THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 114/03

In the matter between:

ZUBEIDA ABRAMS	Appellant
and	
IQBAL KAZI ALLIE NO	First Respondent
ABDUL RAZAK MAHATEY NO	Second Respondent
THE DEPARTMENT OF LAND AFFAIRS	Third Respondent
PROVINCIAL ADMINISTRATION: WESTERN CAPE : DEPARTMENT OF PLANNING, LOCAL GOVERNMENT AND HOUSING	Fourth Respondent
REGIONAL LAND CLAIMS COMMISSION, WESTERN CAPE	Fifth Respondent

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Coram: HOWIE P, SCOTT, FARLAM, LEWIS JJA *et* PONNAN AJA
Date of hearing: 20 FEBRUARY 2004
Date of delivery: 26 MARCH 2004

Summary: Restitution of a right in land in terms of Act 22 of 1994 – meaning of 'dispossessed' – underlying object of acquisition to implement past racially discriminatory law or practice – on the facts market value the equivalent of just and equitable compensation – marginal difference between what claimant received in 1979 and court's determination of what market value would then have been.

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] This is an appeal from the Land Claims Court. It concerns a single-storeyed, semi-detached dwelling ('the property' or 'the subject property') known as 3 Lever Street, Walmer Estate, and situated on the lower slopes of Devils Peak adjacent to District Six. Until 1980 the property was owned by Mr Bawa Mahatey who was born in India. In 1971 he let the property to the appellant. Although of Indian extraction, she was classified as 'coloured' under the relevant apartheid legislation. On 13 June 1975, in terms of the now repealed Group Areas Act 36 of 1966, the area was declared a 'coloured' group area. On the same day certain provisions of the now repealed Community Development Act 3 of 1966 were declared to be applicable to the area. The following year, on 21 May 1976, the Community Development Board, established in terms of s 2 of the latter Act, gave notice that it had prohibited for a period of 10 years the subdivision of land or the erection or alteration of buildings in the same area. Subsequently and after being invited to do so, Mahatey sold the property to the Community Development Board for a total amount of R11 599.50. Transfer was effected in February of the following year. The appellant remained in possession as a tenant of the Board. She

not only maintained the property but over the years effected a number of substantial improvements. Although still registered in the name of the Community Development Board, the property later vested in the National Housing Board and thereafter in the Provincial Housing Board of the Western Cape. The latter, in order to encourage home ownership, embarked upon a scheme of selling off its properties to tenants on a non-profit basis. The appellant, as a first time home-owner and a tenant of long standing, was considered an eligible purchaser under the scheme and in terms of a deed of sale dated 18 November 1997 purchased the property at a cost to her of the modest sum of R5 197.21. However, the provincial authorities representing the Provincial Housing Board either overlooked or were unaware that Mahatey had previously lodged a claim for the restitution of the right to the property in terms of the Restitution of Land Rights Act 22 of 1994 ('the Act') and that notice of that fact had been published in the Gazette. The error was discovered before transfer to the appellant was effected and in due course Mahatey's claim was referred to the Land Claims Court.

[2] The court (Meer AJ sitting with an assessor), after hearing evidence, held that Mahatey had been dispossessed of a right in

land as a result of past racially discriminatory laws or practices within the meaning of s 2(1)(a) of the Act and that the market value of the property as at the date of the dispossession, being the just and equitable compensation which Mahatey should have received, was the sum of R11 810, ie R210.50 more than the amount he actually received. On the basis of these findings the court directed the Department of Land Affairs (the third respondent) to expropriate or otherwise acquire the property from the Provincial Administration: Western Cape: Department of Planning, Local Government and Housing (fourth respondent) in order to restore it to the claimants (the first and second respondents), being the executors of the estate of Mahatey who had died during the trial. The claimants, in turn, were ordered to pay the Department of Land Affairs the sum of R11 599.50, being the amount received for the property in 1980 (without regard to currency depreciation), against registration of transfer.

[3] The order is likely to result in the eviction of the appellant and her family from the property where she has lived for more than 30 years. Leave to appeal was refused by the court *a quo* but granted by this court. The third, fourth and fifth respondents abide the judgment of the court.

[4] Counsel for the appellant attacked the correctness of the judgment of the court *a quo* essentially on four grounds. He submitted, first, that Mahatey was not a person 'dispossessed' of ownership of the property within the meaning of s 2(1)(a) of the Act; second, and even if he was, that such dispossession was not 'as a result of past racially discriminatory laws or practices' within the meaning of the same subsection; third, that he was paid 'just and equitable compensation' within the meaning of s 2(2) of the Act at the time of the dispossession; and fourth, that the remedy granted by the court *a quo* was in any event wholly inappropriate, given the circumstances.

[5] The relevant part of s 2 of the Act reads as follows:

'2 (1) A person shall be entitled to restitution of a right in land if –

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or . . .

(2) No person shall be entitled to restitution of a right in land if –

(a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or

(b) any other consideration which is just and equitable,

calculated at the time of any dispossession of such right, was received in respect of such dispossession.

(3) . . . .'

[6] It is necessary to relate in some detail the preceding events and the circumstances surrounding the purchase of the property by the Community Development Board. In 1952 Mahatey and his brother inherited nine properties from their father. These were initially held jointly but in 1965 they divided the properties between them. Mahatey became the sole owner of a shop at 48 Coventry Road, two semi-detached dwellings at 7 and 7A Princess Street, a semi-detached dwelling at 49 Duke Street and the subject property at 3 Lever Street. The subject property and 49 Duke Street were adjoining properties and shared a common wall. Mahatey lived at 49 Duke Street where he remained until his death. As previously mentioned, he let the subject property to the appellant in 1971. The rent was initially R25 per month but later increased to R50 per month. In about 1974 Mahatey took back one room of the subject property which he required for his two sons. It appears that a door was made in the common wall providing access from 49 Duke Street and the existing door into the rest of 3 Lever Street was blocked with furniture.

[7] On 13 June 1975 the area in which Mahatey's properties were situated was proclaimed in the Gazette to be an area for occupation and ownership by members of the 'coloured group' in terms of s 23 of the Group Areas Act. The same Gazette contained a proclamation in terms of s 51 of the Community Development Act declaring sections 16 to 23 and 29 to 37 of the latter Act to be applicable to the area.

[8] On 21 May 1976, in terms of s 15(2)(e) of the Community Development Act, the Community Development Board gave notice in the Gazette that 'in furtherance of an urban renewal scheme' subdivision of land and the erection or alteration of buildings in the area were prohibited for a period of 10 years. Section 15(2)(e) empowered the Board to give such notice 'if it is satisfied that it is expedient to do so in furtherance of a slum clearance scheme or an urban renewal scheme…'. The effect of this notice was to afford to the Board a preferent right to purchase all property in the area. In this regard, s 15(5)(a) of the Community Development Act provided:

'Any owner of immovable property in an area in respect of which any notice under subsection (2)(e) is in operation, who desires to dispose of such property, shall offer such property for sale to the board, and the board shall thereupon have a preferent right to purchase such property at a price agreed

upon between it and the owner concerned, or (if within sixty days after the date on which the offer was made the board and such owner fail to agree as to the price to be paid) at a price fixed as if the provisions of section 14 of the Expropriation Act, 1975, were applicable in respect thereof.'

On the same day as the publication of the notice, Mahatey was notified in writing by the Department of Community Development that the subject property had been included in the list of affected properties compiled in terms of s 29(1) of the Community Development Act. In terms of s 1 of that Act an 'affected property' was property owned or occupied by a disqualified person in terms of a proclaimed group area.

[9] Some two years later on 21 September 1978 the Department of Community Development addressed a letter to Mahatey inviting him to offer 49 Duke Street and the subject property for sale to the Board in terms of s 15(5)(a). The relevant part of the letter reads:

'As you may already be aware . . . this Department is assisting the Municipality of Cape Town with a renewal scheme of Walmer Estate.

In terms of the redevelopment plan drawn up for this specific area the abovementioned properties, owned by you, are affected by future redevelopment and will accordingly have to be acquired by the Department.

In the circumstances I wish to enquire whether you will be prepared to offer erf 12376 and Rem. Erf 12377 Woodstock to the Community Development Board for sale stating a definitive selling price.'

It appears that shortly thereafter Mahatey was informed that only the subject property was required. He wrote back on 2 November 1978 expressing his 'intention to co-operate with your department in the implementation of your development schemes' and his willingness to sell the subject property to the Board for R18 000. The Department thereafter obtained valuations of the property (to which I shall refer later in this judgment) and by letter dated 14 December 1978 rejected the offer of R18 000 and made a counter offer of R10 545 plus 10 per cent, *viz* R1 054, in terms of s 41 of the Community Development Act. Section 41(2) made provision for the addition of 10 per cent to any compensation agreed upon, subject to a limit of R10 000. On 27 January 1979 Mahatey rejected the 'offer of R11 599' but at the same time reduced his asking price to R15 000.

[10] In the meantime, Mahatey had entered into negotiations to sell 7 and 7A Princess Street to the respective tenants. Both dwellings were ultimately sold on 23 January 1979 at a price of R13 500 each. Negotiations for the sale of the subject property continued. In June 1979 Mahatey reduced his asking price to R13 300. On 27 September 1979 he finally agreed to a price of R11 599.50 and a Deed of Sale was signed by the parties on 11

and 12 December 1979. Transfer was effected in February 1980. Mahatey continued to occupy 49 Duke Street. He said that to do so he required a permit which was renewed annually. He retained the shop at 48 Coventry Road on the same basis. Eventually he was told that there was no need to obtain a permit every year.

[11] Against this background I turn to the first question in issue which is whether Mahatey was 'dispossessed' of the property within the meaning of s 2(1) of the Act. 'Dispossessed' is not defined in the Act. The Shorter OED gives the following meanings of 'dispossess': 'to put out of possession; to deprive of the possession of; to dislodge; oust'. The ordinary meaning of 'dispossessed' in the context of the section makes it clear, I think, that what is contemplated is a deprivation of possession in consequence of some outside agency. It need not be physical force. But a sale freely and voluntarily entered into followed by transfer would clearly not result in a dispossession within the meaning of the section. There would have to be an element of compulsion which induced the alienation of the property. It follows that merely because the purchaser is the Community Development Board exercising its preferent right, as opposed to some other purchaser, would not be enough. What is required, therefore, is an

element of compulsion of such a nature that without it there would have been no sale. (Compare *Dulabh and another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) at 1118B-1120E.) There was no disagreement between counsel as to the test to be applied. The question debated before us was whether on the facts there had been such an element of compulsion.

[12] On behalf of the appellant it was contended that despite Mahatey's *ipse dixit* to the contrary, it was clear from his conduct that he in fact was a willing party to the sale of the property. Counsel referred in particular to Mahatey's willingness 'to co-operate' expressed in his letter of 2 November 1978 to the Department of Community Development and his conduct in selling 7 and 7A Princess Street. He argued that all this was inconsistent with Mahatey's evidence that he was not a willing seller. I do not agree. The letter of 21 September 1978 addressed to Mahatey inviting him to sell 49 Duke Street and the subject property expressly stated that the properties will 'have to be acquired by the Department'. The fact that he was later told that the Department did not want 49 Duke Street at that stage did not affect the position in so far as the subject property was concerned. Nor is Mahatey's apparent willingness to co-operate of any significance. Once he

realised he would have to part with the property he had little choice other than to sell or wait for the property to be expropriated. His professed willingness is consistent with no more than an attempt to gain the goodwill of the Department and possibly obtain a better price. Mahatey was aware that he was a disqualified person who owned property in a 'coloured' group area. He would also have known of the fate of disqualified persons in adjacent District Six. Before selling the Princess Street properties he had received the Department's counter offer in respect of the subject property. He was obviously hoping for more. In these circumstances, I can see no reason for rejecting his evidence that he sold the Princess Street properties in the hope of obtaining a better price than he would have obtained from the Department. It follows that in my view the evidence established that Mahatey was dispossessed of the subject property within the meaning of s 2(1) of the Act.

[13] The next question is whether Mahatey's dispossession was 'as a result of past racially discriminatory laws or practices'. In contending that it was not, counsel for the appellant emphasized that the stated reason for the Community Development Board's acquisition of the property was an urban renewal scheme which was being implemented in conjunction with the Municipality of

Cape Town, and that the statutory provisions in terms of which the Board had acted were by their nature not racially discriminatory. He referred in particular to s 15(1)(a) and s 15(2)(e) of the Community Development Act. (The latter section is referred to in para 8 above.) In terms of the former, the objects for which the Board was established included –

'to develop or assist in the development of such areas, not being areas referred to in section 23(6)(c) of the Group Areas Act, as may from time to time be designated by the Minister, to promote community development in any such area and, after consultation with the local authority concerned, to take steps to prevent decay in any such area or to rehabilitate or assist with the rehabilitation of any such area or any portion thereof which tends to decay'.

Counsel pointed out further that only one of Mahatey's several properties was acquired by the Board and that notwithstanding the former's disqualified status he was able to retain both the Duke Street and Coventry Road properties, thus indicating, so it was argued, that the acquisition of the subject property was unrelated to race. It was accordingly submitted that there was no racial discrimination against Mahatey in the exercise of his rights in property (*cf Richtersveld Community and others v Alexkor Ltd and another* 2003 (6) SA 104 (SCA), para 99, at 137I-J).

[14] Save for references to the Group Areas Act and such terms as ‘affected property’, the provisions of the Community Development Act were so formulated as to suggest that it had as its object such worthy causes as slum clearance, urban renewal and general community development without regard to race. However, the Act has rightly been described as ‘a true sister Act of the Group Areas Act’ (*S v Samy-Padiachy* 1972 (3) SA 895 (NC) at 901H). The proclamation of areas for the occupation and ownership by members of a particular racial group must necessarily result in the disruption of communities involving the movement and resettlement of different racial groups. Although not expressed as such, the principal object of the Community Development Act was undoubtedly to facilitate such movement and resettlement. Indeed, it is apparent from the evidence that it was the operation of the Community Development Act that resulted in the destruction of District Six. The proclamation of Walmer Estate as a ‘coloured’ group area constituted the first step in a process that had as its object the ultimate exclusion of all disqualified persons from owning or occupying land in the area, including those of the ‘Indian racial group’. In the event, good sense prevailed, the Group Areas Act was repealed and the goal of establishing a racial group area was abandoned. But for that,

Mahatey, as a disqualified person, would have been obliged in the course of time to part with all his properties in the area, whether by sale or expropriation. In all probability it was considered expedient by the Board to commence the process with the acquisition of those affected properties which were in urgent need of repair. This was true of the subject property. But further acquisitions would have had to follow in order to establish the racial group area envisaged. The purchase by the Board of the subject property was therefore in reality part and parcel of that process and hence a step in the implementation of a racially discriminatory law. It cannot, in my view, be fairly construed as a transaction totally divorced from the underlying scheme to establish a racial group area; nor is it of consequence that the relevant terms of the Community Development Act were so formulated as to be capable of being applied to a scheme not involving racial discrimination. It follows that the second ground of appeal must similarly fail.

[15] The third question in issue is whether Mahatey received just and equitable compensation as contemplated in s 25(3) of the Constitution at the time of the dispossession. Sections 25(1), (2) and (3) of the Constitution read:

'25 (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

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

(a) for a public purpose or in the public interest; and

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

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —

(a) the current use of the property;

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

(c) the market value of the property;

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

(e) the purpose of the expropriation.'

In *Ex Parte Former Highland Residents; In Re Ash and others v Department of Land Affairs* [2000] 2 All SA 26 (LCC), para 35, at 40e-f Gildenhuys J expressed the view that

'. . . the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require'.

This approach has been followed in the Land Claims Court (see eg *Khumalo and others v Potgieter and others* [2000] 2 All SA 456 (LCC), para 23, at 465a-c) and was adopted by the court *a quo*. It was not contended in this court that the approach was incorrect and on the facts of the present case there would appear to be no reason for holding otherwise.

[16] The court *a quo*, after considering the factors listed in s 25(3) of the Constitution and other relevant circumstances, came to the conclusion that there was nothing to warrant an upward adjustment of the market value of the property to arrive at just and equitable compensation within the meaning of s 25(3) of the Constitution at the time of the dispossession. In other words, it held that in all the circumstances of the case just and equitable compensation was the equivalent of market value. Counsel for the respondent contended that there should have been an upward adjustment. I am unpersuaded that such an adjustment would be justified. As previously mentioned, the property was occupied by

the appellant who remained on as a tenant of the Community Development Board after the dispossession. It is true that Mahatey had to give up the room occupied by his two sons but it appears that by then they had reached adulthood and proceeded to establish homes of their own in Rylands Estate. Mahatey and the other members of his immediate family continued as before to live next door at 49 Duke Street with little, if any, disruption. The subject property at the time of the dispossession was, moreover, in a poor state of repair. The roof was rotten, the ceilings had been damaged by the rain and there were holes in the floor although otherwise structurally sound. Immediately upon acquiring the property the Community Development Board spent a relatively large sum of money repairing the roof, presumably to prevent further damage. As previously suggested, it was probably the poor state of repair that motivated the Board to acquire the property when it did. In Mahatey's land claim form dated 25 June 1995 and in subsequent correspondence (all of which was handled by Mahatey's son-in-law who played a major role in the prosecution of the claim) much was made of an alleged sentimental attachment to the subject property. It was said that the property had been the family home for generations and that Mahatey's father had expressed the wish that the property be given to Mahatey's

daughter, ie the wife of the son-in-law just mentioned. However, in evidence it became apparent that there was little to justify the alleged sentimental attachment; the property had never been the family home and Mahatey's father had expressed no such wish. Not only had Mahatey never discussed the property with his father but the latter had died prior to the birth of his granddaughter. In all the circumstances, I am satisfied that the approach adopted by the court *a quo* was correct.

[17] This brings me to the question of the market value of the property. Mr Willem van Rijswijk, a valuer of Cape Town, gave evidence on behalf of the claimants. He placed a value of somewhere between R15 500 and R18 000 on the property as at the relevant time, *viz* December 1979. However, he found himself in an invidious position; he had no knowledge of the condition of the property some 22 years previously nor of the properties which formed the subject matter of the transactions on which he sought to rely as being comparable; he had also attempted to value the property with a minimum of investigation because of time constraints. Ultimately, the transactions on which he relied were shown not to be comparable at all. The court *a quo* found itself

unable to set any store by his evidence and rejected his valuation in its entirety. This finding was not challenged on appeal.

[18] The only other valuer to give evidence was Mr C L Gerber, who was called to testify on behalf of the appellant. In 1979 he was the chief valuer and chief inspector of works in the Department of Community Development. He explained that whether the Department acquired property by purchase or expropriation, its policy was to pay market value. On each occasion the Department would obtain valuations from an internal valuer as well as an outside and independent valuer appointed on an *ad hoc* basis. It would then offer the purchaser or expropriatee first the lower valuation, and if that was not accepted, the average between the two, plus an additional 10 per cent as a *solatium.* The internal valuer in the case of the subject property was Mr D J Elrich, who is now deceased but at the time worked under Gerber. The independent valuer was Mr I Jacobs. The latter was also an auctioneer who himself owned property in the vicinity of Walmer Estate. He was described by Van Rijswijk as one of the most knowledgeable valuers of property in the area. He valued the subject property at R9 000. Elrich's valuation was R12 090. The average between the two was R10 545 which, together with the 10

per cent, was the amount offered to Mahatey and which he ultimately accepted. Gerber pointed out, however, that Elrich had made a mistake when measuring up the property and that his valuation, when adjusted to correct the error, was R11 740.

[19] Gerber had the advantage of having inspected the subject property at the time of its acquisition by the Board. He recalled it as being in urgent need of repair in the respects previously mentioned. At the time it had an outside toilet in poor condition and no bathroom. Subsequently the Department had all but replaced the roof and the appellant herself had obviously spent money renovating the property and adding a bathroom. Gerber also had a reasonable recollection of the properties which were the subject matter of the comparable transactions on which he relied to value the property. Some of these he had inspected at the time, including the properties at 7 and 7A Princess Street which he considered to be far superior to the subject property. The Princess Street properties, it will be recalled, were sold by Mahatey for R13 500 each, being a price with which he said he was satisfied. Notwithstanding his intimate knowledge of the area at the time, Gerber emphasized the difficulties associated with determining the market value of property two decades later. He stressed the

importance of the condition of the subject property and the comparable properties relied upon in order to arrive at a fair market value.

[20] In calculating the market value of the subject property as at 1979, Gerber had regard to sales of vacant land outside the affected area, eg land in areas such as Vredehoek and University Estate, from which he established a norm of R12.50 per square metre as a starting point. This in fact was a norm which he himself had established at the time when valuing properties for the Department and which had been used by Elrich. Applying this land value to sales of improved property both in and outside the affected area at the relevant time he determined the notional amount paid for the improvements. He then adjusted this notional amount on the basis of comparability to arrive at a value for the building on the subject property of R70 per square metre, to which he added R30 per square metre for the stoep area. By this means he arrived at a figure of R11 810.

[21] Gerber emphasized, however, that the valuation of immovable property was not an exact science and that the property, if sold on the open market, could well fetch a price of anything between 10 per cent more or 10 per cent less than the

value he had placed on it. When translating these percentages to figures he adjusted them slightly to arrive at a range of between a low of R9 700 and a high of R12 500. He expressed the view that the proclamation had in fact not depressed the market. This was particularly so, he said, because the destruction of District Six had resulted in an abundance of ‘coloured’ buyers.

[22] A perusal of the record reveals Gerber to have been a knowledgeable witness. His evidence was accepted by the court *a quo*, as was the correctness of his valuation. No criticism was directed at these findings. However, I would make two observations at this stage. The first is that in principle the method of valuation employed by Gerber is not above criticism. Nonetheless, given the peculiar problems associated with valuing an affected property, and particularly having to do so some 22 years after the relevant date, the method adopted does not strike me as being unreasonable. Second, it is apparent that the Department of Community Development did not attempt to acquire the property for less than market value. The practice of taking the average of two valuations may be regarded as somewhat arbitrary but it was not unfair.

[23] Having accepted the market value of the subject property at the relevant time to have been R11 810, the court *a quo* noted that the amount paid to Mahatey was R11 599.50 and concluded that, because the latter amount was less than the former, Mahatey had not been paid market value, and hence just and equitable compensation, and was accordingly entitled to restitution of his right in the property.

[24] The difference between the two amounts is, of course, R210.50, which is less than 1,8 per cent of the amount determined to be the market value. The amount paid, R11 599.50, falls well within the range of between R9 700 and R12 500 suggested by Gerber and in fact is greater than the midpoint of that range which would be R11 100. Counsel for the respondent submitted, however, that it mattered not that the amount paid was only marginally less than the amount subsequently fixed as the market value and that once it was established that the latter amount was less than the former, the claimant would have crossed the threshold of s 2(2) of the Act and would be entitled to restitution, whether by way of restoration of the property or equitable relief. In support of this submission she referred to a schedule at the conclusion of the judgment of the Land Claims Court in *Ex Parte*

Former Highland Residents; In Re: Ash and others v Department of Land Affairs, *supra*, from which it appears that claims for equitable relief (ie compensation as opposed to restitution of property) were upheld even where in one case the difference between the compensation paid in the 1960's and the market value subsequently determined, with considerable difficulty I might add, was as little as R18. The judgment, however, contains no comment regarding the marginal nature of the difference.

[25] In the absence of an actual sale of the property to be valued, the determination of its market value necessarily involves an estimate of what that property would realise at a notional sale in the open market. By the very nature of the exercise 'only approximate results can be achieved'. (A Gildenhuys in 30 *Lawsa* (first reissue) para 177.) This is all the more so in the absence of transactions which are directly comparable or where there are factors relating to the notional sale, such as in the present case the need to think away the proclamation, which render the exercise more complex (cf *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 516). This court has in the past frequently commented on the nature of the inquiry and hence the approximate nature of its result. In *South African Railways v New*

Silverton Estate Ltd 1946 AD 830 at 838 Tindall JA stressed the importance of bearing in mind that a valuation 'is to a material extent a matter of conjecture'. Ogilvie Thompson JA in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253A described a valuation as 'essentially a matter which is in the realm of estimate'. Botha JA in *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 391E similarly described it as 'noodwendig 'n kwessie van skatting in die lig van al die omstandighede'. Nothing, I think, demonstrates this more than the regularity with which good and honest valuers arrive at relatively widely different conclusions.

[26] When determining the value of property, whether in consequence of an expropriation or otherwise, a court is of course obliged to arrive at a particular figure. This is because an award must be in the form of a determined, or at least readily determinable, amount. But the present inquiry is different; it is whether some 22 years previously the former owner of the property was paid just and equitable compensation which on the facts of the case would be the equivalent of market value. To hold that he was not, when the difference between what he was then paid and the estimate of market value made two decades later is

less than two per cent, is to proceed on the assumption that market value is capable of being estimated with such precision as not to permit a variation of less than two per cent. This is quite clearly not the case and this was established in evidence. Gerber was at pains to point out that valuation was not an exact science and that although he had estimated the value of the property in a particular amount, in the event of a sale in the open market the property could realise anything within the range he estimated. Accordingly, it cannot be said that the price paid to Mahatey in 1979 was less than market value at the time.

[27] It follows that in my view the claimants did not cross the threshold of s 2(2) of the Act and the appeal must succeed.

[28] It is therefore unnecessary to consider the appropriateness or otherwise of the remedy granted by the court *a quo*. I might add, however, that counsel for the appellant argued at length before us that the restoration of the property, as opposed to any other relief, was so unreasonable in the circumstances as to justify interference by this court. He referred in particular to the marginal nature of the difference between the amounts previously referred to, the consequence of the order, *viz* the probable eviction of the appellant from her home of 30 years, the substantial improvements

to the property effected by the appellant and the absence of any allowance for currency depreciation in determining the amount payable by the claimants. There is no doubt much force in these submissions but, as I have said, there is no need for me to deal with them.

[29] There is, however, the question of costs to be considered. The practice of the Land Claims Court has been not to make awards of costs, save in exceptional circumstances. (See *In Re Kranspoort Community* 2000 (2) SA 124 (LCC), para 121, at 184H and the *Ash* case, *supra*, para 86.) In conformity with this practice the only order as to costs made by the court *a quo* was a special order directing the appellant to pay the wasted costs occasioned by 'the duration of the proceedings taken up by the testimony on expenses incurred by her in renovating the subject property'. The reason for the order was that the appellant had sought to rely on false invoices in a futile attempt to quantify the amount she had spent on renovating the subject property. (It was ultimately common cause that she had indeed incurred such expenditure, but in an amount she was unable to establish.) Notwithstanding her success on appeal, I do not think there is any justification for interfering with this award; nor is there any justification for making

an order in her favour with regard to the remainder of the costs in that court. However, the position with regard to the costs of appeal is different. The third, fourth and fifth respondents, all of whom participated in the proceedings in the court *a quo*, played no part in the appeal proceedings and abided the judgment of this court. In the result, the issue in this court related to a dispute between private individuals as to their respective entitlement to the subject property. In the court below the appellant enjoyed the benefit of legal aid, but not in this court. It appears that the Legal Aid Board was only prepared to grant legal aid to the appellant on condition that her appeal was handled by a staff member from the Board's Cape Town Justice Centre. It was also not prepared to pay the costs previously incurred of preparing the appeal record and of counsel's heads of argument. The appellant, not unreasonably, elected to proceed without legal aid and with her existing legal representatives who have acted on a contingency basis. In all the circumstances, there seems to me to be no good reason for departing from the ordinary rule that costs should follow the result.

[30] A further issue relates to the costs of preparing and perusing the appeal record. The appellant's attorneys wrote to the attorneys representing the other parties in the appeal requesting them to

agree to the omission from the appeal record of the contents of two departmental files of the Provincial Administration which had been admitted in the course of the trial. The response of the attorneys representing the first and second respondents was to request a copy of the files. On being advised that the files were already in their possession, they simply ignored the request. The fourth respondent, which abides the judgment of this court, had no objection to the omission. However, the attorneys representing the third and fifth respondents wrote back insisting that the files be included. In view of the attitude of the first, second, third and fifth respondents, the files were included and accounted for volumes 8 to 13 and pages 1112 to 1148 of volume 14 (out of a total of 30 volumes). It was common cause between counsel in this court that this portion of the record was unnecessarily included and no reference was made to it in argument. The attorneys representing the third and fifth respondents were afforded the opportunity of furnishing reasons why their clients should not be held jointly and severally liable with the first and second respondents for the preparation and perusal of this part of the record. The response of the attorneys was that they had insisted that the files be included in the record as they had believed them to be relevant. They added that they had in any event informed the appellant's

attorneys subsequently that in the absence of the 'court record' their clients were unable to state which part of the record was relevant. As to the first point, I have already indicated that it was common cause at the hearing of the appeal that the files in question were irrelevant. As to the second point, the third and fifth respondents were represented at the trial by counsel. They did not require the 'court record' to ascertain whether the files were relevant or not. I accordingly propose holding them jointly and severally liable with the first and second respondents for the costs in question.

[31] In the result, the following order is made:

(a) (i) The appeal is upheld.

(ii) The appellant's costs of appeal are to be paid by the first and second respondents in their capacity as joint executors of the estate of the late Bawa Mahatey, but subject to sub-paragraph (iii) below.

(iii) The third and fifth respondents are jointly and severally liable with the first and second respondents for the costs of preparing and perusing volumes 8 to 13 and pages 1112 to 1148 of volume 14 of the court record.

(b) That part of the order of the court *a quo* directing erf 12377 Cape Town situated at 3 Lever Street, Walmer Estate, Western Cape, to be restored to the first and second respondents in their capacity as executors in the estate of the late Bawa Mahatey and directing them against registration of transfer to pay the sum of R11 599.50 to the fourth respondent, is set aside and replaced by the following:

'The application is dismissed.'

D G SCOTT
JUDGE OF APPEAL

CONCUR:

HOWIE P
FARLAM JA
LEWIS JA
PONNAN AJA