casu as the first respondent has stood surety for the DDC. The state would be benefit unduly if they were to under compensate the respondent considering that she still has an obligation to pay the debt payable.

⁸ Khumalo v Potgieter

⁹ S12(5)(f) of the Expropriation Act 63 of 1975.

¹⁰ Pointe Gourde Quarrying & Transport Co Ltd v Sub intended of Crown Lands (Trinidad) [1947] AC 565 (PC).

¹¹ Former Highlands Residents concerning the Area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria: In re Sonny and others v Department of Land Affairs [2000] 1 All SA 157 (LCC) per Gildenhuys J.

¹² Currie De Waal pg 566.

¹³ Stebbing v The Metropolitan Board of Works (1870) LR 6 QB 37, 42

- 7.8 It is submitted that the respondents have developed and still continue to develop the land as it is currently being rezoned as commercial property. The current market value of the property
- 7.9 The farm into commercial property was intended to provide for her retirement and to ensure that she had sufficient means to live until her death. She argues that a failure to take her personal circumstances into account results in compensation that is not just and equitable.
- 7.10 In *Highlands*, having established the market value, the court then considered whether it should be adjusted upwards or downwards in the determination of ‘just and equitable compensation’. This required evidence relating to the interests of the affected individuals and the public interest¹⁴.
- 7.11 This was further affirmed by the apex court when it held “Market value is not a sufficient apparatus to measure the value of the property”, the Constitutional court gave its interpretation of section 25(3) in *Du Toit v Minister of Transport*.¹⁵ The court found that the market value should be used as a point of departure, after which amounts that are fair and equitable could possibly be deducted.
- 7.12 The respondents therefore submit that as in the Msiza case, the Pointe Gourde principle is only applicable to market value factor, and is not entirely consistent with the property clause. Therefore, in the facts before us the principle would not be suitable since we are looking on section 25 as a whole and not only on the market value basis.

8. Market Value

It is common cause that the DF is currently in the process of being developed and rezoned as commercial land. Based on the current use it is marked as agricultural land, and has been valued by the City of Johannesburg at R940 000.00.

9. Any other relevant factors

9.1. Msiza case

The facts of Msiza case are quite different to the facts before this court in that on Msiza case there was no any process to develop or rezone the land and to the facts before the court now there is a process underway, so there is basically no coherent of facts between the two cases. This means that the Msiza case does not apply to the facts before court.

9.2. The area in which they reside is nearby the Mall of Africa- this is a good reflection the public interest as it has an effect on the increase of the value of their property. Most notably, the estimated market value may reflect aspects of the property that truly enhance its value, but which the DLA would not necessarily wish to assist people to purchase.¹⁶

¹⁴ Highlands [68]

¹⁵ Du Toit v Minister of Transport.

¹⁶ DLA Handbook on Property valuation [10].

International Instrument- The African Charter

9.3 African Charter on Human and Peoples Rights- Article 14 provides “*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*”.

9.3.1. The African Charter is consistent with South African Jurisprudence in this regard.

9.3.2. The respondent submits that they are in no way encroaching upon the interests of public need nor in the general interest of the community. To the contrary, they are contributing effectively to the interests of the community as this rezoning will have a positive effect on the value of property of the community as a result of it being classified commercial land.

10. CONCLUSION

DETERMINING JUST AND EQUITABLE COMPENSATION

10.1. The department indicated that it was willing to settle the claim at the market value, which such value is calculated according to the present use of the land – the agricultural use – as opposed to the potential development of the property – for which is already on its way.

10.2. I am not satisfied that the market value of the land, as agricultural, is just and equitable and reflects an equitable balance between the public interest and the interest of those affected by the expropriation. I have concluded that the amount must be calculated taking into account the current process to rezone the land.

10.3. The reasons set by the respondents are in summary the following:

- a. **First**, there current value of land or property as valued by city of Johannesburg valuers did not take into account the process underway to rezone it, which has already been filed, and it is on its way.
- b. **Second**, the landowners have made significant investments in the land by planning to take loans to help it ease the process for rezoning the land and paying surety for the process too.
- c. **Third**, the use of the land has not changed since it was acquired but it is about to change so soon by the current process underway.
- d. **Fourth**, the first respondent was totally dependent on her husband until his death, and thereafter on her father and the Downton Farm. The plan to develop the farm into commercial property was intended to provide for her retirement and to ensure that she had sufficient means to live until her death; therefore, this must be taken into account.

We have submitted above that the amount to be compensated as based only on the current use will fail to be just and equitable.

It is determined that the correct amount which would be just and equitable is anything not less than R10 000 000.00 for the land.

11. Prayers:

The respondent's hereby request that the applicant's submissions be dismissed and we pray that the court grant an order in the following terms:

- 11.1 The SHRC in making its determination is not confined to factors pertaining to the land.
- 11.2 Make an order declaring that the pointe gourde principle does not apply in this matter.
- 11.3 The SHRC declare that land reform process sought by the respondent is sustainable and feasible as the compensation sought by the respondent [of 15 000 000 and no less than 10 000 000] is just and equitable.
- 11.4 Alternatively, we pray that actual restitution be dismissed and the applicant be granted equitable redress in the form and amount which the court deems appropriate.

Costs: we pray that costs of two counsel on be awarded on a party-to-party scale.

THE RESPONDENT THEREFORE PRAYS THAT THE COURT GRANT AN ORDER IN THE FOLLOWING TERMS:

Signed at JOHANNESBURG on this the 8th day of December 2017.

Counsel for the first Respondent:

Mr Lutendo Siphuma (SC)

L. Siphuma

Ms Dineo. M Modise (Junior counsel)

D. Modise

BIBLIOGRAPHY
RESPONDENTS AUTHORITIES

A. The Constitution

- i. The Constitution of the Republic of South Africa, 1996.

B. International Instruments

- i. African Charter on Human and Peoples Rights- Article 14 The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

C. South African Legislation

- ii. Restitution of Land Rights Act 22 of 1994.
- iii. Property Valuation Act
- iv. Expropriation Act

D. South African Case Law

- 1) Uys & another v Msiza & others (1222/2016) [2017] ZASCA 130
- 2) Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) [2012] ZALCC 7 (19 April 2012)
- 3) Khumao
- 4) Ash v Department of Land Affairs
- 5) Highlands
- 6) Nkanamazi Municipality v Ncname of Lugediane community and others
- 7) Haakdoornbult Boerdery CC and Others v Mpheia and Others 2007 (5) SA 596 (SCA)
- 8) Nelungaioo Pty Ltd v Commonwealth [1947] HCA 58; (1948) 75 CLR 495.
- 9) Sandton Town Council v Erf 89 Sandown Extention 2 (Pty) Ltd 1986 (4) SA 576.
- 10) Du Toit v Minister of Transport

E. Foreign Case Law

- 1) Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated), [1970] AC 874.

F. Textbooks

1. Land Reform- Juta- J M Pienaar
2. Fundamental principles for Civil Procedure
3. The Bill of Rights Handbook
Iain Currie and Johan De Waal
Sixth edition

G. Journal articles

Department of Land Affairs (DLA) handbook on property valuation.