

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/04

PAUL JOHANNES DU TOIT

Applicant

versus

MINISTER OF TRANSPORT

Respondent

Heard on : 9 November 2004

Decided on : 8 September 2005

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JUDGMENT

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MOKGORO J:

*Introduction*

[1] This is an application for leave to appeal against the judgment of the Supreme Court of Appeal (the SCA)<sup>1</sup> setting aside the order of the Cape High Court.<sup>2</sup> The case concerns a dispute between Mr Du Toit (the applicant) and the South African Roads Board (the Board) whose rights and obligations have since been taken over by the Minister of Transport (the respondent). The dispute relates to the correct approach to compensation, and the correct amount to be paid in terms of section 12 of the

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<sup>1</sup> *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA).

<sup>2</sup> *Du Toit v Minister of Transport* 2003 (1) SA 586 (C).

Expropriation Act 63 of 1975 (the Act) for an expropriation under section 8 of the National Roads Act 54 of 1971 (the Roads Act).

[2] Since its inception the Act has been applied as the primary statutory instrument for expropriation of property in South Africa. The law regarding expropriation is now also governed by the Constitution. The applicant has not challenged the constitutionality of the Act or any of its provisions directly, but rather submitted that the Act should be interpreted and applied in conformity with the Constitution as required by section 39(2) of the Constitution.<sup>3</sup>

### *Background*

[3] On 12 November 1997 a notice of expropriation was served on the applicant. It purported to be a notice issued in terms of section 8(1)(c) of the Roads Act,<sup>4</sup> which has since been repealed.<sup>5</sup> Following the notice, the Board entered the applicant's farm Hooi Kraal and on a portion approximately 3,03 hectares in size known as Moordenaarskop, used a borrow pit which it created to excavate gravel for a period of approximately eighteen months. About 80 000 cubic metres of gravel was extracted from the pit and removed from the land for the purposes of the construction of a public road. These facts were not in dispute between the parties. What was

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<sup>3</sup> Section 39(2) provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

<sup>4</sup> Section 8(1) is reproduced in para 4 below.

contentious, was whether the notice of expropriation was properly issued under section 8(1)(c) as opposed to section 8(1)(b) of the Roads Act and whether as a result, section 12(1)(b) rather than section 12(1)(a)<sup>6</sup> of the Act was the correct statutory basis for the determination of compensation following the expropriation.

[4] Section 8 of the Roads Act provides for the expropriation of land or building material as well as the right to use land temporarily. It states:

“8(1) The Board may, subject to an obligation to pay compensation—

- a) expropriate land for a national road or for works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of vehicles, machines, equipment, tools, stores or material;
- b) take gravel, stone, sand, clay, water or any other material or substance on or in land for the construction of a road or for works or for purposes referred to in paragraph (a);
- c) take the right to use land temporarily for any purpose for which the Board may expropriate such land;
- d) if any land is or will be divided by a road referred to in paragraph (a) in such a manner that in the opinion of the Board, that land or any part of it is or will be useless to its owner, expropriate that land or the part of it in question.”

Section 8(2) of the Roads Act makes the provisions of sections 7 – 24 of the Act apply, *mutatis mutandis*, in respect of the expropriation of property or the taking of property or a right in terms of section 8. Section 12 of the Act provides for the

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<sup>5</sup> The Roads Act, except for section 2(1A), was repealed by section 60(2) of the South African National Roads Agency Limited and National Roads Act 7 of 1998.

<sup>6</sup> The provisions of section 12(1) are reproduced in para 4 below.

measure of compensation, depending on whether property had been expropriated, or a right in property. It states:

“12(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed—

- (a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of—
  - (i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and
  - (ii) an amount to make good any actual financial loss caused by the expropriation; and
- (b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:

Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined—

- (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
- (bb) in any other suitable manner.”

[5] The applicant contended that the correct section of the Roads Act for issuing the notice of expropriation was section 8(1)(b) and not section 8(1)(c). Resultantly, the compensation should be awarded under section 12(1)(a) of the Act, and be based on the market value of the property which was expropriated. The contention of the respondent, on the other hand, was that the section 8(1)(c) notice was proper in that a temporary right to use the applicant’s land and not the property itself had been

expropriated. It follows that section 12(1)(b) is applicable in determining compensation which should be based on the actual loss of the applicant.

[6] When the parties failed to reach an agreement, the applicant, relying on section 12(1)(a) of the Act, claimed compensation in the amount of R801 980.00 based on what he submitted was the market value of the gravel removed. Rejecting this claim, the respondent, relying on section 8(1)(c) of the Roads Act, read with section 12(1)(b) of the Act, offered R6 060.00, an amount representing what was said to be the actual financial loss incurred by Mr Du Toit as a result of the expropriation, together with a solatium. This dispute about the amount of compensation to be awarded prompted Mr Du Toit to approach the High Court.

*Proceedings in the High Court*

[7] In the High Court, Jamie AJ held that the notice issued under section (8)(1)(c) of the Roads Act was proper<sup>7</sup> in that what was expropriated was a right to use land temporarily. The right, he held, had two elements: First, the temporary use of the land in question to create a borrow pit to excavate gravel for purposes of the construction of a public road and second, the permanent taking of a quantity of gravel from that land.<sup>8</sup> Having found that there was no open market for what was expropriated in this case, being the temporary right to use land, together with a right to remove an unspecified amount of gravel, he then proceeded to find that the proviso contained in

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<sup>7</sup> Above n 2 at para 12.

<sup>8</sup> Id.

section 12(1)(aa) and (bb) of the Act were applicable.<sup>9</sup> These sections state that where there is no open market for the property expropriated, compensation can be determined either on the basis of the replacement value of what was expropriated or in any other suitable manner.

[8] Electing to determine the compensation “in any other suitable manner”,<sup>10</sup> the judge was of the view that because the Constitution enjoins a court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation, the phrase “any other suitable manner” in section 12(1)(bb) ought to be interpreted in the light of sections 25<sup>11</sup> and 39(2) of the Constitution when determining compensation for expropriation. Section 25(3), he observed, requires additional considerations to those of the market value of the property to be taken into account.<sup>12</sup> Moreover, it requires compensation to be just and equitable and to reflect an equitable balance between the public interest and the interests of those affected by the expropriation.<sup>13</sup>

[9] Having considered the taking of the gravel as a component of the expropriated right, and using the market value of the quantity of the gravel taken as the basis for determining compensation, the Court held that on the available evidence, the market

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<sup>9</sup> Id at para 12.

<sup>10</sup> Id at para 13.

<sup>11</sup> The relevant provisions of section 25 are reproduced in para 27 below.

<sup>12</sup> Above n 2 at para 25.

<sup>13</sup> Id at para 27.

value of the applicant's gravel was fixable at R5 per cubic metre.<sup>14</sup> The Court further considered whether the compensation should be adjusted from the market value, after having regard to the other factors set forth in section 25(3)<sup>15</sup> together with any other relevant circumstances. The factors that the Court considered were: (a) the extent of the remaining deposits of gravel at Hooi Kraal; (b) the use of the property at the time of expropriation, and in particular the rate of extraction of gravel therefrom; (c) the effort and cost of removing the material, the cost of rehabilitation of the site thereafter; and (d) the purpose of the expropriation.<sup>16</sup> It was found that the compensation based on the price of R5 per cubic metre should be reduced by 40% and the Court awarded compensation in the amount of R257 623.00, which included a solatium in terms of section 12(2)<sup>17</sup> of the Act.<sup>18</sup>

### *Proceedings in the SCA*

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<sup>14</sup> Id at para 43. This value was based on the fact that the hypothetical sale would be of a quantity of 80 000 cubic metres of gravel – a far greater quantity than the applicant was accustomed to selling. It was accepted that the sale of larger quantities of gravel would entail a discounted price.

<sup>15</sup> The relevant provisions of section 25 are reproduced in para 27 below.

<sup>16</sup> Above n 2 at paras 45-50.

<sup>17</sup> Section 12(2) provides:

“Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to–

- a) ten per cent of such total amount, if it does not exceed R100 000; plus
- b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus
- c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus
- d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.”

[10] Following the decision of the High Court, the respondent brought an appeal to the SCA contending that the High Court had erred in its finding that compensation for the expropriation was to be calculated in terms of the proviso contained in section 12(1)(bb) of the Act.<sup>19</sup> The respondent argued that compensation should have been assessed under section 12(1)(b)<sup>20</sup> of the Act and based on the actual financial loss of the applicant, resulting from the expropriation of the temporary right to use the land.

[11] Upholding the appeal against the decision of the High Court, Heher JA held that the Board, having taken the right to use the land, was authorised to expropriate under section 8(1)(c) of the Roads Act but held that compensation should properly have been measured in terms of section 12(1)(b) of the Act.<sup>21</sup> He rejected the reliance placed by the High Court on the proviso in section 12(1)(bb) as the basis to settle the amount of compensation.

[12] The SCA found that the owner of land is not entitled to compensation merely because a right to use his or her property is taken, even where the exercise of the right involved the permanent deprivation of some elements of the land.<sup>22</sup> It was pointed out that where a determinable market value can be attached to that right, compensation will only be payable if the taking has caused *actual financial loss*, flowing directly,

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<sup>18</sup> Above n 2 at paras 52 and 67.

<sup>19</sup> See section 12(1) in para 4 above.

<sup>20</sup> *Id.*

<sup>21</sup> Above n 1 at para 7.

<sup>22</sup> *Id.* at para 8.

not hypothetically, from the expropriation.<sup>23</sup> The evidence indicated that there were huge reserves of gravel on the farm, which could have been used to supply what was viewed as a limited market for at least the next 60 years. Since the applicant was bound to mitigate his loss, he would have satisfied the demand for gravel from these other sources had the Board bought the property on the open market.

[13] Moreover, the Court held, the applicant's evidence of the market price of the gravel was misleading because he did not take account of the fact that if he had sold gravel which was to be sourced from the expropriated portion of his land, he would have been obliged to open a new quarry because the gravel was not easily accessible on the portion of land expropriated by the Board. He would have had to pay for the cost of creating a quarry, extracting the gravel and rehabilitating the site. Considering that the market for gravel from the site would thereafter amount to only approximately 1800 cubic metres per annum, being the average amount of gravel he sells annually, the evidence did not establish that he could have justified the venture. Therefore, the possibility of such a loss occurring, the Court held, could not be regarded as actual financial loss because it was too speculative.<sup>24</sup>

[14] Furthermore, enhancement in the market value of the land or gravel could not be taken into account because the increased demand was due to the same project for

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<sup>23</sup> Id.

<sup>24</sup> Id at para 15.

which the expropriation had occurred. Section 12(5)(f)<sup>25</sup> of the Act, which was not challenged, requires one to think away any enhancement in the value of the property if that increase resulted from the expropriation itself.<sup>26</sup> The Court rejected the applicant's argument that the potential for the market had been created by the original construction of the national road in 1948. This was because the market had remained a mere 1800 cubic metres of gravel annually since then.<sup>27</sup>

[15] Consequently, the SCA upheld the appeal with costs and set aside the order of the High Court. The Board was ordered to pay compensation amounting to a total of R6 060.00, plus a solatium in terms of section 12(2) of the Act. The SCA held that these amounts represented just and equitable compensation within the meaning of section 25(3) of the Constitution. The Court also ordered the payment of interest under section 12(3)(a) of the Act in respect of the compensation and the solatium. Mr Du Toit now appeals the decision of the SCA.

### *Issues before this Court*

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<sup>25</sup> Section 12(5)(f) states,

“In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely—

any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the 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”.

<sup>26</sup> This rule is derived from the so-called *Pointe Gourde* principle developed from the case of *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* [1947] AC 565 (PC).

<sup>27</sup> Above n 1 at para 13.

[16] Before this Court the applicant was persistent in his submission that what was expropriated was not a right to use the 3,03 hectares of land to operate a quarry for purposes of upgrading a national road, but the 80 000 cubic metres of extracted gravel which was removed from the land. He argued that he was entitled to compensation under section 12(1)(a) of the Act, measured by the market value of the gravel taken. As in the High Court and the SCA, he relied in the alternative on a claim for just and equitable compensation in terms of section 25(3) of the Constitution.

[17] The applicant did not challenge the constitutional validity of section 12(1)(b) or any other provision of the Act. However, he did contend that the SCA's finding that section 12(1)(b) of the Act was applicable was incorrect and affected the constitutional interpretation and application of the Act. The applicant argued that the Act will not have been interpreted in line with section 25(3) of the Constitution if the expropriating authority purports to take away a right to use land but in the process takes the landowner's property, and the court considers the landowner's right to compensation to be limited to considerations referred to under section 12(1)(b). This is because section 12(1)(b) includes no explicit reference to the market value of the property, but section 25(3) of the Constitution mandates a consideration of market value in the calculation of compensation for expropriated property.

[18] Today, the applicant argued, the statutory protection of property, the authority to expropriate it and the obligation to pay compensation all require a constitutional dimension not reflected in pre-constitutional legislation and case law. Relevant

legislation and case law now all have to be interpreted to promote the spirit, purport and objects of the Bill of Rights as required by section 39(2) of the Constitution. If one interprets section 12(1)(b) as not making room for the consideration of just and equitable standards to be applied when assessing the amount of compensation, but instead as confined to compensating for financial loss, it is contrary to the provisions of section 25(3) of the Constitution.

[19] Counsel for the respondent submitted that on the contrary, the applicant was entitled to compensation measured on the basis of actual financial loss in terms of section 12(1)(b). The respondent contended that when the SCA considered the amount of compensation that the applicant was entitled to under section 12(1)(b) of the Act, it interpreted the section in a way that made clear that the calculation of actual financial loss does take into account the loss of the market value of the gravel, making section 12(1)(b) no less disadvantageous than section 12(1)(a).

[20] The respondent further averred that what was expropriated by the Board was the right to use 3,03 hectares of the applicant's farm as a quarry pit to excavate gravel for a temporary period of 18 months only and for purposes of upgrading a public road. With regard to the purposes for which the right was taken, there is no dispute that it was to create a quarry to procure gravel, which amounted to 80 000 cubic metres, for public road development purposes. The notice under section 8(1)(c) of the Roads Act, the respondent contended, therefore was issued properly.

[21] Arguing that while the aim of the Act is to ensure there is just and equitable compensation for property taken in the public interest so as not to prejudice the expropriatee, the respondent submitted that it is also to ensure that he or she does not benefit unduly by obtaining a windfall at the expense of the public.<sup>28</sup> The respondent submits that the purpose of compensation is therefore to place the expropriatee financially in the same position as he or she would have been but for the expropriation.<sup>29</sup>

[22] The respondent acknowledges that whenever there is expropriation, which must be in the public interest, compensation shall be paid.<sup>30</sup> He contended that it was fallacious for the applicant to aver that compensation based on financial loss cannot constitute just and equitable compensation, simply because it does not explicitly include the market value of what has been expropriated. Market value, he argued, is only one of the factors to be taken into account when compensation for expropriation is assessed in terms of section 25(3) of the Constitution. When regard is had to all relevant circumstances, just and equitable compensation in the end, may amount to more or less than market value. Therefore, market value alone should not be equated with just and equitable compensation, as appears to be argued by the applicant.

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<sup>28</sup> See Budlender, Latsky and Roux *Juta's New Land Law* (Juta and Co. Ltd Cape Town 1998) at 1-60.

<sup>29</sup> See *Illovo Sugar Estates Ltd v South African Railways and Harbours* 1947 (1) SA 58 (D) at 64; *Kangra Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA) at 342I; *Minister van Waterwese v Mostert en Andere* 1964 (2) SA 656 (A) at 667A-B and *Mooikloof Estates (Edms) Bpk v Premier, Gauteng* 2000 (3) SA 463 (T) at 471F.

<sup>30</sup> See section 25(2) of the Constitution at para 27 below.

[23] The respondent further contended that section 12(1)(b) neither explicitly nor by implication excludes a consideration of market value in establishing actual financial loss. If it did, the respondent suggested, section 12(1)(b) would be in conflict with section 25(3) of the Constitution.

[24] The SCA's finding that the High Court should have assessed compensation under section 12(1)(b) therefore did not exclude the need to take into account the market value of what had been expropriated. In the case of *Kangra Holdings (Pty) Ltd v Minister of Water Affairs*<sup>31</sup> and in the present case, the SCA made it clear that financial loss includes the loss of the market value of what had been expropriated. The SCA therefore did factor in a consideration of market value in its calculation of compensation. The SCA arrived at its decision not because it applied the legal principles incorrectly, the respondent contended, but because there was a lack of relevant evidence.

*Whether leave to appeal should be granted*

[25] A preliminary question to be determined is whether leave to appeal should be granted in this matter. While the constitutional protection of private property is an important right, the ability to expropriate property is a crucial constitutional power of the state. Firstly, it enables the state to perform several of its important functions without private ownership becoming an undue impediment. Secondly, in view of the history of the unequal and unjust distribution of property in our society, land in

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<sup>31</sup> Above n 29.

particular, the Constitution enjoins the state to effect redistribution equitably. Considering that the Act is the law of general application in this regard, it is essential that there be certainty on its interpretation and its application. The current differing views of the High Court and the SCA regarding the constitutional interpretation and application of the relevant sections of the Act has the potential to create uncertainty. There can be no doubt that the need for certainty in the interpretation and application of such an important piece of legislation is necessary. The application for leave to appeal is therefore granted.

*The application of the Constitution*

[26] Although the Act has for nearly two decades been applied in the expropriation of property and has been regarded as the major source of expropriation law in South Africa, it is important to recognise and appreciate that since the inception of the Constitution, all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values.<sup>32</sup> 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 section 25 in particular.

[27] The relevant provisions of section 25 of the Constitution provide:

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<sup>32</sup> See para 29 below.

- “(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.”

[28] Section 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 section 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, section 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,<sup>33</sup> or to the aggregate of market value and financial loss when the subject of the expropriation is tangible property.<sup>34</sup> 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.

[29] The difficulty in this case, however, is that as already indicated, the applicant did not impugn the constitutionality of section 12(1) or any provision of the Act. He instead contended that the finding of the SCA that section 12(1)(b) rather than section 12(1)(a) was applicable, was flawed and impacted on the constitutional interpretation and application of the Act. In these circumstances, and in the circumstances of this case, the Act cannot be bypassed.<sup>35</sup> Section 39(2) of the Constitution requires that

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<sup>33</sup> Section 12(1)(b) of the Act.

<sup>34</sup> Where the right expropriated has a market value, however, there is no real difference between the two bases of compensation payable because, in that event, the compensation payable will be the market value of the right as well as actual financial loss. Similarly in *Kangra Holdings*, above n 29 at 336I-337B, the SCA concluded:

“In other words, where that which is expropriated is a right having a market value, there is no difference between the measure of compensation respectively afforded by paras (a) and (b). Consequently, (b) entitles the owner of an expropriated right with market value to compensation not only in respect of such value but to additional actual loss provided, of course, that the latter is ‘caused by the expropriation’ and, provided further that, apart from causation, it is a loss for which the Act permits compensation.”

<sup>35</sup> In *Ingledeu v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) Ngcobo J pointed out that relevant legislation should not be ignored in favour of direct resort to the Constitution. He stated at paras 20 and 22:

“This Court has adopted the doctrine of objective constitutional invalidity. The effect of this doctrine is that any law in existence prior to the Constitution coming into effect, and inconsistent with the Constitution, becomes invalid the moment the Constitution comes into operation, and that any constitutionally inconsistent law, passed after the Constitution, becomes invalid from the moment it is passed. It is important to appreciate, however, that the

unless it is unduly strained, section 12(1) of the Act must be applied in conformity with the fundamental values of the Constitution wherever possible. In the case of *In Re Hyundai Motor Distributors*<sup>36</sup> this Court held that:

“All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.” [Footnotes omitted.]<sup>37</sup>

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doctrine only determines the moment of invalidity – in the absence of any constitutional provision to the contrary – *once the law in question has been declared invalid*. As pointed out earlier, at no stage has the applicant challenged the constitutionality of Rule 35(14). That being so the Rule must be taken to be valid.

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In *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* this Court pointed out that ‘considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity (of a statutory provision) without any formal declaration of invalidity of that provision’. Grave doubts were expressed whether such a procedure was compatible with s 172(1) of the Constitution, which obliges a Court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency.” [Footnotes omitted.]

<sup>36</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

<sup>37</sup> *Id* at paras 21-22.

This Court explained further,

“Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read ‘in conformity with the Constitution’. Such an interpretation should not, however, be unduly strained.” [Footnotes omitted.]<sup>38</sup>

[30] Therefore, it is necessary to consider whether section 12(1) enables the award of an amount of compensation which is just and equitable as required by section 25 of the Constitution. Section 12(1) pre-dates the Constitution. At this stage it provides the mechanism by which compensation (under the Act) may be calculated. That section 12(1) of the Act and section 25(3) of the Constitution are different to each other is not surprising. Section 25(3) on the other hand provides a broad standard against which the amount of compensation arrived at under section 12(1) of the Act must be measured to ensure that it accords with the Constitution.

[31] As already indicated, section 25(3) is in peremptory terms. It says that the amount of the compensation “must be just and equitable”. Section 2 of the

Constitution, in addition to providing that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid, also provides that the obligations imposed by the Constitution must be fulfilled. Section 8(1) of the Constitution makes it plain that the Bill of Rights is also binding on the judiciary. Section 25(3) therefore imposes a positive duty on the executive, the legislature and the courts to ensure that compensation paid pursuant to an expropriation is just and equitable regardless of what the legislation concerned with compensation provides. Difficult questions of interpretation might arise where the amount considered by a court to be just and equitable exceeds the amount representing the market value of the property or the right to the property where the right has a market value, or the actual financial loss, and the amount payable under subsection 2.<sup>39</sup> It is nevertheless incumbent upon a court to determine whether compensation calculated in terms of section 12(1)(a) and (b) is just and equitable.

[32] Section 12 of the Act does not preclude the award of just and equitable compensation in circumstances where neither the market value nor actual financial loss has been proved. In the case before us, the SCA held that neither actual financial loss nor the market value of the right or of the gravel was established. However, it concluded that the amount offered by the state constituted just and equitable compensation. If the SCA's findings were correct, it cannot be said that section 12 of the Act was applied in a manner that is inconsistent with the Constitution.

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<sup>38</sup> Id at paras 23-24. See also *Ingledeu* above n 35.

<sup>39</sup> Above n 17.

[33] Section 25(3) does not make it peremptory that all factors listed be applied. The list is open-ended. Factors listed there will apply only in so far as they are relevant or applicable. Factors other than those listed may also be taken into account if they are relevant or applicable. The outcome reached must however be just and equitable, and it must reflect an equitable balance between the interests of the public and of those affected by the expropriation. Therefore, whether the amount of compensation is reached in terms of section 12(1)(a) or 12(1)(b), it must similarly be a just and equitable amount which reflects an equitable balance of the relevant interests. Here too we must have regard to all relevant circumstances listed in section 25(3), including all other relevant circumstances of the case.

[34] Section 12(1)(a) bases the determination of the amount of compensation paid for the expropriation of property on the aggregate of the market value and actual financial loss, and section 12(1)(b), where what has been expropriated is a right, bases the compensation only on actual loss suffered. In section 25(3) of the Constitution, however, provision is made for a range of relevant circumstances to be taken into account to ensure that the compensation agreed to between the parties or approved by a court of law in terms of section 25(2) is just and equitable and reflects an equitable balance between the public interests and the interests of those affected by the expropriation. The Act does not explicitly insist that the compensation meet these standards. While section 12(1) of the Act bases compensation on market value or financial loss, none of the relevant circumstances listed in section 25(3) of the

Constitution, which include market value and possibly actual financial loss,<sup>40</sup> are given any particular prominence. The Constitution therefore does not foreshadow which of the circumstances provided in the open-ended list will be relevant, will actually apply or will be more significant. If, after having regard to all relevant factors, the compensation awarded is just and equitable and it reflects an equitable balance between the public and the private interests, the constitutional standards as envisaged in section 25(3) would have been met. The construction of the relevant provisions of the Act and section 25(3) of the Constitution is different but does not appear to give rise to inconsistency. If on closer scrutiny it does, we have not been called upon to make that determination. I will therefore proceed on the assumption that there is no inconsistency.

[35] Under these circumstances, the more practical approach which will ensure that the peremptory standards of compensation envisaged in section 25(3) of the Constitution are met, is therefore to consider what compensation is payable under the Act, which is still valid and then to consider if that amount is just and equitable under section 25(3) of the Constitution.

[36] This two-stage approach to determine a constitutionally compliant amount of compensation is not ideal. It would have been more expedient if the legislature had made provision in the Act itself for complying with the constitutional standards of just

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<sup>40</sup> Section 25(3) requires that relevant circumstances be considered, and the list provided in that section is open-ended. Therefore, should actual financial loss be a relevant consideration, it must be taken into account to reach compensation which is just and equitable and also reflects an equitable balance between state and individual interests.

and equitable compensation and ensuring that an equitable balance between the interests of the state and those of the individual is reflected. Whatever the case may be, it is important that the provisions of this Act be brought in line with the Constitution. While that is not the case, the approach that I take in this matter permits us not to ignore the applicable legislation and more importantly, to give cognisance to the imperative nature of section 25(3) as required by section 39(2) of the Constitution. It must be ensured that the compensation ultimately awarded to Mr Du Toit is just and equitable, and reflects the necessary balance between his interests and the interests of the state.

[37] 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 Gildenhuis J in *Ex Parte Former Highland Residents; In Re: Ash and others v Department of Land Affairs*.<sup>41</sup> The Court in that matter did not deal with the interpretation and application of section 12(1) of the Act but rather with section 2 of the Restitution of Land Rights Act<sup>42</sup> in the context of monetary compensation for dispossession of land. Nevertheless, the judge pointed out that the market value of the

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<sup>41</sup> *Ex Parte Former Highland Residents; In Re: Ash and others v Department of Land Affairs* [2000] 2 All SA 26 (LCC).

<sup>42</sup> Act 22 of 1994.

expropriated property could become the starting point in the application of section 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an amount may be added or subtracted as the relevant circumstances in section 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 section 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.

*The application of section 8 of the Roads Act and section 12 of the Act*

[38] Section 12 bases the determination of the compensation payable under the Act on market value and/or financial loss. In the context of the reasons given in the preceding paragraphs, I will therefore use these considerations to determine what compensation is payable in this matter, then proceed to determine whether, under section 25(3) of the Constitution, the amount arrived at under the Act is just and equitable and reflects an equitable balance of the relevant interests.

[39] In my view, both the SCA and the High Court were correct in finding that what was expropriated was a right which included the taking of property. Section 8(1)(c) authorises the Board to take the right to use land temporarily for a purpose foreshadowed in section 8(1)(a). That purpose includes:

“works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance”.<sup>43</sup>

The SCA was correct in its conclusion that the right to use land for excavation and acquisition of the materials referred to in that subsection will inevitably result in a permanent deprivation of the ownership of those materials. The Board, in my view, correctly preferred to issue its notice under section 8(1)(c) rather than section 8(1)(b) because it includes the power to take an unspecified amount of gravel as section 8(1)(b) envisages, but also, unlike section 8(1)(b), precludes the owner or third party from doing so whilst the Board holds the right to use the land. This temporary security of tenure must be vital if the taking of the gravel requires considerable effort and resources and the quantity required for the purposes sought cannot be predetermined. Indeed, on the date of expropriation the gravel was in situ, and the quantity that was required was unknown. What was expropriated was not gravel but the right to remove gravel. Thereafter, 80 000 cubic metres of gravel was excavated from 3,03 hectares of land and permanently removed for the purposes of upgrading a public road. This in circumstances where there was previously no quarry on the land over which the right taken was exercised and where the Board used its own resources to establish the facility. For these reasons, the notice was properly issued under section 8(1)(c) of the Roads Act.

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<sup>43</sup> Section 8(1)(a) in para 4 of this judgment.

[40] The applicant argued that the compensation awarded to him is not just and equitable because the amount was determined only according to the actual financial loss suffered, pursuant to the taking of the right, as required by section 12(1)(b). He does not argue that since section 12(1)(b) does not explicitly make reference to compensation on the basis of the market value of the right, even where the exercise of such a right involves the taking of physical property, which itself has a market value, the amount of compensation arrived at does not meet the constitutional standard of just and equitable compensation. Rather, he contends that if the section is interpreted so as not to take into account such market value, as he claims the SCA interpreted the section, the interpretation of the Act will not be consistent with the Constitution.

[41] But the applicant misperceived the approach of the SCA. As already indicated,<sup>44</sup> in trying to determine the actual loss suffered by the applicant, being of the view that actual loss included the loss of the market value of the 80 000 cubic metres of gravel taken, the SCA did take into account the market value of the applicant's property. It is important to point out that considering market value where financial loss is the basic measure of compensation, as already indicated, is not a novel interpretation.<sup>45</sup> It is legitimate to determine actual financial loss by making reference to the market value of the property in question, which could well constitute the actual amount of the loss suffered by the expropriatee. The High Court made

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<sup>44</sup> See para 24 of this judgment.

<sup>45</sup> *Kangra Holdings* above n 29 at 336I-J.

reference to the case of *South African Roads Board v Bodasing*<sup>46</sup> where the Court found:

“If what was taken had a nett market value of X thousand rand then plaintiff’s loss is X thousand rand because either the value of the plaintiff’s property on a willing seller/willing buyer basis would probably be diminished by this amount or this is the amount for which he could probably have sold the material and that reflects his actual financial loss.”

This approach was confirmed in the SCA case of *Kangra Holdings*,<sup>47</sup>

“It is nevertheless plain that loss of an asset through expropriation constitutes actual loss of its market value.”

[42] In determining the amount of compensation payable under section 12(1)(b), Heher JA held,

“Third, although the immediate cause of the loss is the taking of the right vested in the owner to use his own property and exploit his own gravel during the temporary period, a secondary but equally direct result of the taking is the permanent deprivation of the owner’s right to exploit gravel in the quantities removed. The value of that deprivation (if any) will also be part of the loss caused by the taking.”<sup>48</sup>

He held further,

“While it is correct, as pointed out in *Kangra Holdings* . . . that the *measure* of such loss will include the equivalent of the market value of what is taken by the

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<sup>46</sup> *South African Roads Board v Bodasing* (NPD) Case no 948/94, 22 September 1995, unreported at 6–7, quoted in the High Court judgment above n 2 at paras 8-9.

<sup>47</sup> Above n 29 at 336I-J.

<sup>48</sup> Above n 1 at para 8.

expropriator, that does not mean that the market value can always be used to prove the *fact* that such a loss was suffered.”<sup>49</sup>

The applicant’s claim that the SCA in this case did not interpret section 12(1)(b) so as to take account of market value is therefore incorrect.

[43] The SCA concluded that even though, theoretically market value can be factored into a consideration of what loss was suffered, that does not mean that in every factual situation, a loss was actually, and not merely hypothetically, suffered. The Court found that there was no market value proven for the hypothetical sale of 80 000 cubic metres of gravel. The Court was bound in terms of section 12(5)(f) to think away the market for gravel created by the project, since the increased demand and enhancement in value owed its existence to the purpose for which the expropriation took place. The Court found that on the evidence, the possibility of the applicant ever suffering a financial loss became too speculative.<sup>50</sup>

[44] Therefore, where market value attaches to property, the measure of financial loss will require a consideration of that market value. In instances where a right has been expropriated and the right does have a market value, the distinction between section 12(1)(a) and 12(1)(b) will be blurred.<sup>51</sup> In the *Bodasing* case the Court found:

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<sup>49</sup> Id at para 15.

<sup>50</sup> Id at paras 13-14.

<sup>51</sup> Above n 34.

“In my view on the facts of this case it makes little difference whether compensation is assessed under s 12(1)(a) or 12(1)(b) of the Expropriation Act. I say this because I find that what the defendant expropriated was in fact a right as contemplated by section 12(1)(b). It was the right to take gravel from the defined 4.83 hectares of plaintiff's land. That right was abandoned before the trial started. The amount of gravel taken is known, that is to say it was agreed at 194945 cubic metres. That is what ultimately was taken so whether compensation is to be based upon what a willing buyer would pay a willing seller under 12(1)(a) for that material or for the actual financial loss to the plaintiff is really of no practical difference.”<sup>52</sup>

[45] The applicant contended that section 12(1)(a) should govern the amount of compensation he receives because what was actually taken was gravel. Having decided that what was taken was indeed a right to use land, where the exercise of that right resulted in the permanent removal of gravel, it then becomes necessary to compensate for both aspects of this expropriated right, being the right of use of the land, and for the gravel that was taken as part of that right of use. Because section 12(1)(b) enables compensation of both the right of use and the property taken under that right, it is the correct section under which compensation is to be determined in this case. That said, there would be no difference in respect of compensation for the gravel alone, if compensation were assessed under section 12(1)(b) or 12(1)(a) of the Act. In a case such as this, both sections would require a consideration of the market value of the gravel because financial loss includes the loss of the market value of what has been expropriated. Besides, whether the calculation for compensation is determined under section 12(1)(a) or 12(1)(b), it will have to comply with section 25(3) of the Constitution.

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<sup>52</sup> Above n 46 at 6.

*Measure of compensation under the Act*

[46] The SCA held that Mr Du Toit had established neither the market value of the gravel nor his actual financial loss.<sup>53</sup> It further held that realistically the market value of agricultural land would carry no premium above the value of land without the gravel. In the circumstances the SCA concluded that compensation for the market value of the land that had been used for a period of eighteen months, was just and equitable compensation pursuant to section 25(3) of the Constitution. I cannot fault this finding.

[47] Mr Du Toit received the market value of his property despite the fact that his land was returned to him. It will be necessary to determine if the finding that this amount is just and equitable and reflects an equitable balance between the public and his interests is correct. To make this determination, the circumstances set out in section 25(3) of the Constitution must be considered so far as they are relevant.

*a) The current use of the property*

[48] The evidence indicates that the land and gravel in the expropriated portion of property lay dormant and was therefore not being used for the purpose of excavating gravel. I agree with the SCA's assessment that it is also unlikely or at least highly speculative that this portion of property that was temporarily used by the Board was going to be used to excavate gravel in the future. Evidence was moreover led to the

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<sup>53</sup> See paras 13 and 43 of this judgment.

effect that extensive deposits of gravel remained available at Hooi Kraal, so that the applicant could continue for decades to uplift gravel from the farm without being affected by the quantity of material taken in the course of the expropriation to satisfy the demand that he had been supplying. The High Court concluded that there remains virtually inexhaustible and readily accessible deposits of gravel at Hooi Kraal.<sup>54</sup>

*b) The history of the acquisition and use of the property*

[49] It is clear that the property to which the expropriation notice applied was bought and used for agricultural purposes and was used for the excavation of gravel only on an ad hoc basis. The portion of property from which the gravel was taken was not used for the purpose of excavating gravel. At the rate of extraction in the order of 1800 cubic metres of gravel per year, it would have taken about 45 years to remove approximately 80 000 cubic metres of gravel. The history of its acquisition would also include the price paid for the property. It was agricultural property and one can infer that the cost of its acquisition was no more than the agricultural value of the property at the time. Mr Du Toit did not indicate that he had paid more for the property because of its gravel content.

*c) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property*

[50] This is not a relevant factor since there was no state investment in the property. In terms of section 25(3) of the Constitution, it is not relevant nor is it applicable.

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<sup>54</sup> Above n 2 at para 46.

*d) The purpose of the expropriation*

[51] The purpose of the expropriation was to upgrade the N2 highway, a major national road in the country. The High Court emphasised that the importance to the economy and the general wellbeing of the populace of the improvement of the road system should not be overlooked. The road system is therefore a national asset and a matter of public interest.<sup>55</sup> As a farming member of the public who needs the road both for farming purposes and personal needs, including his gravel supply business, the applicant himself benefits from the upgraded road.

*e) Other relevant factors*

[52] The High Court pointed out that on the date of expropriation, the gravel was in situ and the precise quantity required was not known. Since it was the right to remove gravel which was expropriated, in determining a just and equitable amount as compensation, the effort and cost involved in extracting and removing a large quantity of gravel and of rehabilitating the site must be taken into account. The evidence established that it was unlikely that in the ordinary course excavations would have taken place to the depth that they did in the expropriated quarry. Therefore, in the absence of the expropriation, the harder and deeper deposits would have remained undisturbed in favour of the extraction of more easily accessible deposits elsewhere on Hooi Kraal. The limited demand for gravel from Hooi Kraal, absent the expropriation, would have made it unlikely that excavation would have taken place

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<sup>55</sup> Id at para 50.

with the same intensity in a single location.<sup>56</sup> Although it does not appear that there were any improvements done on the property, the Board did incur the cost of excavating and rehabilitating the site. It is important to note that because the right was temporarily expropriated, the land was returned to Mr Du Toit after this rehabilitation, so that he could continue to use it.

[53] The consideration of the factors in section 25(3) of the Constitution and other relevant circumstances clearly confirm that there is no other basis on which Mr Du Toit can be justifiably compensated.

#### *Conclusion*

[54] I have concluded that what has been expropriated in this matter is a right to use land temporarily to create a quarry pit to excavate gravel for the purposes of the construction of a public road, where the right includes the permanent removal of gravel for the purposes of that road construction. Having applied the provisions of section 25(3) of the Constitution, I conclude that the compensation paid to Mr Du Toit is just and equitable and reflects an equitable balance between the private and public interests.

[55] Although the respondent had asked for a costs order, the applicant has brought an important issue to this Court regarding the application and interpretation of the relevant provisions of the Act. I therefore make no order as to costs.

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<sup>56</sup> Id at paras 48-49.

*Order*

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

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The costs order of the SCA is set aside.

Madala J, Moseneke J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of Mokgoro J.

LANGA ACJ:

[57] I have had the benefit of reading the judgment of Mokgoro J which sets out admirably the facts that give rise to the dispute and the issues that have to be decided. I would dismiss the application for leave to appeal on the grounds that it bears no prospects of material success for the applicant and there are no other interests of justice that require it to be considered as will appear from this judgment. Moreover, I have two differences of opinion to record on the legal issues traversed in Mokgoro J's judgment. First, I am unable to agree with her analysis of section 8(1) of the National

Roads Act 54 of 1971 (the Roads Act); and secondly, and more fundamentally, I cannot agree with her analysis of the relationship between section 12(1) of the Expropriation Act 63 of 1975 and section 25(3) of the Constitution.

*The Roads Act*

[58] The notice to applicant purported to be in terms of section 8(1)(c) of the Roads Act. Pursuant to it, about 80 000 cubic metres of gravel was extracted over a period of eighteen months from a new borrow pit, about 3,03 hectares in size located on a hill on the applicant's farm. Section 8(1) of the Roads Act identifies categories of property that may be expropriated. Applicant's contention is that the subject matter of the expropriation was the gravel on his property which the National Roads Board (the Board) required for the purpose of upgrading a national road, the N2 highway. Although the process of taking the gravel would necessitate conceding to the Board the temporary right to use the portion of land concerned to set up an excavation site for the extraction of the gravel, the expropriation was, according to the applicant, primarily concerned with the taking of the gravel under the provisions of section 8(1)(b) of the Roads Act.

[59] The respondent, on the other hand contends that the expropriation was that of a right to use 3,03 hectares of applicant's property as a temporary gravel quarry, which included the right to extract and remove gravel for the use of the Board. This, according to the respondent, is an activity that falls under the provisions of section 8(1)(c) of the Roads Act.

[60] In terms of section 8(2) of the Roads Act, the provisions of sections 7 to 24 of the Expropriation Act 63 of 1975 apply mutatis mutandis to the expropriation of property or the taking of property or a right in terms of section 8(1) of the Roads Act. Only section 12 of the Expropriation Act is relevant for present purposes. It contains the basis for the determination of compensation and provides for different measures of compensation with respect to the taking of property, on the one hand and the taking of a right to use, on the other. In the case of the expropriation of property as provided for in section 8(1)(a) or (b) of the Roads Act, section 12(1)(a) of the Expropriation Act provides for compensation on the basis of market value together with actual financial loss. In the case of the taking of a right as envisaged in section 8(1)(c) of the Roads Act, section 12(1)(b) of the Expropriation Act provides that only actual financial loss should be taken into account in the computation of compensation.

[61] Section 8(1) of the Roads Act provides that:

“The Board may, subject to an obligation to pay compensation—

- (a) expropriate land for a national road or for works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of vehicles, machines, equipment, tools, stores or material;
- (b) take gravel, stone, sand, clay, water or any other material or substance on or in land for the construction of a road or for works or for purposes referred to in paragraph (a);
- (c) take the right to use land temporarily for any purpose for which the Board may expropriate such land; . . .”

Section 12(1) of the Expropriation Act states:

“The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed—

- (a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of—
  - (i) the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer; and
  - (ii) an amount to make good any actual financial loss caused by the expropriation; and
- (b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:

Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined—

- (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
- (bb) in any other suitable manner.”

[62] Although the expropriation notice to applicant reflects that it was issued in terms of section 8(1)(c) of the Roads Act read with section 12(1)(b) of the Expropriation Act, the enquiry as to which provisions are applicable remains a factual one, regard being had to all the circumstances of the case. What really matters, in my view, is the essence of what was expropriated. To be “just and equitable”, as required by section 25 of the Constitution, compensation cannot be determined solely on the terms of a notice, which may misrepresent the reality of the expropriation, but on what the subject matter of the expropriation is.

[63] The contention by the applicant that the notice should have been in terms of section 8(1)(b) of the Roads Act means that it is the gravel that was taken which should be the basis for the computation of compensation. This, it was argued, implicates section 12(1)(a) of the Expropriation Act which requires that compensation for the expropriation of property should be based on the market value of such property. Relying on that basis, the applicant claimed R801 980.00 which was, according to him, the market value of the gravel taken.

[64] Both the High Court and the Supreme Court of Appeal held that the invocation of a section 8(1)(c) notice by the Board, rather than a notice in terms of section 8(1)(b), was correct as the former provision authorised the Board to take the right to use land temporarily “for any purpose for which the Board may expropriate such land.” According to section 8(1)(a), such purposes include “works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance”. The two Courts reasoned that the mining and acquisition of the materials referred to in that section will inevitably result in a permanent deprivation of the ownership in those materials. This is to be contrasted with section 8(1)(b) which empowers the Board to “take gravel . . . or any other material or substance on or in land for the construction of a road or for works or for purposes referred to in paragraph (a).”

[65] In the Cape High Court, Jamie AJ held that the section 8(1)(c) notice was correct because what was expropriated was a right which had two elements to it,

namely, the right to use the applicant's land temporarily to create a borrow pit to excavate the gravel as well as to take the gravel from the land permanently. The Supreme Court of Appeal, as well as Mokgoro J, agree. As already indicated, I take a different view.

[66] One of the issues in this case is the correct identification of the applicable provisions of the Roads Act.

[67] Section 8(1) contemplates three circumstances under which the Board may exercise the powers contemplated in the section. In the first place, the Board may wish to expropriate the land for the purposes mentioned in section 8(1)(a). These include the construction of a national road, repairs to the national road, acquisition of gravel or any material or substance. In this instance, the Board acquires ownership of the land as well as the material in the land such as gravel.

[68] In the second place, the Board may wish to remove only the material such as gravel from the land, for the construction or repair works to the national road. The Board may do this under section 8(1)(b). Unlike the powers conferred by section 8(1)(a) the landowner remains the owner of the land and retains the right to excavate gravel from the same area that is being used by the Board. In other words the landowner is not precluded from the use of the land that is being used by the Board. This section may be used where there is already in existence a quarry or a borrow pit from which gravel is excavated. All that the Board does is to take gravel from an

already existing quarry. The landowner is not prevented from using the same portion of the land from which the Board is taking the gravel. The landowner may also remove gravel from the same quarry.

[69] The third situation contemplated by the section is where the Board takes away temporarily the right of the landowner to use the land. As long as the Board uses the particular piece of land, the owner may not use the land in question because his or her right to use that piece of land has been taken away, albeit temporarily. The Board may exercise this power for any purpose for which the Board may expropriate such land. This will include any of the purposes mentioned in section 8(1)(a) such as the construction of or repair to the national road or obtaining gravel from the land. The Board may exercise this power under section 8(1)(c).

[70] Unlike section 8(1)(a) which envisages a permanent expropriation of the land and any material in the land, section 8(1)(b) gives the Board the right to take and remove any of the material referred to in the subsection for the purposes of section 8(1)(a). By contrast section 8(1)(c) confers on the Board the right to use the land temporarily for any of the purposes for which the Board may expropriate land such as the acquisition of gravel, the construction of or repair to the national road. The Board cannot therefore expropriate the right to use the land under section 8(1)(b). That can only be done under section 8(1)(c). Nor can the Board under section 8(1)(b) expropriate the right to take gravel as opposed to taking gravel.

[71] In *Bodasing v South African Roads Board*,<sup>1</sup> the Durban High Court had occasion to consider a case where the facts were not dissimilar to the present. In that case the Board had issued a notice of expropriation under section 8(1)(b). The High Court had the following to say of and concerning the powers conferred by section 8:

“It is quite clear from the history of the matter that the defendant intended to use the land temporarily for the purpose of taking material from the land, in other words, act in terms of s 8(1)(c), and also intended to take material from the land in terms of s 8(1)(b). Instead of saying so, it issued the notice under s 8(1)(b), which of course relates to the taking of material but stated that it was expropriating the right to take material temporarily for seven years. It seems to me that the board could not in terms of ss (b) expropriate a right to use the land in a certain fashion; that had to be done in terms of ss (c). On the other hand it could not under ss (b) expropriate a right to take gravel as opposed to taking gravel and other substances.”<sup>2</sup>

[72] The Court then concluded:

“In my view the notice of expropriation, despite its defects, constituted a notice in terms of which the defendant expropriated the material which it required in terms of s 8(1)(b) and the temporary right to use the land for this purpose in terms of s 8(1)(c). In my opinion, furthermore, that which was expropriated in terms of s 8(1)(b) constituted property for which the measure of compensation was that provided for in s 12(1)(a) of the Expropriation Act. Section 12(1)(b) provides the basis of the compensation for the right to use the property for the purpose of taking the material.”<sup>3</sup>

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<sup>1</sup> 1995 (4) SA 867.

<sup>2</sup> Id at 871E-G.

<sup>3</sup> Id at 875F-G.

[73] On appeal to the Full Bench<sup>4</sup> the Court was called upon to decide whether the Board had expropriated a right rather than a property so as to determine the amount of compensation to which the landowner was entitled. In determining the subsection under which the notice had been issued, the Full Bench appears to have relied upon the terms of the notice, in particular the fact that it refers to section 8(1)(b). It disagreed with the holding of the court below to the effect that the notice of expropriation constituted a notice under which the defendant expropriated the material which it required. It expressed doubt, whether the notice of expropriation under which the defendant expropriated “the material which it required” would constitute a valid notice. Consequently it held that what was expropriated was the right to take gravel from the 4,83 hectares in question for the period of seven years which was reduced thereafter. In the result it held that the expropriation was in terms of section 8(1)(b).

[74] In reaching its conclusion the Full Bench relied upon an unreported decision of the Durban High Court in *Greyling v The Administrator of Natal*,<sup>5</sup> which according to the Full Bench had facts that “were not dissimilar because the legislation there was the Roads Ordinance as opposed to the National Roads Act.” In the *Greyling* case the court was concerned with the Natal Ordinance 10 of 1968. It acknowledged that there were differences between the Ordinance and the National Roads Act but took the view

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<sup>4</sup> *South African Roads Board v Bodasing* (NPD) Case no 948/94, 22 September 1995, unreported.

<sup>5</sup> *Piet van Zyl Greyling v The Administrator of Natal*, unreported case no 92/722, Supreme Court, Durban and Coast Local Division, per Thirion J dated 22 May 1995.

that the differences were not significant. The section under which the expropriation had taken place in the *Greyling* case was section 10(1)(b) which authorised the Board to “enter upon any property and take and remove there from any . . . gravel . . . required for the construction, reconstruction, repair or maintenance of any main road”. The Court in *Greyling* held that “ordinarily the right to use property does not include the right to consume the property.” It held that section 10(1)(b) gave the Administrator the right to take and remove any of the material referred to in the paragraph from any property.

[75] The approach adopted by the Durban High Court in *Bodasing v South African Roads Board* is preferable. The proper approach is not to look at the subsection under which a notice purports to have been issued but at what actually happened. Here there can be no question that the Board intended to use the land temporarily for the purposes of taking gravel from the land, in other words, act in terms of section 8(1)(c), and also intended to take gravel from the land in terms of section 8(1)(b). However, instead of saying so it issued a notice in terms of section 8(1)(c). The Board should have issued a notice in terms of sections 8(1)(c) and 8(1)(b).

[76] While I accept that the Board necessarily had to take temporary possession of the portion of the land concerned in order to set up the machinery necessary to extract the gravel, the fact that the undertaking was directed at the extraction of gravel and its permanent removal cannot be ignored. The occupation of the land was incidental to

acquiring the gravel. Accordingly, the situations envisaged in sections 8(1)(b) and 8(1)(c) are, in my view, both implicated.

[77] It has been argued that section 8(1)(c) encompasses everything that is contained in section 8(1)(b) and that the former should accordingly be the applicable provision. This does not explain why section 8(1)(b) was enacted at all and under what circumstances it could be applicable. If a meaning can be ascribed to a legislative provision, it should not easily be assumed that such provision is mere surplusage. Besides, it is not clear to me that a right of use, as envisaged in section 8(1)(c), includes the right to remove large quantities of gravel permanently. It is however not necessary to make a positive finding in this respect. As already stated, both sections 8(1)(b) and 8(1)(c) are implicated for the reasons stated above.

[78] As already indicated, both the High Court and the Supreme Court of Appeal erred, in my view, in their sole reliance on section 8(1)(c) of the Roads Act. As it happens, however, this error does not affect the outcome of the case. This now brings me to the next issue upon which I differ from Mokgoro J.

*The relationship between section 12 of the Expropriation Act and section 25(3) of the Constitution*

[79] There was no challenge to the constitutional validity of any of the provisions of either the Roads Act or the Expropriation Act. Pursuant to his finding that what was expropriated was a right, Jamie AJ went on to embark on an enquiry to determine the

correct measure of compensation. He held that as there was no market value for what had been expropriated, compensation should be determined on the basis of the proviso to section 12(1). The Supreme Court of Appeal, on the other hand, having found that there was no actual financial loss (the measure under section 12 of the Expropriation Act it considered relevant) determined the compensation on the basis of what it considered just and equitable.

[80] In this Court, in essence, the applicant objects to the amount of compensation awarded by the Supreme Court of Appeal. As stated above, the applicant does not challenge the provisions of the Expropriation Act which regulate the payment of compensation.<sup>6</sup> Instead, he argues that the expropriation notice was issued in terms of the wrong provision of the Roads Act and that that resulted in the incorrect calculation of the amount of compensation. I have agreed with him that the expropriation notice was issued under the wrong provision of the Roads Act. In my view, however, nothing turns on that for the outcome of this case as I shall explain.

[81] There can be no doubt that the calculation of compensation for expropriation raises a constitutional issue. Indeed, the precise formulation of the property clause in our Constitution<sup>7</sup> was a matter of great sensitivity at the constitutional negotiations

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<sup>6</sup> The payment of compensation is regulated in section 12 of the Expropriation Act.

<sup>7</sup> Section 25 of the Constitution reads:

- “(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

and for good reason. Three and a half centuries of colonial deprivation and apartheid together resulted in a deeply racist pattern of land ownership in our country, which our Constitution seeks to alter. The provisions of the property clause were carefully formulated to ensure that while protecting property on the one hand, the constitutional protection of property, important as it is, should not impede the important social and political purpose of land reform.

[82] It is not surprising, therefore, that the Constitution provides not only for the purposes for which expropriation may be effected, but also for the calculation of compensation payable. It is true that it expressly contemplates legislation to give

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- (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.
  - (4) For the purposes of this section—
    - (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
    - (b) property is not limited to land.
  - (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
  - (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
  - (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
  - (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
  - (9) Parliament must enact the legislation referred to in subsection (6).”

further detail to its provisions. It is clear, however, that its provisions are peremptory and that legislation to give effect to them must be consistent with them.

[83] The mandatory approach for the calculation of compensation set in section 25(3) of the Constitution requires that compensation paid for property expropriated be “just and equitable” and reflect “an equitable balance between the public interest and the interests of those affected”. It identifies a range of factors that should be taken into account, including the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the property; and the purpose of the expropriation. This test (and these factors) differs markedly from the factors set out in section 12 of the Expropriation Act which refers to two factors, market value and actual financial loss.

[84] Mokgoro J suggests that section 12 can be reconciled with section 25(3) by first undertaking the section 12 calculation and then considering whether that calculation is consistent with the test set by the Constitution. I cannot accept that such an approach is permitted by our Constitution. It seems to me that our Constitution expressly avoided the approach to the calculation of compensation set out in the Expropriation Act, which has been the approach in South Africa for many years. In my view, the Constitution expressly insists upon a different approach – one which makes justice and equity paramount, not as a second level “review” test but as *the* test for the calculation of compensation. In my view, the approach advocated by Mokgoro J would continue to privilege market value at the expense of other considerations

relevant to justice and equity which are expressly advocated by the Constitution. Moreover, it would be unwieldy to apply.

[85] It seems to me, however, that this case can be decided without following the approach suggested by Mokgoro J. If the compensation awarded by the Supreme Court of Appeal is just and equitable as contemplated by section 25(3) of the Constitution, then the applicant has no cause for constitutional complaint, no matter how the compensation was calculated in other courts. The applicant would accordingly have no prospects of obtaining relief in this Court.

[86] The reasoning of the Supreme Court of Appeal that led to its finding that the compensation it awarded was just and equitable is set out in paragraph 16 of its judgment. It reasoned that the landowner would not have been able to negotiate a price for gravel alone. In the circumstances, the Supreme Court of Appeal held that “[o]ne cannot realistically be satisfied that the market value of agricultural land with an underlying gravel content carried any premium above the price of land without gravel.”

[87] In my view, the amount of compensation arrived at is just and equitable as contemplated by the Constitution for the reasons given both by the Supreme Court of Appeal and Mokgoro J.

[88] The clear purpose of this application for leave to appeal was to obtain an increase in the compensation awarded by the Supreme Court of Appeal. Given that it is our conclusion that the compensation awarded was not inconsistent with the Constitution, the applicant had no prospects of success. The applicant did not point to any other considerations relevant to the interests of justice which would suggest the application should have been granted. In my view, therefore, the application for leave to appeal should have been dismissed on this basis.

[89] The question of the relationship between section 12 of the Expropriation Act and section 25(3) of the Constitution should, in my view, stand over for another day. I accordingly disagree with Mokgoro J that the application for leave to appeal should be granted. The effect of this is however the same for the applicant in that Mokgoro J dismisses the appeal.

[90] The appeal must accordingly fail.

Ngcobo J, O'Regan J and Van der Westhuizen J concur in the judgment of Langa ACJ.

For the applicant:

RS van Riet SC and HJ de Waal instructed by Van der Spuy & Partners Inc.

For the respondent:

RC Hiemstra SC and W de Haan instructed by State Attorney (Cape Town)