THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 710/2024

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD **APPELLANT**

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LIMITED **CROSS-APPELLANT/ FIRST RESPONDENT**

THE MINISTER OF THE NATIONAL DEPARTMENT OF TRANSPORT **SECOND RESPONDENT**

Neutral citation: *NAD Property Income Fund (Pty) Ltd v The South African National Roads Agency SOC Limited and Another* (710/2024) [2026] ZASCA 42 (1 April 2026)

Coram: UNTERHALTER, BAARTMAN and COPPIN JJA

Heard: 23 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 1 April 2026.

Summary: Expropriation – s 12(1) of the Expropriation Act 63 of 1975 – s 25(3) of the Constitution – just and equitable – compensation payable – true discretion – market value – potential use – actual sales – expert evidence-remittal – costs – s 15(2) of the Expropriation Act.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Diamond AJ, sitting as the court of first instance):

1 The appeal is upheld, with costs, including the costs of two counsel, where so employed;

2 Paragraphs 1 and 2 of the high court's order are set aside;

3 The portion of paragraph 4 of the high court order that requires the first respondent to pay the costs of suit is set aside, the balance of paragraph 4 that orders the first respondent to pay the costs of the trial dates 28 November 2022 – 2 December 2022 on a scale as between attorney and client stands, as does paragraph 3 of the high court order;

4 The case is remitted to the high court for the hearing of further evidence and argument, as the high court further directs;

5 The cross-appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Unterhalter JA (Baartman and Coppin JJA concurring):

Introduction

[1] The Appellant, Nad Property Income Fund (Pty) Ltd (Nad), was the registered owner of Erf 215, Extension 6, Hoedspruit (the property). The first respondent, the South African National Roads Agency Soc Limited (Sanral), requested the second respondent (the Minister) to expropriate a portion of the property. This the Minister did. The date of the expropriation was 25 July 2016. The expropriation was effected in terms of s 41 of the South African National

Roads Agency Limited and National Roads Act 7 of 1998 (the Sanral Act). Nad claimed compensation from Sanral in terms of s 41(5) of the Sanral Act, read with s 12 of the Expropriation Act 63 of 1975 (the Expropriation Act). Nad and Sanral could not agree upon the amount of compensation. Nad brought an action against Sanral in which, after an amendment to its claim, it sought compensation in an amount no less than R16 980 000. Sanral pleaded that it was liable to compensate Nad in an amount of R190 777.40. The case proceeded to trial. On 19 January 2024, the high court handed down its judgment. It awarded Nad compensation in the amount of R933 509,52, interest calculated from 25 July 2016 to the date of payment; and costs, including certain costs to be paid by Sanral on a scale as between attorney and client.

[2] Nad sought leave to appeal the whole of the judgment and order made by the high court. Sanral sought to cross-appeal the costs order. The high court granted Nad and Sanral leave to appeal to this Court.

[3] The high court gave a detailed judgment. The essential reasoning of the high court may be summarised as follows. First, the determination of compensation in terms of the Expropriation Act requires conformity with s 25(3) of the Constitution. The market value of the expropriated property is but one consideration. Ultimately, compensation is determined by what is just and equitable, as prescribed by s 25(3) of the Constitution. That determination is an exercise of judicial discretion, and it constitutes a true discretion. Second, to determine market value, the parties' experts utilised a methodology that made use of comparative sales, on the basis of a 'before and after valuation', that is, before and after the expropriation. Third, the high court rejected the position of Nad's experts that the highest and best use of the property was the development of a community shopping centre. And once that was so, the comparators relied upon by Nad's expert, Mr Parfitt, no longer had relevance because they were predicated upon the use of the property as a community

shopping centre. In consequence, the high court rejected the market valuation proposed by Nad.The high court also declined to adopt the expert opinions proffered by Mr Winckler Snr and Mr Winckler Jnr for Sanral.

[4] Instead, the high court proceeded to determine an amount by recourse to the standard to be found in the proviso in s 12(1) of the Expropriation Act, being a determination 'in any other suitable manner', having considered the factors set out in s 25 *(a)*, *(b)*, *(d)* and *(e)* of the Constitution. The high court proceeded to make a determination in the following way. It took into account that Nad purchased the property in January 2015 for an amount of R7 750 000. That price, allowing for changes in the value of money over time, was then adjusted to an amount of R8 137 500 to reflect the market value of the property as at the date of expropriation, that is, 25 July 2016. It was common ground that the property, without the portion expropriated by Sanral (the remaining property), was sold by Nad on 25 January 2022 for an amount of R14 500 000. I shall refer to this as the ex-post transaction. The purchase price of the ex-post transaction, calculated by Mr Parfitt (and not placed in issue) to reflect the present value as at the date of expropriation was R11 487 966.

[5] This gave rise to a paradox for the high court. The market value of the property before expropriation was less than the market value of the remainder of the property after the expropriation. The high court observed that in consequence the property was worth more after the expropriation than before it. This would indicate that no compensation was due. This, the high court concluded, would be an inequitable result.

[6] To avoid this result, the high court reasoned as follows. Nad should be compensated on the basis of the pro rata amount of the purchase price of the property that represents the value of the asset. The property was purchased by Nad for the amount of R174,82 per square meter. The expropriated portion of the

property is an area of 5101 square meters. The amount of the compensation the high court found to be due was thus R891 756,82. The high court then added a solatium and thus ordered Sanral to pay compensation in the amount of R933 509.52, together with interest calculated from 25 July 2016.

[7] The high court then proceeded to consider the question of costs. It found that Sanral's unsuccessful application to amend its pleading had been a waste of court time. Furthermore, the high court concluded that the conduct of the case by Sanral's erstwhile counsel had led to a protracted trial that was unwarranted. Sanral was ordered to pay the costs occasioned by the application to amend, on the scale as between attorney and client. Sanral was also ordered to pay the costs of suit, and the costs of the six trial days, 28 November 2022 – 2 December 2022, on the scale as between attorney and client.

[8] The following issues consequently arise for determination in the appeal. First, what is the law of application to decide Nad's claim for compensation? Second, on a proper application of the law to the evidence led at trial, did the court below arrive at the correct amount of compensation due to Nad? Third, if not, is this Court in a position to determine the compensation due to Nad? Fourth, if so, what is this amount? Fifth, as to the cross-appeal, we must decide whether there is any basis established to interfere with the costs orders made by the high court. And only if that is so, to consider if any revision is warranted.

The law

[9] Nad's pleaded case for compensation relied upon s 41 of the Sanral Act, read with s 12 of the Expropriation Act. In particular, Nad invoked s 12(1)*(a)*(i) of the Expropriation Act. Its case was thus predicated on the compensatory standard of the Expropriation Act which determines value by reference to a construct of market exchange. I shall refer to this standard as 'the market standard'.

[10] The market standard reflects the pedigree of the Expropriation Act. It is the standard that long prevailed before the Constitution to determine the amount of compensation due to the owners of property who were lawfully expropriated. The Expropriation Act has continued to be of force and effect after the Constitution became the foundation of our legal order. Section 25 of the Constitution provides a regime in terms of which property may be expropriated, and it entrenches the constitutional norm that determines the amount of compensation. That norm is set out in s 25(3) of the Constitution. The amount of compensation and the time and manner of payment must be just and equitable. What is just and equitable must reflect an equitable balance between the public interest and the interests of those effected, having regard to all relevant circumstances, which includes an enumerated list. I shall refer to this as the constitutional compensatory norm. This norm includes the consideration of the market value of the property. But this consideration is but part of a larger, expansive enquiry that must ultimately decide what is just and equitable.

[11] It is plain that s 12(1) of the Expropriation Act, and the market standard it applies, has a poor fit with the constitutional compensatory norm. This constitutional problem was considered by the Constitutional Court in *Du Toit*.[1] It sought to reconcile s 12(1) of the Expropriation Act and s 25(3) of the Constitution. The judgment of Mokgoro J (which enjoyed the support of the majority of the Constitutional Court) adopted what it styled a 'two-stage approach'. On the assumption that there is no inconsistency between s 12(1) of the Expropriation Act and s 25(3) of the Constitution, Mokgoro J held as follows: '. . . consider what compensation is payable under the [Expropriation] Act, which is still valid and then to consider if that amount is just and equitable under s 25(3) of the Constitution'.[2] The minority considered this approach to be incorrect because it 'would continue

[1] *Du Toit v Minister of Transport* [2005] ZACC 9; 2005 (11) BCLR 1053 (CC); 2006 (1) SA 297 (CC).
[2] Ibid para 34.

to privilege market value at the expense of other considerations relevant to justice and equity which are expressly advocated by the Constitution'.[3]

[12] The judgment of the high court does not cite *Du Toit*. Rather, it held that the market value of the expropriated property is '. . . no longer a core consideration. It is but one consideration and the weight that should be attached to it is to be determined in the light of the circumstances of each case and finally in the light of what is 'just and equitable', as is prescribed in s 25(3) of the Constitution'. The high court went on to say that the final determination of compensation, 'takes place by way of discretionary power of the court'. That discretion, the high court found, was 'a true discretion', though 'market value is a valuation and not the exercise of a discretion, but is a valuation based on the facts'.

[13] This is not a correct statement of the law. First, the approach required by the majority's holding in *Du Toit* does not render the market value of the property 'no longer a core consideration'. Indeed, the minority judgment of Langa ACJ (as he then was) in *Du Toit* offered as its principal criticism of the judgment of Mokgoro J that it would privilege market value, and render justice and equity 'a second-level "review" test'. Even if this criticism is a somewhat parsimonious treatment of the two-stage approach adopted by the majority in *Du Toit*, market value sets the presumptive standard against which consistency with justice and equity must then be determined. This approach does not render market value a subordinate consideration. The high court was bound by the holding of the majority in *Du Toit,* as are we, and it failed to state or apply the two-stage relationship between the statutory standard of market value and the constitutional standard of just and equitable compensation.

---

[3] Ibid para 84.

[14] Second, the high court's decision bifurcates the determination of market value and the final determination of compensation that is just and equitable. Market value is said to be based on the facts of the case, whereas what is just and equitable is a determination made by the court on the basis of the exercise of a true discretion. In *Trencon*,[4] the Constitutional Court explained the difference in our law between a true discretion and a discretion 'in the loose sense'. A true discretion is one where the repository of the power enjoys a range of permissible options and the exercise of the power is beyond (in this case) appellate review, if the power is exercised by recourse to one of these options, even though the adoption of a different option would have been preferable.

[15] The proposition that the application of the constitutional compensatory norm is the exercise of a true discretion by the court is an error of no small consequence. The difficulty of applying a legal norm is not a reason to adopt the notion that the courts enjoy a wide discretionary power, being a true discretion, to decide what compensation is just and equitable. For a number of reasons, quite the opposite is true.

[16] First, s 25(3) is not cast as a regime of discretion. It specifies that compensation *must* be just and equitable. Second, s 25(3) requires that a court has regard to circumstances that may be relevant, including an enumerated list of circumstances. These circumstances are matters of fact that a court, where relevant, must determine. They are not discretionary considerations. While findings of fact may give rise to different conclusions, these differences are not matters of discretion, but differences as to what findings the evidence supports. And this is an objective enquiry, not a discretionary exercise of power.

---

[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South African Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 85.

[17] Third, no doubt, the equitable balance demanded by s 25(3) may, in some cases, be difficult to determine. But a matter that is difficult to adjudicate is not to be equated with a discretionary power, characterised as a true discretion. The balancing of interests may give rise to different views as to how the correct balance is to be struck. So too, how the relevant circumstances referenced in s 25(3) provide reasons for deciding what compensation is just and equitable may also require judgments that are difficult to make, and may be contested. The concept of 'just and equitable' references overarching legal values. Even in the domain of compensation for the expropriation of property, these values engage much complexity of history, distributive justice, and constitutionally sanctioned recompense. It is tempting, in the face of this complexity, to retreat into the protective embrace of discretion that confers both freedom and inoculation from intrusive review.

[18] But this is mistaken. We are here concerned with rights under the Bill of Rights. Section 25(3) reflects a constitutional compromise that was strenuously negotiated. That the State may expropriate property for a public purpose or in the public interest is an important competence that the Constitution recognises. But so too is the constitutional regime of compensation to which the state's competence to expropriate is rendered subject. As s 25(2)*(b)* of the Constitution states, absent agreement, compensation must be approved or decided by a court. That approval or decision is not framed as one of discretion. It is a duty that the courts must discharge to ensure that the constitutional regime of compensation is honoured. That is done, in the first place, by a court making the findings of fact required to have regard to all relevant circumstances, including those enumerated in s 25(3). Having done so, and taking account of all relevant circumstances, the court determines compensation as to amount, timing, and the manner of payment. Such compensation, s 25(3) states plainly, *must* be just and equitable. The decision of the court must meet this constitutional standard. It does so by setting out the facts

and reasoning that support its order of just and equitable compensation. Conformity with the constitutional standard under s 25(3) provides no basis to posit that a court is given discretionary latitude to choose from a variety of permissible options and select its option of preference.

[19] This interpretation of s 25(3) is entirely inimical to the investiture of a true discretion in the court to decide upon compensation, and for three principal reasons. First, once compensation is required to meet a defined constitutional standard, the compensation either meets the standard or it does not. Conformity with the standard is not a matter of variable satisfaction. Second, and in consequence, the question of whether a court's decision conforms to the constitutional standard permits of intervention on appeal by recourse to the criterion of correctness, and not under the extremely deferential standard of application to the exercise of a true discretion. Third, as indicated, the court is required to have regard to enumerated circumstances that are relevant to the case. This is a further indication that what is required of the court is an objective determination.

[20] For these reasons I find that the court below was in error as to the law of application to this matter. The implications of this error are considered in what follows.

Market value and just and equitable compensation

[21] Following *Du Toit*, the first step in the analysis is to determine the amount of compensation to be paid in terms of s 12(1) of the Expropriation Act. The high court devoted a considerable part of its reasoning to the market value of the property expropriated. However, because it did not follow the two-step analysis required of it by *Du Toit*, it did not finally arrive at an amount of compensation to be paid in terms of s 12(1). It explained why it did not agree with the expert opinions offered in evidence by the parties. But then went on to decide upon the

compensation to be paid on its construction of what it considered just and equitable. The high court thereby fell into error because it was not at large to come to a discretionary determination of compensation and fail to adhere to the discipline imposed by the holding in *Du Toit*. In particular, the high court was required to determine the amount of compensation to be paid to Nad in terms of s 12(1) of the Expropriation Act. It did not do so.

[22] I turn to consider the determination of the amount of compensation to be paid to Nad in terms of s 12(1) of the Expropriation Act. The essential basis for this determination is set out in s 12(1): it is the amount which the property would have realized if sold on the date of notice of expropriation in the open market by a willing seller to a willing buyer, or under the proviso in s 12(1), if the proviso applies, by recourse to 'any other suitable manner'. One of the issues that was central to the reasoning of the high court, and divides the parties before us, is the potential use to which the property may have been put. In *Port Edward*,[5] this Court explained that a party may contend that a property has a particular potential, that is a use, additional to its current use, 'for which the property is suited and reasonably capable of being put in the future'.[6] The party who relies on potential use must prove the potential exists and that a willing buyer and seller would have taken it into account in fixing the price. The Court further clarified the position as follows: 'Where there are several possibilities, all reasonable, for which the property is suited, the party relying on the potential is entitled to select from amongst them the one which is most advantageous to him as being the "highest and best use" to which the property can be put, provided of course that such use would have occurred to both the notional parties and would have been accommodated by them in their negotiations about the price. But such potentiality must not be inflated; it remains

[5] *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) at 674J-675F.
[6] Ibid at 675A.

a mere potentiality, not a reality'.[7] In other words, the possible future use of the property only has value if the hypothetical buyer would be prepared to pay for that potential in arriving at the price.

[23] Nad's case was that there was a reasonable possibility that the property had the potential to be used as a community shopping centre. This was the opinion of the experts called by Nad at trial, Mr Makkink, a professional town and regional planner, and Mr Parfitt, a professional property valuer. Mr Parfitt took account of what he testified were six comparable sales of community shopping centres. He then used these sales to derive a value of R641,26 per square meter. Applying this rate to the property before the expropriation resulted in a value of R28 414 871.86. Mr Parfitt valued the property after the expropriation to be R11 487 966.00. The difference of value before and after the expropriation is the compensation payable, being an amount of R16 926 905,86. What drives Mr Parfitt's valuation is the potential use of the property as a community shopping centre before the expropriation and the elimination of that potential, according to Mr Parfitt, because the expropriation bisects the property in such a way as to render this use impossible.

[24] Sanral relied upon the opinions of two professional valuers, Mr Winckler Snr and Mr Winckler Jnr. Mr Winckler Jnr testified at the trial. Mr Winckler Jnr's valuation ultimately came down to the following. The property was purchased by Nad in January 2015 for R7 750 000.00. The property was expropriated on 25 July 2016. The property, less the expropriated land, was sold by Nad on 25 January 2022 for R14 5000 000.00. Taking these actual sales, and comparable sales in the vicinity as a check, Mr Winckler Jnr considered R317.00 per square meter to be fair market value. Applying this value to the expropriated portion of the property, being 5101 square meters, the compensation payable is R1 617 017.00. Mr Winckler Jnr did not accept that the potential best use of the property was a

[7] Ibid at 675E-F.

community shopping centre, but rather a retail small business development. And he did not consider that the expropriation compromised the potential use of the property after the expropriation as a small business development. Thus, he was content to rely upon the value derived from the actual sale prices achieved for the property.

[25] The high court declined to adopt either of the valuations presented in evidence by these experts. The high court reasoned thus. Whether, before the expropriation, the property's highest and best potential use was its development as a community shopping centre is determined by answering the following questions: was it physically possible, appropriately justified, legally permissible and financially feasible? First, the high court concluded that under the property's zoning of Business 1, and given the location and size of the property, a community shopping centre was physically possible. Second, the development rights attaching to the property, before the expropriation, made it possible to a develop a community shopping centre. However, at the time that Nad acquired the property, negotiations had already commenced between Sanral and the erstwhile owner as to the possible expropriation of the property by Sanral. A reasonable purchaser of the property, the high court found, would have realised that 'some action from the side of SANRAL to acquire the Expropriated portion, was possible and imminent'. This would have created a legal obstacle to the future development of a community shopping centre because, on Mr Parfitt's analysis, if Sanral proceeded with the expropriation, this would effect a bisection of the property and put paid to such a development. Lastly, the high court found that Nad did not adduce sufficient evidence to show that a community shopping centre was financially viable. The high court thus concluded that the potential use of the property as a community shopping centre was not reasonably possible.

[26] This conclusion had profound consequences for Nad's case. Once the highest and best potential use of the property as a community shopping centre was excluded, the central premise of Mr Parfitt's valuation fell away. The effect of the expropriation was then not to eliminate the potential use of the property as a community shopping centre. And the significant loss of value that Mr Parfitt attributed to such elimination was of no account. Consequently, no point was served by his comparative sales analysis.

[27] Was the high court's conclusion correct? A number of conceptual and factual issues arise. Following *Port Edward*, it is important properly to situate the analysis within the hypothetical negotiation that would have taken place between a willing buyer and seller in respect of the property before its expropriation. The potential use of the property concerns the possible future development of the property and the value that would be placed on such potential use in the hypothetical negotiation. I will call this 'the potential use value'. The potential use value should not be confused with the value the property would have if it was to be developed. Nor should it be confused, relatedly, with the costs that would be incurred to affect the development. It is the present value of the property's potential use that matters.

[28] The potential use value of the property should also recognise that potential use value cannot avoid the consideration of risk. Whether the potential use of a property will be capable of being so used in the future carries uncertainty and risks of different kinds: some known risks, some known unknown risks, and even some unknown unknown risks, to borrow this well-known typology. Risk does not mean that the potential use of the property does not have a value, it means that if risks would have likely figured in the hypothetical negotiation, such risks will be reflected in the price. Indeed, it is precisely because parties to a negotiation have different appetites for risk, and different views of the returns that an asset may yield in the future that a bargain is struck.

[29] Illustrative of the question of risk is the emphasis that the high court placed upon the fact that Nad knew at the time it purchased the property of the possibility that Sanral may require the expropriation of a portion of the property. Nad placed reliance upon *Mooikloof*[8] for the proposition that an owner may continue to develop his property regardless of the fact that a road may one day be proclaimed over the property. And hence, knowledge of the possibility of expropriation does not affect potential use value. The high court distinguished what it took to be the framing of the proposition in *Mooikloof*, being a plan of indeterminate future possibility, and the position in this case, where Sanral had undertaken a traffic study and initiated a process that ultimately resulted in the expropriation.

[30] Both Nad's submission and the stance adopted by the high court, pulling in opposite directions, appear to me incorrect. Sanral had commenced planning the road in 2011/2012, and various negotiations had ensued. The agreement of sale in terms of which Nad acquired the property in 2015 referred to a plan of the State to proclaim a road and a diagram of the portion of the property that Sanral might acquire was given to the seller and made available to Nad. Nad acquired the property subject to this risk. As it turned out, the risk materialised.

[31] This does not mean that the potential use value should be assessed without regard to the risk of expropriation, nor, as the high court would have it, that the risk of expropriation constituted a legal impediment such as to render the development of a community shopping centre impossible. This binary position, in the face of risk, is not consistent with a correct understanding of the legal framework of application to the assessment of potential use value. Prior to the expropriation there was a non-negligible risk that Sanral's plans may be pursued and result in the expropriation that in fact occurred. But of course, Sanral may have ultimately

---

[8] *Mooikloof Estate (Edms) Bpk v Premier, Gauteng* 2000 (3) SA 463 (T) at 490 C-E.

decided not to proceed, or been persuaded of another plan. The risk of expropriation cannot be ignored in the hypothetical negotiation. But nor is the presence of this risk a legal bar to the reasonable possibility of the development of the property as a community shopping centre.

[32] The question is rather how significant was the risk and what effect would it be likely to have on the price. Since the case of Nad is that the significant upside potential use value of the property was that of a community shopping centre, and the road under consideration by Sanral would make this use impossible, the risk of the expropriation going ahead would have a significant impact upon the development potential of the property. The key question is then this: would the risk exclude any price to be paid for the potential use of the property to develop a community shopping centre? Or would the risk be reflected in the price that would be negotiated to take account of this risk in the hypothetical negotiation prior to the expropriation. These questions were not squarely faced.

[33] However, the reasoning of the high court is also incorrect. The high court understood the risk of expropriation to constitute a legal impediment to expropriation. That is not so. Sanral enjoyed the competence to go ahead with the expropriation. But this does not mean that it would do so. It may have been persuaded to adopt a different plan or defer its plans. The competence to do something does not mean that the competence will be exercised. There was a concrete plan in place, and hence a risk, but not a legal *fait accompli*.

[34] The high court also went astray in its consideration of the financial viability of a community shopping centre. The high court found Nad's evidence wanting because there should have been 'some tangible evidence concerning total retail demand . . . how much of that demand is currently satisfied by the current retail facilities in the area . . . one would have expected clear evidence regarding the retail profile of the consumers in the catchment area of the to-be-developed shopping

centre'. This requirement for a feasibility study of current demand for a community shopping centre is misplaced. The issue before the high court was to consider potential use. That does not require evidence that it was financially viable to build a community shopping centre in July 2016. The correct question is whether a hypothetical buyer would have placed a potential use value on the property because it would in the future have the potential to be developed as a community shopping centre. It is the potential for such a development of the property in the future that counts and not whether there is a buyer who would have considered it a viable commercial proposition in 2016. However, that in itself would be a factor that could influence the price in a notional sale.

[35] I have explained that Wincklers' expert valuation proceeded from a premise different to that of Mr Parfitt. They did not accept that the potential use of the property was the development of a community shopping centre. Their opinions emphasised the significance of the purchase by Nad of the property in January 2015, and the fact that it was expropriated on 25 July 2016, some 18 months later. That there was a sale between a willing buyer and a willing seller at a time not far distant from the expropriation is a data point of significance. So too, the fact that the remaining extent of the property, after the expropriation, was sold on 25 January 2022 constitutes another actual sale, and a further data point to be reckoned with. If there are actual sales in the market, rather than constructed sales in a hypothetical negotiation, these are salient data. As the matter was put in *Southern Transvaal Buildings*,[9] a serious *bona fide* offer made by a willing purchaser on the date of expropriation is strong evidence of the value of a property. *A fortiori*, if there is an agreed sale.

[36] Mr Parfitt did not attach significance to the price paid for the property in 2015 because it was acquired with 'all sorts of strings attached'. These included

---

[9] *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956H.

the considerable costs of demolishing a school on the property and relocating it; securing zoning rights; and assuming development risks attaching to the property. As a result, Mr Parfitt disregarded the sale price because 'it was not a clean comparative'.

[37] This position is also untenable. It confuses the incremental costs that would have to be incurred to render the property fit for development, in Mr Parfitt's view, as a community shopping centre, with the potential use value of the property. The costs incurred to realise the development potential of the property is not the same thing as the value that attaches to its potential use. Potential use value determines what value attaches to the property at a point in time in virtue of its potential. It does not determine what value the property would have if that potential were developed. Thus, Mr Parfitt's outright rejection of actual sale prices as an indication of value was incorrect.

[38] The high court, in essence, rejected Mr Parfitt's postulate that the potential use of the property was that of a community shopping centre. It accepted, in consequence, the position of Messrs Winckler that there was no value to be attached to the integrated potential of the property, as that concept is understood in *Ingersoll-Rand*.[10] That is to say, that that the development potential of a property may be adversely effected because the property does not remain an integrated whole. In the present case, the potential to develop the property as a community shopping centre, as Mr Parfitt proposed, depended upon the property not suffering the bisection effected by the expropriation. But once the high court rejected this potential use, the effect of the expropriation was no longer to end the potential use of the property for other kinds of commercial development.

---

[10] *Ingersoll-Rand CO (SA) Ltd v Administrateur Transvaal* 1991(1) SA 321 (T) at 329.

[39] The high court then reasoned that the correct way to value the property before expropriation was to treat the 2015 sale 'as representing the sale of the property'. The purchase price of R7 750 000.00 stood to be adjusted for the time value of money, which is to adjust the value of the property as at the date of expropriation. This, the experts agreed, should be done by multiplying the purchase price by 1,05, with the result that the high court concluded that the market value of the property on the date of expropriation was R8 137 500.00. It was common ground that the expropriated property had no value, since no purchaser would be interested in buying this parcel of land on the open market. This meant that the proviso in s 12(1) was of application. If the expropriated property has no open market value as specified in s 12(1)*(a)*(i), then under the proviso of s 12(1), compensation is determined 'in any other suitable manner'. The high court decided that, having rejected the potential use of the property as an integrated whole, as proposed by Nad, it would then determine the compensation payable for the expropriated portion of the property, and do so in a suitable manner in terms of the proviso in s 12(1) of the Expropriation Act.

[40] The high court however did not then do so. What it then did was to offer a brief consideration of the enumerated circumstances in s 25(3)*(a)-(f)* of the Constitution. And then sought to determine compensation that is just and equitable. What the high court did not do was to complete its analysis of the compensation payable under the s 12(1) of the Expropriation Act, and then proceed to the second stage of evaluation required by *Du Toit*.

[41] Rather, it proceeded to determine just and equitable compensation in the following way. It adopted the market value of the property as at the date of expropriation to be R8 137 500.00 in conformity with its earlier reasoning. It then had to confront the oddity presented by Mr Parfitt's calculation of the present value of the 2022 transaction (by which Nad sold the remaining extent of the property).

That is to say, the purchase price of R14 500 000.00, discounted back to the date of the expropriation in July 2016, being an amount of R11 487 966. As the high court observed, this was 'a strange result . . . [in] that the Property is worth more after expropriation than before expropriation'. I shall refer to this as the Parfitt paradox.

[42] The high court considered that the payment of no compensation is only justified in special circumstances. This was not such a case. What was required was to award a sum of money to replace what had been lost by the owner of the property, striking an equitable balance between the public interest and the interest of the property owner. To do this, the high court decided that Sanral should be placed in the position it would have been in had Sanral concluded the negotiations it had commenced with Overine 145 BK (Overine) (the original owner of the property) to buy a portion of the property. These negotiations came to naught because Overine sold the property to Nad in January 2015. Quite why the compensation payable to Nad for the expropriation is determined by placing Sanral in the position it would have enjoyed had it concluded its negotiation with Overine to buy the property is not explained by the high court.

[43] However, the basis upon which the high court then made its determination of compensation is straightforward. Overine was willing (and did) sell the property for R7 750 000.00. Divided by the size of the property, this works out at a value of R174.82 per square meter. The expropriated portion of the property measures 5101 square meters. 5101 x R174.82 = R891 756.82. This amount, the high court found, is the just and equitable compensation to be paid to Nad.

Assessing the high court's judgment

[44] I have set out the reasoning of the high court and its engagement with the expert evidence before it in some detail. I have done so in order to decide whether the high court's judgment and orders can be sustained.

[45] The first difficulty is that the high court did not adopt nor apply what was required of it under the holding in *Du Toit.* The high court, as I have observed, failed to determine the amount of compensation to be paid in terms of s 12(1) of the Expropriation Act. It ventured upon a detailed enquiry into the question of market value, and finally determined the market value as at the date of expropriation, but did not complete the analysis by deciding what diminution of market value was occasioned by the expropriation. Having failed to complete the first stage of the enquiry required by *Du Toit*, the high court then did not engage the second stage of the enquiry, and in particular, how compensation determined by recourse to the market standard should be modified in conformity with the constitutional compensatory norm. These omissions are compounded by the further error of the high court: that it enjoyed a true discretion at to decide upon the payment of just and equitable compensation. For these reasons alone, the judgment of the high court cannot stand.

[46] There are also a number of important conceptual errors that vitiate the reasoning of the high court in its consideration of market value. First, as I have explained, the high court rejected the potential use of the property as a community shopping centre and as a result attributed no value to the developmental potential of the property as an integral whole. It did so on the basis of an incorrect understanding of the relationship between the potential value of a property in a hypothesised negotiation and the incidence of risk. The risks of the development of a community shopping centre do not mean that this potential use of the property is ousted. The issue is rather whether a hypothetical bargain could have been struck if this potential use, with all its attendant risks, was in play. That issue was not engaged by the high court. Nor was the high court's assessment of financial viability a proper basis to reject a community shopping centre as a potential use.

Given the centrality of this premise for Nad's case, the rejection of this premise, for unsupportable reasons must be corrected.

[47] Second, the high court rightly attached significance to actual market transactions concerning the property. They are data points that are informative of market value at a point in time. The high court however fell short in two ways. It did not ask what the purchase price paid by Nad for the property in 2015 might mean for the potential value of the property, if the premise of a community shopping centre was correct. The high court's rejection of the premise excluded this line of enquiry.

[48] In addition, the high court understood the two data points, being the sale price of the property in 2015 and the price achieved for the sale of the remaining extent of the property in 2022 to give rise to the Parfitt paradox. The high court did not resolve the paradox; it simply evaded it. It had to do so because if both data points were valid, worked back to present value, then no compensation was due. The high court, however, did not entertain a different possibility. The price of the 2022 transaction, discounted back to July 2016, reveals the following. Nad sold the remaining extent of the property, being some 39 230 square meters for R11 487 966. That is, by my calculations, R292.83 per square meter. That compares with the price of the property at the date of the expropriation in respect of the 2015 transaction of R8 137 500.00, divided by the size of the property, being 44 331 square meters, resulting in the rate of R183.56 per square meter. What this comparison indicates is not a paradox, but rather that the market has generated different prices, and done so by giving a higher value to the property, even with the bisection effected by the expropriation. This variance requires explanation. It may suggest that Nad bought the property at a discount because the parties undervalued the property's potential value. There are other possibilities. Market's yield different prices at different times. What the data means requires proper consideration, guided

by the experts. It does not warrant selecting one data point, as the high court did, and ignoring the other, simply to avoid a seeming paradox. For this reason, also, the judgment does not reason to a defensible conclusion.

Completing the analysis

[49] We were urged by the parties, if we should find that the high court's determination of compensation is faulty to use the evidence of record to determine the correct amount of compensation to be paid to Nad. With some regret, that is not possible. The evidence in this case turns largely on expert evidence. The high court sought to navigate its way through the differences the expert evidence gives rise to. The role of the court is not simply to select an opinion from what is offered by the experts. And commendably, the high court did not do so. But, as I have explained, there is much that the experts have yet do to place the court in a properly informed position to determine the compensation payable in terms of s 12(1). And that is but the first phase of what is required under the holding in *Du Toit*.

[50] It is a well-recognised principle of our law and practice that experts owe a duty to the court to exercise their independence and use their expertise to assist the court in coming to a robust conclusion. In this case, there remain too many issues that require engagement with the experts. Much more is required to interrogate potential use and whether the development of a community shopping centre can figure in a proper understanding of potential use, and if so, with what appreciation of risk and resulting value. So too, the use of market data must be properly engaged, understood, and reconciled, if necessary, with plausible scenarios as to potential use. All of this is required so as not to end up with an answer to the question of market value that does not do justice to all the data and its analysis.

[51] The matter must thus be remitted to the high court so as to permit the parties to recall those witnesses they consider will assist the court to resolve the difficulties that I have sought to highlight. And for the high court itself to engage the experts

so as to be in a position to cure the errors I have identified. The parties will also have to apply *Du Toit* and ensure that they have adduced the evidence required to do so. Here too, the high court will be mindful that the determination of market value is but the first phase of the analysis, and what follows is a further step in the analysis to secure conformity with what is constitutionally sanctioned recompense. Here too, the court may seek the assistance of the expert witnesses called by the parties.

[52] In the result, Nad's appeal must be upheld.

The cross-appeal

[53] Sanral appeals against the cost orders granted by the high court. Paragraph 3 of the high court's order requires Sanral to pay Nad's costs in respect of Sanral's application to amend its pleadings, brought on 27 December 2023, and to do so on a scale as between attorney and client. I shall refer to this as 'the amendment costs order'. Sanral points out that the amendment was in fact moved by its counsel on 27 March 2023. The reference to the wrong date is a clerical error. Sanral complains that the amendment was sought in good faith, and its refusal by the high court did not warrant a punitive costs order. Rather the application should have been dismissed and costs award on a party and party scale.

[54] Paragraph 4 of the high court's order requires Sanral to pay the costs of suit and the costs of the trial dates 28 November 2022 – 2 December 2022, on a scale as between attorney and client. I shall refer to this as the 'trial costs order'. The high court made this order on the following basis. It would be prejudicial to Nad to apply the formula set out in s 15(2) of the Expropriation Act, and the high court considered that a deviation from the formula was required. An application of the formula would result in Nad receiving less than 5% of its costs. In addition, the trial was drawn out by reason of Sanral's erstwhile counsel engaging in protracted and irrelevant cross examination; and valuable court time was wasted by counsel

reading the pleadings and expert reports while contemplating the next question to put to a witness. This waste of court time was calculated to be six days, hence the punitive aspect of the trial costs order.

[55] I turn first to the appeal of the amendment costs order. The amendment sought by Sanral was brought at a stage when Nad had indicated that it would be closing its case. The amendment not only sought to amplify its case as to the illegality of the zoning of the property (subsequently abandoned), but included a prayer to have the zoning reviewed and set aside. The high court considered the amendment not simply unnecessary but, in addition, the proposed review would impact upon the interests of the new owners of the property. Confronted with this difficulty, counsel simply responded that the court could ignore the review portion of the proposed amendment. The high court considered the application to amend frivolous and unjustified.

[56] The award of costs by the high court is the exercise of a true discretion. An appellate court will only interfere if the discretion has not been exercised judicially. I cannot find that this test is met. Litigants should not be discouraged from seeking to place their case before a court. That an amendment is refused is not of itself a reason to make a punitive costs order. Here, however, the proposed review sought in the amendment would have had consequences that reached beyond the interests of the parties to the action. The apparent nonchalance with which the amendment to introduce the review was abandoned provided a basis for the high court's displeasure. It suggested a careless failure to consider what was being sought. The reasoning of the high court is not such that a court could not reasonably make the order that it did. This aspect of the cross-appeal therefore, cannot succeed.

[57] The trial costs order must be considered in its component parts. The first complaint of Sanral is the punitive costs order awarded in respect of six of the eleven days of the trial. The high court found that Sanral's erstwhile counsel had

wasted this court time. Sanral complains on this score that, without conceding the criticisms of its counsel, Nad's conduct of the trial was also wasteful of time. Sanral submits that Nad and its witnesses made many errors that also prolonged the trial. This complaint is different to that upon which the high court criticised the conduct of Sanral's counsel. Court time is precious. It must be used well. But in every trial, there will be errors made in the construction and presentation of a case. That is, in part, what the trial process is there to achieve. Entirely different is the use of cross-examination in a wasteful, meandering, and purposeless way. Cross-examination is there to test adverse witnesses. It is not a process to be used to discover what case a litigant might wish to make.

[58] Here too, I find no basis to interfere with the punitive costs order that was made in virtue of the waste of court time occasioned by the manner of counsel's cross-examination. These court days were lost, according to the reasoning of the high court, for no good reason. Nothing was gained from them, and they are irretrievably lost. Accordingly, this aspect of the trial costs order must stand.

[59] Sanral would also have this Court interfere with the decision of the high court that decided to deviate from the award of costs determined in terms of s 15(2) of the Expropriation Act. The trial court costs order, apart from the punitive costs order, also contains an order that Sanral 'pay the costs of suit'. This order is a deviation from the costs regime dictated by s 15(2). The high court was cursory in its reasoning as to why deviation was warranted. It simply said that a costs order in terms of s 15(2) would be prejudicial to Nad. This treatment of the matter may not suffice to bring this aspect of the trial court's costs order within the deviation permitted under s 15(3). The matter is complicated because the ultimate determination of compensation is not simply an application of the Expropriation Act. It necessarily involves the consideration of the constitutional compensatory framework.

[60] Happily, this aspect of the cross-appeal need not be decided. The outcome of the appeal requires that the matter be remitted to the high court. What determination as to compensation this brings about lies in the future. It would be prudent, as an incident of the appeal being upheld, that the order of the high court requiring Sanral to pay the costs of suit should also be set aside. At the end of the trial, and in its judgment, the high court may again consider what order should be made in respect of the costs of the suit. This will depend in part upon the outcome of its final award of compensation. The high court will then be able to consider the entire course of the trial and its outcome, and may then also revisit the question of s 15(2) and any deviation from it. It follows that the cross-appeal in respect of the trial court costs order fails, and the punitive costs order made in paragraph 4 of the high court's order stands. That portion of paragraph 4 that requires Sanral to pay the costs of suit is set aside, not by reason of the cross-appeal, but simply as an incident of the main appeal being upheld. This aspect of the challenge raised in the cross-appeal is thus premature.

[61] As a result, the cross-appeal must be dismissed, and the costs thereof must follow the result.

Conclusion

[62] For the reasons given, Nad's appeal succeeds, and the costs of the appeal follow this outcome. Paragraphs 1 and 2 of the high court order must be set aside. The case is remitted to the high court on the terms set out in the order I propose to make. The order of the high court as to the costs of suit is set aside, on the basis I have set out. The cross-appeal falls to be dismissed, with costs. In consequence, Paragraphs 3 and 4 of the high court order stand, save for the costs of suit in paragraph 4 of the high court order.

[63] The following order is made:

1 The appeal is upheld, with costs, including the costs of two counsel, where so employed;

2 Paragraphs 1 and 2 of the high court's order are set aside;

3 The portion of paragraph 4 of the high court order that requires the first respondent to pay the costs of suit is set aside, the balance of paragraph 4 that orders the first respondent to pay the costs of the trial dates 28 November 2022 – 2 December 2022 on a scale as between attorney and client stands, as does paragraph 3 of the high court order;

4 The case is remitted to the high court for the hearing of further evidence and argument, as the high court further directs;

5 The cross-appeal is dismissed with costs, including the costs of two counsel, where so employed.

_____

D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For Appellant:	NGD Martiz SC (with him JA Venter SC)
Instructed by:	Ivan Pauw & Partners, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For Cross-Appellant/First Respondent:	R de Villiers (with him SM van Vuuren)
Instructed by:	Haasbroek & Boezaart Inc., Pretoria
	Honey Attorneys, Bloemfontein.