THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1222/2016

In the matter between:

JOHANNES UYS N.O **FIRST APPELLANT**

DIRK CORNELIUS UYS N.O **SECOND APPELLANT**

and

MSINDO PHILLEMON MSIZA **FIRST RESPONDENT**

DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **SECOND RESPONDENT**

MINISTER FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **THIRD RESPONDENT**

Neutral citation: *Uys & another v Msiza & others* (1222/2016) [2017] ZASCA 130 (29 September 2017)

Coram: Navsa ADP, Cachalia and Seriti JJA and Tsoka and Lamont AJJA

Heard: 1 September 2017

Delivered: 29 September 2017

Summary: Land – Land Reform – calculation of just and equitable compensation to owner for land awarded to labour tenant – proper evaluation of factors including market value – owner aware of labour tenant's claim when land purchased for development – claim a pre-existing impediment affecting development potential -Pointe Gourde principle not of application.

ORDER

On appeal from: the Land Claims Court of South Africa, Johannesburg (Ngcukaitobi AJ and Canca AJ sitting as court of first instance), judgment reported sub nom as *Msiza v Director General for the Department of Rural Development and Land Reform & others* 2016 (5) SA 513 (LCC) (5 July 2016):

1 The appeal is upheld with costs.
2 The third respondent is to pay the first respondent's costs and 70% of the appellant's costs, such costs are to include the costs of two counsel.
3 The order of the Land Claims Court is amended as follows:
The figures 'R1 500 000 (one million five hundred thousand rand)' are deleted and substituted with the figures 'R1 800 000 (one million eight hundred thousand rand)' where they appear in paragraphs one and two.
Paragraph 5 is deleted and substituted with '5. The second respondent is to pay the costs of the applicant and the Dee Cee Trust, including the costs of two counsel'.

JUDGMENT

Lamont AJA (Navsa ADP, Cachalia and Seriti JJA and Tsoka AJA concurring):

[1] This is an appeal from the Land Claims Court (the LCC) (Ngcukaitobi AJ and Canca AJ) against the amount of compensation it determined was due to the owner of a portion of a property expropriated pursuant to successful claim by labour tenant under s 23 (1) of Land Reform (Labour Tenants) Act 3 of 1996. The owner of the property is the Dee Cee Trust (the Trust) and the labour tenant, who was awarded the property, is Mr Msindo Phillemon Msiza (Mr Msiza). The Trust's complaint is that the LCC

determined the compensation on the basis that the property was zoned for agricultural use instead of having regard to its developmental potential. And it then compounded the error by arbitrarily reducing the market value of the property because it was awarded to a labour tenant. The judgment of the LCC is reported as *Msiza v Director General for the Department of Rural Development and Land Reform and Others*.[1] This court granted the Trust leave to appeal against the decision. Agri SA sought and was granted leave to make submissions to this court as amicus curiae regarding the proper consideration of market value in the assessment of just and equitable compensation as contemplated in s 25 of the Constitution.

[2] The first and second appellants are the trustees of the Trust which owns the property that is the subject of this dispute. It measures approximately 352 hectares in extent and is known as Remainder of Portion 4 (a portion of Portion 2) of the farm Rondebosch 403 JS. It is situated in the district of Middelburg, Mpumalanga Province (Rondebosch). The extent of the land awarded to Mr Msiza by the LCC was a portion of Rondebosch, 45.8522 hectares in extent (the land).

[3] The Msiza family has continuously occupied the land since at least 1936. Mr Msiza's grandfather was recognised as a tenant who had the right to grow crops, graze cattle and reside on the land in consideration for labour. The arrangement was set out in a contract concluded under s 4(1) of The Native Service Contract Act 24 of 1932. The family exercised those rights on the land.

[4] On 5 November 1996 Mr Msiza's father lodged a claim for an area of land situated on Rondebosch to be awarded to him as a labour tenant in terms of Chapter 3 of the Act. On 21 November 1996 receipt of the claim was acknowledged by the second respondent, the Director General of the Department of Rural Development and Land Reform (the Director General). On 2 December 1996 the Director General notified Mr Jooste, who owned

[1] *Msiza v Director General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) (5 July 2016).

Rondebosch at the time, of the claim. Notice of the claim was published in the Government Gazette on 3 January 1997.

[5] The trust became the owner of Rondebosch on 9 May 2000 pursuant to an agreement for the purchase thereof concluded on 17 December 1999. The purchase price was R400 000. It is common cause that the Trust was aware of the claim and the presence of the Msizas when it acquired the property.

[6] Subsequent to the award of the land to Mr Msiza by the LCC on 16 November 2004, the parties attempted to reach agreement over the amount of compensation to be paid to the Trust. Offers of R408 000 and later R550 000 were made by the Minister to the Trust which it found unacceptable. The negotiations also involved an offer that the Msizas accept other land in lieu of the land awarded. That suggestion too was rejected. Unable to resolve their differences the matter stalled. On 21 August 2012, Mr Msiza launched an application in the LCC for a determination in terms of s 23(2) of the Act. The LCC determined the amount payable by the Director General and the Minister as R1,5 million. That order is the subject of this appeal.

[7] An owner's right to compensation for the loss of rights in land is dealt with in s 23(1) of the Act in the following terms:

'The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.'

[8] When a court considers the nature of the order it makes, it must have regard to s 22(5) of the Act,[2] which echoes the relevant provisions of the Constitution.

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[2] 'In determining the nature of the order which is to be made the Court shall have regard to-

(a) the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis;

(b) the achievement of the goals of this Act;

(c) the requirements of equity and justice;

(d) the willingness of the owner of affected land and the applicant to make a contribution, which is reasonable and within their respective capacities, to the settlement of the application in question; and

(e) the report and any determination made by an arbitrator appointed in terms of section

[9] The provisions of the Constitution that deal with just and equitable compensation for the expropriation of property are s 25(2) and (3) which provide that land may:

'(2) …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.'

[10] These provisions were considered in *Du Toit v Minister of Transport*:[3] The court held at para 28 that:

'[s]ection 25(2) of the Constitution requires property to be expropriated only in terms of a law of general application and subject to compensation. The amount of compensation must then be agreed upon between the affected parties. Alternatively, it may be decided or approved by a court of law. However, the amount of compensation agreed or decided upon must adhere to the standards of justice and equity. It must also reflect an equitable balance between the interests of the public and of those affected by the expropriation. These standards, provided for in s 25(3) of the Constitution, are peremptory and every amount of compensation agreed to or decided upon by a court of law must comply with them. To determine that the amount is just and equitable, s 25(3) provides an open-ended list of relevant circumstances to be taken into account, including the market value of the property. In contrast, the Act does not specifically require that the amount of compensation meet the peremptory standards of the Constitution. Section 12(1) of the Act confines the compensation amount to either actual financial loss, when what is expropriated is a right, or to the

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19 (1) (a).'

[3] *Du Toit V Minister of Transport* 2006 (1) SA 297 (CC).

aggregate of market value and financial loss when the subject of the expropriation is tangible property. Section 25 of the Constitution, on the other hand, does not draw that distinction. There are clearly differences between the Act and the Constitution which may affect the fairness of the amount of compensation.'

[11] *Du Toit* dealt with valuation in the context of expropriation of land under the Expropriation Act 63 of 1975 (the Expropriation Act). The approach and the principles that were dealt with in *Du Toit* apply, as s 23(1) of the Act set out in paragraph 7 above invokes s 25(2) and (3) of the Constitution. *Du Toit*'s case at para 26 (footnotes omitted) sets out in relation to the Expropriation Act that:
'It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation, must comply with the Constitution, including its spirit, purport and objects generally and s 25 in particular.'

[12] Section 25(3) sets out a number of factors to be considered. Because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then the other factors are considered to arrive at a final determination.[4] This approach, known as the two-stage approach is set out in *Du Toit* at para 37(footnotes omitted) as follows:
'Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces. The approach of beginning with the consideration of market value (or actual financial loss for that matter) and thereafter deciding whether the amounts are just and equitable is not novel. It was adopted by Gildenhuys J in *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs*. The Court in that matter did not deal with the interpretation and application of s 12(1) of the Act but rather with s 2 of the Restitution of Land Rights Act in the context of monetary compensation for dispossession of land. Nevertheless, the Judge pointed out that the market value of the expropriated property could become the starting point in the application of s 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an

[4] *Msiza* para 38.

amount may be added or subtracted as the relevant circumstances in s 25(3) may require. Actual loss may play a similar role depending on the circumstances of the case. For this reason, the approach adopted here which applies the Act as a starting point and proceeds to apply s 25(3) of the Constitution may not be suitable in all cases. It is, however, the most practicable one in the circumstances of this case where there is no challenge to the constitutionality of the Act.'

[13] This approach, the court emphasised, must be applied with care to ensure that all the factors set out in s 25(3) are given equal weight. The factors set out in s 25(3) makes justice and equity paramount in the calculation of compensation;[5] market value on its own is but a component of the set.

[14] In the present matter the primary issue between the parties regarding the market value was whether the property had residential development potential. It was agreed between the parties, on the basis of expert evidence, that if the property had residential development potential, its market value was R4,36 million. On the other hand, if it was considered in its present state, namely as agricultural land then the market value was R1,8 million. The disparate valuations must of course be considered in relation to the history and circumstances of the present case and against constitutional and relevant statutory provisions.

[15] The report of the expert called on behalf of the State is significant. In reaching his valuation of R1,8 million he considered the physical features attaching to the land as also its present and historical use by the Msiza family. He stated as follows 'taking cognisance of the historic and current use, the characteristics of the subject property, the lawful use, and the judgment on the subject property in terms of Chapter lll of the Land Reform (Labour Tenants) Act, we considered agricultural use is the highest and best use for the subject property and will be valued accordingly.' Simply put, the valuation of R1.8 million took account of the Msiza claim in the valuation of the property.

[5] See *Du Toit* para 84.

[16] Having regard to the aforesaid and applying the principles set out in the cases referred to above, the conclusion of that expert in relation to the compensation to be paid cannot be faulted. But, contends the appellant, the application of the *Pointe Gourde* principle requires the impediment to residential development constituted by the Msiza land claim to be ignored in determining the value. The true market value of the land would then be R4,36 million reflecting its developmental potential.

[17] The *Pointe Gourde* principle usually applies in expropriation matters. It found its way onto the statute books in section 12(5)*(f)* of the Expropriation Act in the following terms:

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

(f) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account.'

[18] The section has its origin in the *Pointe Gourde*[6] judgment of the Privy Council, where Lord MacDermott said that it 'is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition'. The purpose of the principle is set out in *Helderberg*,[7] referring to Australian authority[8] as follows:

'(T)o ensure that a resuming [expropriating] authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption [expropriation] on the basis that the destroyed potential had never existed. . . . The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a

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[6] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (P.C).

[7] *City of Cape Town v Helderberg Park Development (Pty) Ltd* (429/05) [2006] ZASCA 91; [2007] 1 All SA 517 (SCA); 2007 (1) SA 1 (SCA) para 28.

[8] *Queensland v Murphy* (1990) 95 ALR 493 (HC) at 496.

feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption. . . .'

[19] In the present matter, the Constitution and the Act set the legal and policy parameters for the restoration of land rights to labour tenants. As mentioned at the outset the relevant steps sanctioned by the legislation to enforce Mr Msiza's rights were in place and known before the Trust purchased the land. In other words there was a known impediment to the property's development potential when the property was purchased which had a direct bearing on the price that a willing buyer in the Trust's position would have been prepared to pay for the property.

[20] The application of the *Pointe Gourde* principle, where the purchaser of land has knowledge of the facts which constitute the impediment to development at the time of the purchase, was considered in *Port Edward v Kay.*[9] In that matter, which dealt with an expropriation, the existence of an impediment to development of the land was known. The impediment was constituted by a policy known as the 'green wedge scheme' which prevented the type of development for which the land was otherwise suitable. For that reason the permissions required to develop the land would probably not have been obtained. The development potential was accordingly remote. It was held in *Kay*'s case that if the purchaser had knowledge of the impediment at the time of the sale to him, that knowledge would have been reflected in the price paid at the time of purchase. Hence the 'purchaser … had the benefit of that depreciation; to disregard the depreciation in his capacity as seller would be to benefit him in a manner clearly not intended by the section.'[10] The section referred to is s 12(5)*(f)* of the Expropriation Act more fully set out above. *Kay* is accordingly authority that the *Pointe Gourde* principle does not apply where the owner, who bought knowing of the impediment, is subsequently expropriated.

[9] *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 678 B-C; *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (t) 524 F-H.
[10] *Kay* supra 681

[21] The *Pointe Gourde* principle therefore does not apply to the present case as the Trust bought the land knowing of the Msiza claim and the presence of the Msiza family on the land. On this basis the market value of the land is therefore R1,8 million, and not R4,36 million, which would have been the market value of the land with its developmental potential.

[22] The LCC was hesitant to apply the two-stage approach[11] but did so and accepted the market value of R1,8 million. It then proceeded to consider compensation which would be just and equitable. It determined that an amount of R300 000 should be deducted from the market value.

[23] The reasons for making the deduction[12] were listed as being: that there was a 'disproportionate chasm' between the amount paid by the trust and the market value it sought to claim; that the trust made no significant investment in the land; that the use of the land had not changed since it was acquired; that when the land was acquired there was a land claim and the Msiza family were residing on the land; that the land had been awarded to the Msiza family in 2004 and had not been transferred; that as the object of the compensation is land reform the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform; that the Msiza family had lived and worked on the farm since 1936 as Labour tenants and should receive compensation. The LCC also found that there has been no direct State investment or beneficial capital improvement of the land.

[24] In my view, there was no 'disproportionate chasm' between the price paid by the Trust when it bought the land and the market value at the time of the determination. Over the period of Trust ownership the value of land increased. This does not result in a disproportionate chasm but rather in a reflection of the escalation of the value of land.

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[11] *Msiza* para 38.
[12] *Msiza* para 80.

[25] The failure of the Trust to make any significant investments in the land since acquisition; the unchanged use of the land; the Trust's knowledge of the impediment to development; the success of the determination, the fact that the Msiza family have been labour tenants and have worked the land since 1936 have all been taken into account in considering market value. The LCC accepted that the expert had considered these factors as against market value.[13]

[26] There was therefore no justification for stigmatising the Trust's claim as 'extravagant'. Nor was there any evidence that the fiscus is unable to pay R1,8 million for the land. In fact it accepted that the valuation was appropriate. There is similarly no evidence that the State is unable to meet claims of this nature. On the contrary it is the amount the State was willing to pay.

[27] There were thus no facts justifying the deduction of the amount of R300 000. The LCC arbitrarily decided on this amount with no rational foundation. The computation was accordingly unfounded and cannot stand.

[28] A just and equitable determination for the land is R1,8 million.

[29] The LCC made no order as to costs which is the usual order made in the LCC where no exceptional circumstances exist. This approach to costs has been recognised in this court.[14] In my view exceptional circumstances do exist in the present matter. Mr Msiza was obliged to bring the application as the matter was not moving forward. The negotiations between the Trust and the Minister had stalled. Shortly prior to the commencement of the proceedings, the Minister accepted that R1,8 million was an appropriate determination, yet did not tender that amount. The Trust was therefore compelled to go to trial to get any determination in its favour at all. The extreme dilatory conduct of the Minister coupled with his failure to make an appropriate tender constitute exceptional circumstances and justify an award of costs against him in favour of the Trust as well as in favour of Mr Msiza. Each achieved substantial

[13] *Msiza* para 76.
[14] *Abrams v Allie N O & others* 2004 (9) BCLR 914 (SCA) para 29.

success. The position on appeal is different. The Trust was unsuccessful in its main attack. It succeeded on the issue of the deduction and should be awarded costs on that basis. Counsel were agreed that an appropriate order was that the Minister pay 70% of the Trust's costs and all of the first respondent's costs.

[30] It remains to thank the amicus curiae for the assistance which it gave this court.

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

1 The appeal is upheld with costs.

2 The third respondent is to pay the first respondent's costs and 70% of the appellant's costs, such costs are to include the costs of two counsel.

3 The order of the Land Claims Court is amended as follows:

The figures 'R1 500 000 (one million five hundred thousand rand)' are deleted and substituted with the figures 'R1 800 000 (one million eight hundred thousand rand)' where they appear in paragraphs one and two.

Paragraph 5 is deleted and substituted with '5. The second respondent is to pay the costs of the applicant and the Dee Cee Trust, including the costs of two counsel'.

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C G Lamont

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	G J Scheepers Instructed by: Karien Schutte Attorneys, Middelburg Schoeman Maree Inc., Bloemfontein
For the 1st Respondent:	A A Gabriel SC (with M Bishop) Instructed by: Legal Recources Centre, Johannesburg Matsepes Inc., Bloemfontein
For the 2nd and 3rd Respondents:	N H Maenetje SC (with P Nonyane) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
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