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 **THIRD RESPONDENT**
AND LAND REFORM

SECOND RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

0. In limine MARY GRANTHAM ("**the First Respondent**") as against the second (2nd) respondent - seeks to have the court award in her favour compensation amounting to R 15 791 388.00 alternatively an amount not less than R10 000 000.00 for land expropriated in favour of BAKWENA BA MARE ("**the Applicants**") in this matter. The Director-General, Department of Rural and Land Reform ("**the Second Respondent**")/(**"the State"**) avers that the appropriate amount payable as per the valuation by the City of Johannesburg for compensation resultant of the award of expropriation is R940 000.00.

ARGUMENTS IN GENERAL

1. The first and second respondents have respectively identified the following issues as pertinent in determining just and equitable compensation in this matter:

    - The correct manner of valuation of the affected land.
    - The weight that must attach to market value as against other relevant factors.
      Proper starting point for the compensation analysis.
    - Whether the SHRC is confined to factors pertaining to the land in making a determination on the appropriate amount of compensation, or may it (and should it) consider the circumstances of the owner of the land and;
    - Any other relevant criteria that the SHRC must consider including whether the application of the Pointe Gourde principle applies

THE CORRECT MANNER OF VALUATION

2. For compensation to be payable there must be an act of expropriation defined as in *Harksen v Lane NO*[1] to mean "the compulsory acquisition of rights in property by a public authority", and satisfaction of the criteria set out in section 25 of the Constitution of the Republic of South Africa, 1996 (**"the Constitution"**). Section 25(2) reads as follows:

    (2) Property may only be expropriated in terms of law of general application -

    a) For a public purpose or in the interest of the public.

    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 law of general application implies that the law must apply generally and not against a specific person or a group of people. The first requirement is thus satisfied as the law applies to all property owners[2]. Regarding the second requirement, it is common cause that the award of the property affected in favour of **"the Applicants"** was carried out by "**the State**" therefore meeting the definition in *Harksen*. The award further satisfies another criteria set out in section 25(2) of **"the Constitution"**

[1] 1998 (1) SA 300 (CC)

[2] Msiza v Director-General, Department of Rural Development and Land Reform and Others (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016)

being that the deprivation must serve the public purpose of returning property to a community which was dispossessed of the said property after 19 June 1913 as a result of past racially discriminatory laws or practices[3]. Public interest was added in the Constitution as a requirement alongside public purpose, and qualified in section 25(4) to ensure that land reform is included. This means that expropriation for the benefit of an individual for land reform is permissible. This court therefore bears the task of satisfying the remaining criteria of just and equitable compensation. Section 25(2)(b) sets out that compensation is due once property is expropriated as in the matter before the court. The formula to be followed when determining compensation is provided for by section 25(3).

4. The court in *Msiza v Director-General, Department of Rural Development and Land Reform and Others*[4] *(***"Msiza"**) held that there were many quantifiable points to commence from for purposes of determining just and equitable compensation for expropriated property as defined in section 25(3) of **"the Constitution"**. We submit that the valuation of the property by the City of Johannesburg should be accepted by the court as it was seen through by such experts as envisaged In *City of Johannesburg Metropolitan Municipality v The Chairman of the Valuation Appeal Board of the City of Johannesburg*[5]. The court in ***"Msiza"*** noted that section 25 of **"the Constitution"** gives discretion to courts where a dispute arises on what amount of compensation qualifies as just and equitable. In terms of section 25(8) read with section 25(3)(e), such discretion allows for the court to adjust the amount up or down. In this particular case the court adjusted the amount down, at para [80].

5. It is clear from the facts that the developments and rezoning of the property came to fruition after it was clear that the property would no longer belong to "**the first respondent"**. We submit that the significant personal investment amounting to R900 000.00 made by the "**the first respondent**" was made in bad faith with the intention of ear-making the property to increase the value thereof payable by "**the State"** for expropriating such property. Whatever the value of the property could be in future should not be considered, if the court were to take that into consideration, the same would then have to be effected retrospectively where **"the Applicant"** is concerned in that past benefits that would have accrued to "**the Applicants**" would then also have to be considered.

[3] Preamble of the Restitution of Land Rights Act 22 of 1994
[4] (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016)
[5] (282/2013) [2014] ZASCA 5 (12 March 2014. The court mentioned that valuation requires professional experience to reach logical deductions, it helps recognize the element most likely to influence intending purchasers.
The court further stated that valuation is not an exact science, market value of property can only be estimated and precisely determine…in monetary terms.

6. As with future benefits, past benefits cannot be distinctly quantified, only speculated upon. An award of that nature would not only allow for persons to claim benefits that do not exist, but it would to a large extent undermine the weight of all rights. In *S v Masiya*[6] the court held that persons could only be punished for existing crimes, similarly we submit that persons should only be able to claim existing rights. As expressed in **"*Msiza*"[7]**, the court should caution against further benefiting persons who were benefited by the laws of the Apartheid regime by allowing them to gain profit through the process of expropriation. Such would undermine land reform enshrined in section 25 of **"the Constitution"**.

7. It is for those reasons that we submit that the correct valuation of the property should be its current agricultural use for which R940 000 is payable.

THE WEIGHT THAT MUST BE ATTACHED TO MARKET VALUE

8. The factors to be considered by courts when reaching just and equitable compensation are set out in section 25(3) of "**the Constitution**".

   The section reads as follows:

> The amount of the compensation and the time and manner of the 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 use of the property.
> (b) The history of the acquisition.
> (c) The market value of the acquisition.
> (d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement; and
> (e) The purpose of the expropriation.

9. In **"*Msiza*",[8]** the court held that market value is not the basis for determination of compensation under section 25 of "**the Constitution"** where property or land was acquired in a compulsory fashion. The court held that the point of departure was justice and equity, and that market value was a consideration to

[6] 2007 (2) SACR 435 (CC)
[7] At para [58]
[8] AT PARA 29.

be borne in mind when determining just and equitable compensation. The court further held that the five factors listed in "**the Constitution**" should not be interpreted in any order of hierarchy. *In Former Highlands Residents, in re: Ash v Department of Land Affairs*[9] the court outlined market value along with the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property as the only factors which lend themselves to easy quantification in monetary terms. The court held that factors in **"the Constitution"** that were quantifiable in monetary terms were easier to use as a starting point, but emphasized that this was not the set starting point envisaged in "**the Constitution**" or one favoured by the courts.

10. The market value of the property plays a central role when calculating compensation in terms of section 12 of the Expropriation Act 68 of 1975 ("**the Act**"). Section 12(1) sets out that compensation should be calculated through the determination of the value that property could attract in the open market. "**The Act**" does not specifically require that the amount of compensation meet the peremptory standards set out in "**the Constitution**". Section 12(1) confines the compensation amount to either actual financial loss, when what is expropriated is a right, or to the aggregate of market value when tangible property is expropriated. However, in terms of section 25(3)(c) of "**the Constitution**", the market value of the property is only regarded as one of the factors which must be taken into account but not the main consideration. In ***"Msiza"*** the court held that market value was not more preferred than the other factors, but rather stressed that due consideration must be given to purpose of expropriation.

11. In *Uys N.O and Another v Msiza and Others*[10], the court held that the market value of the property is a starting point for the assessment of what constitutes just and equitable compensation thereafter other factors are considered to arrive at a decision aligned with **"the Constitution"**. Until recently in the ***"Msiza"*** case the courts where following the two-step approach which was formulated in case of *Highlands*.[11] The two-step approach provides that when calculating compensation, the courts should first determine the market value thereafter based, on the list in section 25(3) adjust the amount upwards or downwards. This approach was affirmed by the Constitutional Court in *Du Toit v Minister of Transport*[12], the court however restricted the influence of other factors by confirming that one should proceed by applying the market value thereafter adjusting that amount to fit the Constitutional list.

[9] [2000] 2 All SA 26 (LCC).
[10] (1222/2016) [2017] ZASCA 130 (29 SEPTEMBER 2017) at para [12].
[11] At para [34]-[35].
[12] *2006 (1*) SA 297 (CC)

12. The court in *City of Cape Town v Helderberg Pack Development (PTY) LTD*[13] emphasized that a balance must be struck between private and public interests as compensation for expropriation was a constitutional matter. It should therefore follow that market value cannot be regarded to have significant effect with regard to just and equitable compensation, as it is not expected to unduly enrich parties to expropriation, but rather to restore the status quo amongst them.

13. It is with regard to the above-mentioned that we submit that market value does not carry more weight than the other factors listed in section 25(3) of **"the Constitution"**

A PROPOSED STARTING POINT FOR COMPENSATION ANALYSIS

14. In *Du Toit*[14] the court stated that it is the Constitution not legislation that provides the principle that are applicable when property is expropriated. This was confirmed by the court in ***"Msiza"*** where it was held that compensation must be 'as prescribed by **"the Constitution"**'. The court further stated in *Du Toit* that these principles must be adhered by the courts and they must strike a balance between the listed factors[15] and no factor carries more weight than the other.[16]

15. After the determination of whether or not an act of deprivation amounts to an act of expropriation in terms of the definition of expropriation in the *Harksen* case read in conjunction with section 25(2) of **"the Constitution"** the correct starting point would be the list provided by section 25(3).

SHOULD THE COURT TAKE INTO ACCOUNT THE PERSONAL FACTORS OF THE OWNER

16. We invite the court to refer to para [6-8] of "**the Second Respondent's**" heads of argument. We have furnished the court with evidence of "**the First Respondent's**" actions which we submit were launched with an aim to increase the value of the property affected as a result of the expropriation. The possibility of the scheme working to "**the First Respondent's**" disadvantage should not be regarded as a mitigating factor where the court's discretion to adjust the compensation up is concerned. Rather, we humbly

[13] 2007 (1) SA 1 (SCA).
[14] At PARA [31].
[15] At PARA [33].
[16] At PARA [34]

submit that the offer made by "**the Second Respondent**", which is based on the valuation by the City of Johannesburg, be accepted as just and equitable.

17. We further submit that the approach established in *Pienaar v Minister van Landbou*[17], where the court held that market value is an objective concept that should be determined not by looking at the circumstances of the owner but the property itself, be accepted. It is our submission that when the court calculates compensation it should only take into regard the factors listed in terms of section 25(3) of "**the Constitution**", if the court where to depart from these factors and take the owners circumstances into account such conduct will be inconsistent with **"the Constitution"** and therefore in invalid.

18. Furthermore, in ***"Msiza"*** [18] the court held that compensation should be just and equitable. In determining what is just and equitable a balance must be struck between the private land owner and those of the public. With regard to section 25(3)(d) of **"the Constitution"**. It is also our submission that if the court where to accept the "First Respondent" actions as set out in para [6-8] of the Second Respondent heads of argument as personal circumstances would defeat the objectives of compensation which is restorative justice. The personal circumstances listed in paragraph 9 also must not be taken into account by the court as this will be inconsistent with "**the Constitution**" and therefore invalid.

THE POINTE GOURDE PRINCIPLE

19. This principle finds its existence in the case between *Pointe Gourde Quarrying and Transport Co Ltd v Sub-intendent of Crown Lands (Trinidad*)[19]. According to this Principle in the assessment of the market value of land acquired in an expropriation, no regard shall be had to any increase or decrease in value of the land, which is attributable to the scheme underlying the acquisition. The Pointe Gourde principle has been applied and restated in several cases as a yardstick to determine fair market value where an expropriation scheme may influence land values. The principle has found its way into South African law via what is now section 12(5)(f) of the Expropriation Act. Section 12(5)(f) provides as follows:

> "In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely-. . . 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

[17] 1972 (1) SA14(4)
[18] At para [32]
[19] [1947] AC 565 (PC) at para 26.

property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;"

20. In ***"Msiza"***[20] the court held that the Point Gourde Principle is a helpful guide to the fair and objective determination of market value since it precludes the subjectivity of price increases or decreases because of the act of expropriation. According to this principle in the assessment of the market value of land acquired in an expropriation, no regard shall be had to any increase or decrease in value.

21. In *Khumalo v Potgieter*[21] the court applied the Pointe Gourde principle, under this principle, market value at the time of an expropriation must be determined by disregarding any increase or decrease in the market value consequent upon the scheme of expropriation[22]. The court further held that section 25(3) of **"the Constitution"** must be interpreted to include the Point Gourde principle when determining market value, that the section must be interpreted so as to require its application, where appropriate, in the determination of market value. As a result, it will certainly warrantee that the requirement that the amount of compensation reflect an equitable balance between the public interest and the interest of those affected as is stipulated at section 25(3) of **"the Constitution"**.

22. It is therefore our submission that the Principle is applicable only in so far as determining market value.

CONCLUSION

23. Taking into regard the arguments above, it is our submission to the court that the correct approach as to the calculation of compensation is the one established in **"Msiza"** by the Land Claims Court. This court has affirmed the supremacy of **"the Constitution"** by moving away from two-step approach of determining compensation, the market value of the property is no longer the starting point of calculating compensation. The court thus held that the amount of compensation needs to be just and equitable taking all the relevant factors listed in section 25 (3) into account. We therefore apply section 25(3)(a)-(e) to this matter as follows;

    (a) The property in dispute is used for agricultural purpose,

[20] At para 29
[21] (177/99) [2001] ZASCA 41; [2001] 3 ALL SA 216 (A) (26 MARCH 2001)
[22] **"Msiza"**

(b) It is of common cause that the property was acquired by the "**first respondent"** family in 1920, where the community residing was forcibly removed few years earlier

(c) The market value of the property has been discussed in paragraph (8)-(12) s*upra,*

(d) It is our submission that the R900 000 invested by the "First Respondent" into the so-called Downtown Development Corporation (PTY) LTD remains with such **"Corporation"** as no evidence as to the actual improvement of the property has been furnished,

(e) The purpose of the expropriation is quite clear and undisputed by all the parties in this matter.

24. With regard to submissions supra, we put it to the court that R940 000 is the amount that the court should consider for just and equitable compensation as envisaged by "**the Constitution"**.

PRAYER

1. An order rejecting **"the First Respondent's"** request for an amount of R15 791 388.00, alternatively an amount not less than R10 000 000.00 for compensation regarding the expropriation.
2. An order accepting the proposed offer by **"the Second Respondent"** of R940 000.00.
3. Cost of suit.
4. Further and or alternative relief.

DATED AT SANDTON THIS THE 7TH DAY OF DECEMBER 2017

KHOZA MOHANOE & ASSOCIATES

TO: The Clerk

AND TO: The First Respondent