

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 2-6 August, and 23 September 1999 **CASE NUMBER: LCC 34/99**
before **Meer and Dodson JJ, Stephenson (Advisory Assessor)**

Decided on 17 December 1999.

In the case between:

MPONGENI JOHN KHUMALO	1 st Applicant
T A MDLETSHE	2 nd Applicant
M I NHLEKO	3 rd Applicant
ME MHLONGO	4 th Applicant
M MHLONGO	5 th Applicant
K J MKHONZA	6 th Applicant
P S MLABA	7 th Applicant
E NHLEKO	8 th Applicant
S NHLEKO	9 th Applicant
B NKOSI	10 th Applicant
A D MDLETSHE	11 th Applicant
P MDLETSHE	12 th Applicant
S MDLETSHE	13 th Applicant
M S KUNENE	14 th Applicant

and

H W POTGIETER

1st Respondent

DEPARTMENT OF LAND AFFAIRS

2nd Respondent

FIRST NATIONAL BANK OF SOUTHERN AFRICA

3rd Respondent

JUDGMENT

MEER J:

INTRODUCTION

[1] The Land Reform (Labour Tenants) Act¹ (which I will refer to as “the Act”), has as one of its purposes, “to provide for the acquisition of land by labour tenants”.² In furtherance hereof chapter III of the Act makes it possible for labour tenants to apply for an award of the land they are entitled to occupy.³ They may also apply for a state subsidy in order to pay the compensation which becomes payable to the

1 Act 3 of 1996.

2 The long title to the Act states its purpose as follows:

“To provide for security of tenure of labour tenants and those persons occupying and using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith.”

3 Section 16(1)(a) provides:

“16. Right to acquire land - (1) Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an award of-

(a) the land which he or she is entitled to occupy or use in terms of section 3;”

Section 16(1) is quoted in full at n 9 below.

current owner upon an award of such land.⁴ Once they become landowners they cease to be labour tenants. The effect of this is that the Act has introduced a new scheme for the expropriation of land to secure the position of labour tenants.⁵ The legislation forms part of the State's land reform programme.⁶ This judgment concerns itself with the compensation payable to the current owner of a property which is to be awarded to the applicant labour tenants (whom I will refer to as the "applicants").

[2] If labour tenants and the owner of the farm on which they live enter into a deed of settlement in respect of an application for an award of land, a state subsidy to pay the compensation which is due to the owner of the farm is, in practice, only granted if the Director-General of Land Affairs certifies that the settlement agreement is reasonable and equitable. Should the Director-General fail to approve the agreement, it is not accorded any effect, and the Act enables the Director-General of Land Affairs to refer the application for the award to the Land Claims Court to decide the matter and to determine the just and equitable compensation payable to the owner.⁷ This is precisely what has happened in the present case. Following upon an application by the applicants for an award in land, the Director-General refused to approve the settlement agreement which provided for the sale of the first respondent's farm to them for the sum of R1.2 million, as appears more fully from the factual background below. The application has, in the circumstances, been referred to this Court and I must now consider it. In terms of the agreement reached at a series of pre-trial conferences, the only issue to be decided in relation to the application is the just and equitable compensation to be paid to the first respondent for the loss of the land.

4 Sections 26 and 27.

5 See the judgment of Dodson J on the points in limine in this case: *Khumalo v Potgieter*, LCC34/99, 5 November 1999, <http://www.law.wits.ac.za/lcc/1999/khumalosum.html> at para [21] and footnote 16. I will refer to this judgment as "the Dodson judgment".

6 This is clear both from the short title of, and the preamble to, the Act.

7 Section 23 deals with an owner's right to compensation. Section 23(2) provides:

"The amount of compensation shall, failing agreement, be determined by the arbitrator or the Court."

[3] I must, at this point, record the Court's indebtedness to Mr A Stephenson, who was appointed as advisory assessor in terms of section 28(6) of the Restitution of Land Rights Act No 22 of 1994. He is a valuer registered in terms of section 13 of the Valuers Act⁸ with the South African Council of Valuers. He is based in KwaZulu-Natal and has considerable experience of farm valuations. He has advised the Court most ably in the course of its deliberations and the preparation of this judgment.

FACTUAL AND LEGAL BACKGROUND

[4] The applicants applied in terms of section 16(1)⁹ for an award to them of the first respondent's farms (which I will call "the subject properties" or "the properties", interchangeably) comprising three subdivisions namely:

Subject Property 1

Portion 2 of the farm Kliprif 111 registration division HU, in extent 492,0147 hectares

Portion 3 of the farm Basan registration division 382 HU, in extent 59,343 hectares

8 Act 23 of 1982.

9 Section 16(1) deals with the right to acquire land and provides:

“(1) Subject to the provisions of this Act, a labour tenant or his or successor may apply for an award of -

- (a) the land which he or she is entitled to occupy or use in terms of section 3;
- (b) the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties;
- (c) rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm; and
- (d) such servitudes of right of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which he or she enjoys or has previously enjoyed as a labour tenant,

or such other compensatory land or rights in land and servitudes as he or she may accept in terms of section 18(5): Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director-General in terms of section 17 within four years of the commencement of this Act.”

Subject Property 2

The Remainder of the farm Kliprif 111 registration division HU, in extent 492,0147 hectares

The subject properties are situated in the Vryheid/Louwsburg District, in Kwa-Zulu Natal.

[5] Thereafter, on 22 October 1998, the applicants and the first respondent entered into the aforementioned agreement which provided for the applicants to purchase the subject properties for the sum of R1.2 million (which I will refer to as “the agreement”). The agreement was intended to settle the application for an award of land, and was conditional upon the applicants being granted a subsidy by the Department of Land Affairs in accordance with the Act, and their submitting the agreement to the Department for consideration. The agreement further specified that should the Director-General fail to certify the agreement in terms of section 18(5)¹⁰, the parties request that the Department of Land Affairs refer the agreement to the Land Claims Court under section 18(7),¹¹ failing which either party would be entitled to take appropriate legal action and have the fairness of the agreement adjudicated upon by the Land Claims Court in accordance with the provisions of the Act.

[6] On 15 February 1999 the Director-General of the Department of Land Affairs signed a certificate in terms of section 18(5) in respect of the agreement to the effect that “the compensation payable for the

10 Section 18(5) provides:

“No agreement for the settlement of any application shall be of any effect unless the Director-General has certified that he or she is satisfied that it is reasonable and equitable, or unless it is incorporated in an order of the Court in terms of this Act.”

11 Section 18(7) provides that if:

- “(a) the owner does not submit proposals in terms of subsection (1); or
- (b) the applicant rejects a proposal in terms of subsection (4); or
- (c) the parties reach an agreement but the Director-General is not satisfied that it is reasonable and equitable;

the Director-General shall, at the request of any party, refer the application to the Court and inform the other parties that he or she has done so.”

acquisition of the land is not reasonable and equitable”. Thereafter he referred the application for the award of land to this Court for consideration in terms of Section 18(7).¹²

[7] Section 22 sets out the powers of this Court in dealing with an application referred to in section 16 for an award in land. Section 22(1) directs that where it is not in dispute that the applicant is a labour tenant, the Court shall not dismiss such an application.¹³ Paragraph 2 of the agreement provides:

“The ... Seller hereby admits that the purchasers have been Labour Tenants as at 02 June 1995 and that none of them has waived any of his/her rights in terms of the Act.”

It is thus not open to me to dismiss the application for an award in land.¹⁴

[8] The first respondent’s point in limine, dealt with in my colleague’s earlier judgment,¹⁵ sought a finding that the Court has no function with regard to the settlement agreement between the applicants and the first respondent other than to determine the fairness of the agreement. In dismissing the point in limine we found that the Court has, in effect, the power to determine a purchase price binding upon the first respondent, because of its power in terms of section 22(4)(d) and 23(2) to determine the compensation payable to the owner of land which is the subject matter of an award under chapter III of the Act.¹⁶

[9] Section 22(4) provides, amongst other things, that:

12 In so doing he referred both the section 16 application and the agreement to the Court. See the Dodson judgment above n 5 at para [27]-[33].

13 Section 22 deals with the powers of an arbitrator and the Court. Subsection (1) provides:

“An arbitrator and the Court may dismiss an application referred to in section 16: Provided that the arbitrator and the Court shall not dismiss an application if it is found by the arbitrator or the Court, or it is not in dispute, that the applicant is a labour tenant.”

14 See the Dodson judgment above n 5 at para [19].

15 The Dodson judgment above n 5.

16 The Dodson judgment above n 5 at para [16]-[21].

“ the Court may make an order or award ... on the following matters:

....

- (d) the compensation to be paid by the applicant to the owner of affected land or to a person other than the owner whose rights are affected by the determination, order or award;
- (e) the manner and period of compensation.”

[10] Section 22(5) sets out the factors that the Court shall have regard to in determining the nature of the order which is to be made (in this case compensation). It provides:

“ 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 19(1)(a).”

[11] Section 23(1) provides that the owner of affected land is entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by a labour tenant of land or a right in land. Section 23(3) stipulates that compensation shall, failing agreement, be paid in such manner and within such period as the arbitrator or the Court may determine as just and equitable.

[12] Section 25(3) of the Constitution of the Republic of South Africa 1996¹⁷ (hereinafter referred to as “the Constitution”) provides that the amount of the compensation and the time and manner of payment must be just and equitable having regard to all relevant circumstances, including those specified in that section.¹⁸ The compensation to be determined by this Court must therefore have regard to the factors listed therein.

17 Act 108 of 1996.

18 Section 25(3) is quoted in full below at paragraph [23].

Purchase of the subject properties by first respondent

[13] Subject property 1 was purchased by the first respondent from HGB Scheepers on 21 June 1996 for a purchase price recorded in the title deed as R110 000 (that is R200 per hectare). Subject property 2 was purchased by the first respondent from JJ Jansen van Rensburg on 27 June 1997 for a purchase price recorded in the title deed as R100 000 (that is R203 per hectare). When first respondent bought the properties (after the promulgation of the Act¹⁹) there were already labour tenants living there who had acquired rights of use and occupation. The labour tenants continued to use and occupy the properties. The situation on 22 October 1998, the agreed date of valuation, was that the first respondent had left the properties, and that the labour tenants enjoyed rights of use and occupation thereon but provided no labour. This situation continues.

General description of the Subject Properties

[14] It is common cause that the subject properties are essentially a grazing farm situated about 38 to 42 kilometres (km) north-east of Vryheid. The terrain, topography and slope of the properties is severely undulating but is interspersed by gently sloping land comprising sourveld and only about 60 hectares of arable land. There is no irrigated land. The altitude is approximately 900-1400 metres above sea level. Springs and streams are found on the farm and these serve as the only water supply. There are no boreholes.

[15] Access to the subject properties is poor. Regional access is via a tarred road (R69) whilst local access is via a gravel district road (D32), from which a track, in extremely poor condition, leads onto the subject properties. There is neither electricity nor other services on the properties. The only boundary is an electric fence belonging to and erected by a neighbour, the Swissafari Game Farm, along the eastern boundary. There is no camp fencing.

19 The Act commenced on 22 March 1996.

[16] Improvements consist of several kraals, a badly damaged house, outbuildings and a pool. These improvements were in a badly damaged state on the agreed date of valuation. Fourteen labour tenant families (to which the applicants belong) live on the subject properties and graze their livestock there. The first respondent, as indicated above, no longer lives on the property.

History of valuations of the subject properties before the hearing

[17] When the first respondent entered into a settlement agreement to sell the subject properties to the applicants, he obtained a valuation from a Mr HC Venter, an estate agent in Vryheid, who valued the properties at R1 105 500.

[18] The Department of Land Affairs, the second respondent, also had the properties valued. The contract to undertake the valuation was given to a Mr Teversham, a valuer based in Dundee, who apparently submitted the lowest tender. A first valuation report by Teversham dated May 1998 placed a value of R1 040 000 on the subject properties. This report attached a value to the improvements comprising a dwelling, outbuildings and pool, even though the report states that the dwelling had already been “demolished”. The valuation can be summarised as follows:

1043,3728 hectares	@ R750 per hectare	R782 530
Value of dwelling 224 square metres	@ R1 000 per square metre	R224 000
Pool 35 square metres	@ R700 per square metre	R24 000
Outbuildings	(sum)	<u>R10 000</u>
TOTAL		<u>R1 040 530</u>

An amended valuation report submitted by Teversham in July 1998 reduced the value of the subject properties to R780 000 by deducting the value for improvements.²⁰

20 The report poses the question whether any compensation should be paid for the improvements given that there was a dispute whether the owner or labour tenants was responsible for their having been damaged. In this

[19] In spite of Teversham's amended valuation, the applicants signed the agreement on 22 October 1998 in which they agreed to purchase the subject properties for R1 200 000. It is, in the circumstances, hardly surprising that the Director-General of Land Affairs declined to certify the agreement and forwarded the matter instead to this Court. On 22 July 1999 (11 days prior to the trial) the Department of Land Affairs introduced a further valuation in the form of an expert notice by one D Griffiths, a valuer based in Pretoria. He valued the subject properties at R230 000 (that is R220 per hectare).

[20] Although Teversham's valuation report was prepared for the Department of Land Affairs, the Department of Land Affairs did not call him as its expert witness, because it, as the financier of the sale,²¹ felt his valuation was too high. Instead, in a strange turn of events, the first respondent called Teversham to testify as his expert witness, instead of Venter, who had taken ill. The Department of Land Affairs called Griffiths to testify as its expert. The third respondent, the First National Bank, who holds a mortgage bond over the subject properties, agreed to abide the decision of the Court and did not call any experts.

Meeting of experts and facts agreed upon by them

[21] At a meeting of experts on 22 July 1999²² the legal representatives of the parties and their experts (Griffiths, for Department of Land Affairs and Venter, at that stage the expert for first respondent²³) agreed on the following pertaining to the valuation of the subject properties:

regard, see paragraph [100] below. It was agreed that on the date of valuation, 22 October 1998, the improvements were in the condition as depicted in photographs handed into Court as Exhibit "D" which shows the buildings in their damaged state.

21 In so far as the sale depends on a state subsidy and see section 26(1)(a).

22 Held in terms of rule 49(3) of the Land Claims Court Rules published in Government Gazette 17804, 21 February 1997, as amended by GN 345, Government Gazette 18728, 13 March 1998 and GN 20049, Government Gazette 594, 7 May 1999.

23 Teversham did not attend the meeting of experts.

1. The comparable sales method is the best method to determine the market value of the property in question. To assist the Court in what is fair and equitable it is agreed that the market value should be used.
2. The date of valuation is to be 22 October 1998, subject to the Court's determination as to what factors prior to that date should be taken into consideration in the valuation of the property.
3. The price at which an owner has acquired land is a good indication of the value thereof unless shown that special circumstances prevail that exclude it being used as an indication of market value.
4. In essence nothing substantially has changed in the market since the beginning of 1996 to date.
5. The market value will be determined on the basis that the present labour tenants do not have a negative impact thereon.²⁴
6. The transactions in terms of which the respondent purchased the Kliprif properties were open market transactions.²⁵

[22] The challenge which faces us in valuing the subject properties and determining compensation is to ensure that the first respondent is justly and equitably compensated for his land as I am instructed to do by section 23 of the Act and section 25(3) of the Constitution. Awarding the properties will constitute a judicial expropriation.²⁶ It is permissible therefore for us to seek guidance of this Court's function from previously

24 Paragraph 5 was later retracted by Griffiths.

25 An open market transaction is one "which takes place under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all purchasers know that the land in the market was for sale. . . . An open market sale is an ordinary transaction between persons who would normally indulge in that particular business, taking place in circumstances of free competition and resulting in a price acceptable to both." Meyer "Expropriation" in Joubert (ed) 1st Reissue Vol 10 Part 1 *Law of South Africa* (Butterworths, Durban 1997)(which I will refer to as LAWSA) at par 171.

26 See the Dodson judgment above n 5.

decided expropriation cases to the extent that these cases can be reconciled with section 25(3) of the Constitution.²⁷

[23] Section 25(3) of the Constitution reads as follows:

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

- (a) the current use of the property;
- (b) the history of the acquisition and the 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 purposes of the expropriation.”

In deciding how to interpret this subsection, I must consider international law²⁸ and I may have regard to foreign law.²⁹ In both international law and foreign law, there is widespread equation of the concept of just compensation for expropriation with market value compensation.³⁰ The authors Chaskalson and Lewis,³¹ in commenting on section 25(3), suggest that just and equitable compensation would ordinarily be market value compensation, unless the application of paragraphs (a), (b), (d) or (e) warranted an adjustment away

27 In this regard it must be noted that the Expropriation Act 63 of 1975 does not apply in the determination of compensation under the Act.

28 Section 39(1)(b) of the Constitution.

29 Section 39(1)(c) of the Constitution.

30 Eisenberg “Different Constitutional Formulations of Compensation Clauses” (1993) 9 *SA Journal on Human Rights* at 412.

31 Chaskalson and Lewis “Property” in Chaskalson et al (ed) *Constitutional Law of South Africa* Service Issue 4 (Juta, Cape Town 1999) at 31-23.

from market value.³² I have accordingly decided to make my determination of compensation in two stages. In the first stage I shall determine the market value of the subject properties.³³ To this end I shall be guided by the applicable principles formulated to determine compensation where there is an expropriation³⁴ as well as the various comparable sales³⁵ which were placed before us. In the second stage I shall consider whether

32 See also Roux *Constitutional Property Rights Review in South Africa: A Civil Society Model* (dissertation submitted to the University of Cambridge for the degree of Doctor of Philosophy) at 156 where he says:

“ . . . the courts will probably seek to rely on existing experience with regard to the assessment of compensation. The real question to be decided in each case will therefore be, not whether the particular compensation award at issue is ‘just and equitable’, but rather the extent to which the market-value standard laid down in the Expropriation Act has been affected by the insertion of the additional adjudicative criteria listed in section 25(3).”

33 Market value is defined in LAWSA (above n 25) at para 166 as:

“The price which the property may be expected to realise if sold by a willing seller to a willing buyer, each of them bargaining without any artificial constraints.”

The willing buyer willing seller concept is echoed in section 12(1)(a)(i) of the Expropriation Act 63 of 1975. In fixing market value the valuer must determine the probable amount which the subject property would have realised if sold in the open market by a willing seller to a willing buyer, taking into account its highest and best use. The valuer is to take into account and allow for the effect of all factors which would be likely to affect the minds of the parties at a hypothetical sale and to arrive at a probable selling price. In this regard see LAWSA at para 204.

34 To the extent that these are compatible with section 25(3).

35 Our courts have on numerous occasions recognized the comparable sales method as the most acceptable and reliable method of valuation. The comparable sales method assumes that a purchaser will pay no more for a property than the price at which he can obtain similar property elsewhere. By comparing the subject property with the sale of other similar properties, the valuer draws his conclusions on his probable selling price. As many sales as possible must be analysed to bring out the common denominator. The following factors should be taken into account:

time of sale;
improvements;
location;
productivity;
size;
and any other factors such as terms of the sale, the general impression which it makes and so forth (referred to by the mnemonic “TILPSO”).

See *Pietermaritzburg Corporation v SA Breweries Limited* 1911 AD 501 at 506; *Minister of Water Affairs v Mostert* above n 20 at 723F; *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (AD) at 253H-254B; *Southern Transvaal Building* above n 37 at 956B; LAWSA above n 25 at para 194. The margin of error as compared to other methods of valuation is regarded as much smaller and the scope of hypothesis is narrowed down. See *Minister of Agriculture v Davey* 1991(2) SA 877 (A) at 880-882.

the market value determined by me, needs to be adjusted in the light of the other factors listed in section 25(3) of the Constitution.

DETERMINATION OF MARKET VALUE OF THE SUBJECT PROPERTIES

[24] The function of the Court in determining market value has been described as similar to that of a valuer.

“Although the determination of value is to a large extent a matter of estimate, the court must, on the evidence placed before it, make a finding in much the same manner as a valuator would. The finding is one of fact, a logical deduction from factual data. In making its determination of value, the Court is not tied either to the claim or the offer, and it may award more than the amount claimed, or less than the amount offered.”³⁶

[25] Before embarking on this process, there is an important preliminary issue which I must determine. It is whether section 25(3) justifies the application of what has come to be known as the “Pointe Gourde” principle,³⁷ which gets its name from the Privy Council case, *Pointe Gourde Quarrying and Transport Co Ltd v Sub-intendent of Crown Lands*.³⁸ According to this principle in the assessment of the market value of land acquired in an expropriation, no regard shall be had to any increase or decrease in value of

36 *Loubser v SAS&H* 1976(4) SA 589 (T) at 608-615, *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 955H-965A; LAWSA above n 22 at para 245.

37 This principle is discussed in McDermott and Woulfe *Compulsory Purchase And Compensation in Ireland: Law and Practice* (Butterworth (Ireland) Ltd, Dublin 1992) at 205-209.

38 [1947] AC 565. This is a case where in the establishment of a US naval base in Trinidad, the Crown compulsorily acquired quarry land owned by a company, and the value of the quarry land was increased by the construction of the naval base, which was in the vicinity of the quarry land and required large quantities of stone. It was held by the Judicial Committee of the Privy Council that the compensation for the compulsory acquisition of the quarry land should not take into account this increase in value. McDermott LJ said: “it is well settled that the compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition”. See McDermott above n 38 at 207.

the land, which is attributable to the scheme underlying the acquisition. If it applies here, it has a direct bearing on the complex issue which exercised the minds of the Court and parties alike during the hearing, namely, how to assess the impact of the presence of labour tenants on the value of the property.

[26] The Pointe Gourde principle has been applied and restated in cases in several jurisdictions as a yardstick to determine fair market value where an expropriation scheme may influence land values.³⁹ The principle has found its way into South African law via what is now section 12(5)(f) of the Expropriation Act.⁴⁰ It has also become part of the statutory law of other countries, Rule 13 of the Irish Acquisition of Land (Assessment of Compensation) Act 1919⁴¹ and section 60 of the Australian Land Acquisition Act of 1989⁴² being some examples I have found. Section 12(5)(f) of the Expropriation Act in echoing the Pointe Gourde principle provides that any enhancement or depreciation in the value of property either before or after expropriation which may stem from the purpose for which it is being expropriated, or which is a consequence of any act which the state may perform or already has performed or intends to perform in connection with such purpose, must not be taken into account in determining compensation.⁴³ Notwithstanding that the Expropriation Act does not apply to the present enquiry, given the extent to which this principle has come to be accepted both locally and internationally as an equitable one in the

39 See McDermott above n 38 at 206-208.

40 Section 12(5)(f) provides as follows:

“In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely- . . . any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the 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;”

41 See McDermott above n 38 at 208.

42 See *Liverpool City Council v Commonwealth of Australia* 119 ALR 357 at 362.

43 See, for example, *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 105-106, *Sammel and others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629(A) at 693B; *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 524C and the authorities referred to there; LAWSA above n 25 at para 189.

determination of market value, I have come to the view that section 25(3) must be interpreted so as to require its application, where appropriate, in the determination of market value. This is certainly warranted by the requirement that the amount of compensation reflect an equitable balance between the public interest and the interest of those affected as is stipulated at section 25(3) of the Constitution.⁴⁴ It may also be what is envisaged by factor (e) of section 25(3), which refers to “the purpose of the expropriation”, although it is not necessary for me to decide this.

[27] The scheme underlying the acquisition of the property in this case is the Land Reform (Labour Tenants) Act. In furtherance of its purpose of granting security of tenure to labour tenants, the Act accords rights to them which impinge on the owner’s full dominium of the land. These include protection against eviction,⁴⁵ the conferring of what is in effect an option to secure the expropriation of the part of the farm used and occupied by the labour tenants,⁴⁶ and the prohibition of eviction once the process is commenced of exercising this option.⁴⁷ The Pointe Gourde principle instructs that the extent to which the market value of the subject properties is affected by the rights accorded to labour tenants under the Act, must be ignored for the purpose of determining market value.

[28] As indicated there was much discussion during the hearing about the impact of the labour tenancy agreements on the value of the subject properties. Mr Griffiths expressed the view that the presence of the labour tenants had a negative impact on the value of the properties. Mr Rautenbach for the Department of Land Affairs went so far as to argue that the current use of the properties by labour tenants makes them useless to any outside buyer, and posed the question whether the property is worth anything in financial terms. The rights accorded to labour tenants in terms of the Act, must clearly have a negative effect on land value for the simple reason, amongst others, that there is always the risk, to owner and prospective

44 See in this regard the comments by Van Dijkhorst on section 12(5)(f) in *Kerksay* (T) above n 44 at 522.

45 Section 9 of the Act.

46 Section 16 of the Act.

47 Section 14 of the Act.

purchaser alike, that ownership of the land or part thereof may be granted to the labour tenants should they apply under chapter III of the Act for an award in the land.

[29] The above notwithstanding, in keeping with the *Pointe Gourde* principle, I shall at this stage assess the market value of the properties without paying any regard to the influence that can be attributed to the scheme underlying the expropriation (namely the Act and the rights accorded to labour tenants thereunder) on the value of the subject properties. Consequently I shall, at this stage, have no regard to any change in value of the subject properties as a result of the Act. It is only once I have assessed market value and go on to the second stage in my determination of compensation, namely the consideration of compensation in the light of the other factors listed in the Constitution, that I shall take cognisance of the impact of the Act. The exercise which I must now concern myself with has been described by Lord Denning as follows:

“In assessing the value, it is important to consider what would have happened had there been no scheme.... The valuer must cast aside his knowledge of what has happened due to the scheme.”⁴⁸

[30] I thus proceed to determine market value of the subject properties solely on the comparable sales transactions that were placed before us. In doing so I am guided by a second principle of valuation which states that sales to an expropriator should be treated with caution because the owner knows that expropriation may follow if no agreement is reached. These are consequently not open market transactions. Nonetheless, these transactions may be used in certain circumstances.⁴⁹ I deal with this in more detail in paragraph [85] below.

48 McDermott above n 38 at 207.

49 See *Minister of Water Affairs v Mostert* above n 20 at 725, *Estate Marks* above n 35 at 254B, Douglas Brown *Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia and New Zealand* 3ed (Butterworths, Sydney 1991) at 163-164 and LAWSA above n 25 at para 198.

[31] Sixteen comparable sales were presented to us.⁵⁰ Most of these were introduced by Teversham, namely transactions which I have numbered 1, 2, 3, 4, 7 and 8 (referred to as transactions 4.1 to 4.6 in his valuation report), and transactions which I have numbered 11, 12, 14 and 15 (submitted by him, and numbered 4.8 to 4.11 during the hearing). The discussions around transactions 4, 8 and 12 (Teversham's 4.4, 4.6 and 4.9) resulted in related transactions emerging for comparison some of which were unnumbered at the hearing. I have included these in the list of comparable transactions below (indicating that they were numbered by me, rather than at the hearing, where relevant). Griffiths relied on only one comparable sale and on the prices for which the first respondent had acquired the subject properties. For ease of reference in the list of comparable sales set out below, I number the transactions "comparable sales 1 to 16," with a cross-reference to numbers accorded to those sales at the hearing when applicable. Also for ease of reference, I refer to the sales of subject properties 1 and 2 to the first respondent as Sales 17 and 18 respectively. What follows is a list of comparable sales setting out the particulars of each sale.

[32] Comparable Sale 1

(Labelled Sale 4.1 at the hearing)

This transaction included Portions 2, 3 and the remainder of the farm Bedrog 217 and Portion 1 of the farm Kliprif 111, measuring approximately (\pm) 1755 hectares situated immediately to the east of the subject properties. It is made up of four subdivisions. It was sold on the 17 February 1995 by a Mr Steenkamp to Swissafari and Echo Tours (Pty) Ltd for R850 000 (that is R485 per hectare). This property has since been game fenced and converted into a game farm. The farm adjoins the Itala Nature Reserve along part of its northern and eastern boundaries, a fact which enhanced its game farm potential. This property has better topography than the subject properties and was previously operated as a cattle grazing farm with 20 hectares of irrigated lands, three dwellings and a district road passing through it. Both Griffiths and

50 I use the term "comparable sale" in the sense of "potentially comparable sale, subject to later analysis which might show that it is not a truly comparable sale", unless the context indicates otherwise.

Teversham suggested that the price reflected on the title deed was less than the actual price paid for this property.

Comparable Sales 2 to 6 being transactions related to the building of the Paris Dam

[33] Comparable Sale 2

(Labelled Sale 4.2 at the hearing)

The remainder of the farm Paris 750 measuring \pm 988 hectares was sold on 27 February 1996 by Parisienne Boerdery CC to the Impala Besproeingsraad (the Impala Irrigation Board) for R500 000 (that is R506 per hectare) for the construction of the Paris Dam. The Board is a body with expropriating powers. Griffiths testified that according to an official of the Board, a premium had been paid for this property. This property is situated between 10 to 13 kms north-west of the subject properties, has a steeper topography and adjoins the Bivane River.

[34] Comparable Sale 3

(Labelled Sale 4.3 at the hearing)

The remainder of the farm Palmietfontein 584 and the remainder of the farm Dipka 590 together measuring \pm 1058 hectares were sold on the 5 May 1997 by a H L Retief to the Impala Irrigation Board for R529 104 (that is R500 per hectare). This property borders on and is situated immediately to the west of comparable sale 2.

[35] Comparable Sale 4

(Labelled Sale 4.4 at the hearing)

The remainder of the farm Mahlone 524 measuring \pm 930 hectares was sold on 28 March 1997 by Ntubeni Boerdery CC to the Mthetwa Trust for R570 000 (that is R613 per hectare). The property is situated a short distance to the west of comparable sales 2 and 3. The property was purchased by the Mthetwa community who had to be relocated as a result of the construction of the Paris Dam. Griffiths said that one of the reasons the Mthetwa community chose this farm for relocation was because a district road runs through it.

[36] Comparable Sale 5

(Labelled Sale 4.4(a) by the Court)

Two Portions of the farm Zandspruit 448 together measuring \pm 768 hectares were sold on 13 March 1997 by the Mthetwa Trust to the Ntubeni Boerdery CC (the same parties involved in the sale of comparable sale 4 above which adjoins this property) for R500 000 (that is R650 per hectare). Comparable sales 4 and 5 would appear to have been part of a land swap.⁵¹

[37] Comparable Sale 6

(Labelled Sale 4.4(b) by the Court)

The farm Helpmekaar 631 measuring \pm 2163 hectares was sold on 9 July 1996 by Gertges Medisyn (Pty) Ltd to the Mthetwa Trust for R879 321 (that is R407 per hectare). This property, situated directly to the north of comparable sale 4 and adjoining comparable sale 5, was also bought for the relocation of the Mthetwa community.

51 On 13 March 1997 comparable sale 5 was sold by the Mthetwa Trust to Ntubeni Boerdery CC. On 28 March 1997 comparable sale 4 was sold by Ntubeni Boerdery to the Mthetwa Trust.

[38] Comparable Sale 7

(Labelled Sale 4.5 at the hearing)

Two Portions of the farm Pietersrust 617 and the remainder of the farm Makalusi 245 together measuring \pm 1516 hectares were sold on 24 April 1995 by E M van Rensburg to the Hannes Viljoen Trust for R1 117 000 (that is R737 per hectare). This property is some 12 km south-west of the subject properties, has a shop on it and the topographical and arable components differ substantially from the subject properties.

[39] Comparable Sale 8

(Labelled Sale 4.6 at the hearing)

Portion 4 of the farm Paris 750 measuring \pm 1137 hectares was sold on 6 December 1996 for R180 000 (that is R158 per hectare). The property was sold by public auction and it was accepted by the parties that it was not an open market transaction.

[40] Comparable Sale 9

(Also dealt with under the number 4.6 at the hearing)

Portion 1 of the farm Bellevue 600 measuring \pm 974 hectares was sold on 22 January 1999 by JJ Muller to the Baqulusini Communal Property Association for R280 000 (that is R296 per hectare) in a sale involving the Department of Land Affairs and following upon a valuation by that Department.⁵² The property was inhabited by labour tenants. This property is situated a few kilometres to the south-west of

52 The farm had also been the subject of an earlier sale in October 1995 for R125 000 (that is R132 per hectare). This was a public auction sale which was accepted by the parties not to be an open market transaction. For this reason and because there was a subsequent sale of the same property which was in different circumstances, I have not included it in the list of comparable sales.

the subject properties and is reached by travelling along the same district road. It is mountainous and has 60 hectares of arable land.

[41] Comparable Sale 10

(Labelled Sale 4.7 at the hearing)

Portion 1 of the farm Bedrog 217 measuring \pm 180 hectares was sold on 13 February 1998 by T C Potgieter to the Uzulu Akafuni Ukusuka Communal Property Association (which translated means “The Zulu do not want to leave”) for R100 000 (that is R555 per hectare). It was a sale to labour tenants involving the Department of Land Affairs and followed upon a valuation by that department. This property adjoins the Swissafari Game Farm and is situated in close proximity to the subject properties. It is a grazing farm. This sale was mentioned only in passing by Griffiths and was not referred to at all by Teversham.

[42] Comparable Sale 11

(Labelled Sale 4.8 at the hearing)

Portion 2 of the farm Beroofd 107 measuring \pm 343 hectares was sold on 9 September 1998 by J Jansen to J & C du Plessis for R260 000 (that is R760 per hectare). Teversham introduced this transaction in his evidence in chief, to support his contention of grazing values of between R600 and R700 per hectare in the area. This property comprised 182 hectares of grazing land, 60 hectares under cultivation and is improved with a house and outbuildings.

[43] Comparable Sale 12

(Labelled Sale 4.9 at the hearing)

Portion 1 of the farm Beroofd 107 and Portion 3 of the farm Rietfontein 212 together measuring \pm 631 hectares were sold on 26 August 1996 by CJS Steenkamp to the KwaXamu Community Land Trust for R490 000 (that is R776 per hectare). This property has a shop, a modest dwelling and 40 hectares of cultivated land. This sale was facilitated by the Department of Land Affairs.

[44] Comparable Sale 13

(Labelled Sale 4.9a at the hearing)

Portion 5 of the farm Rietfontein 212 measuring \pm 173 hectares was sold on 18 June 1994 by CJS van Rooyen to Cephas Mthembu for R120 000 (that is R694 per hectare). Teversham mentioned this transaction in passing as evidence of grazing land having a value of between R600 and R700 per ha.

[45] Comparable Sale 14

(Labelled Sale 4.10 at the hearing)

Portion 3 of the farm Berdina 399 measuring \pm 424 hectares was sold on 24 April 1996 by C & E Landman to the Mgazini Land and Community Trust for R285 000 (that is R672 per hectare). This property is situated approximately 30 km east of the subject properties, consists entirely of veld grazing and is unimproved. It is more hilly than the subject properties and has worse access. The property was bought by existing labour tenants. The fact that the purchasers were labour tenants and their use of the vehicle of a community land trust suggests that, on the probabilities, the sale was facilitated by the Department of Land Affairs. This would have meant that the price was influenced by a valuation done on the instructions of the Department.

[46] Comparable Sale 15

(Labelled Sale 4.11 at the hearing)

Portion 4 of the farm Berdina 399 measuring ± 273 hectares was sold on 1 August 1995 by C & E Landman for R218 431 (that is R800 per hectare). According to Teversham this property, considerably smaller than the subject properties, was unimproved, had 253 hectares of grazing land and was hillier than the subject properties. It also has between 15 and 20 hectares of cultivated land and abundant water and adjoins comparable sale 14.

[47] Comparable Sale 16

The only sale accepted by Griffiths as being truly comparable (apart from the earlier sales of the subject properties) is the Remainder of the farm Basan 382 measuring ± 625 ha, which was sold on 5 March 1998 by F J Potgieter to Itala Boerdery (Pty) Ltd for R200 000 (that is R320 per hectare). This property adjoins a portion of the subject properties along the western boundary and is also a grazing farm. Griffiths testified that it has better access than the subject properties and approximately 54 hectares of contoured lands (not presently cultivated), which at some stage were irrigated. The Kwagwembe river flows through this property. The property was sold to labourers including labour tenants who obtained a Land Bank bond to purchase the property. This is the only comparable sale to labour tenants in the area that was not done in conjunction with the Department of Land Affairs. It was a private sale between an elderly lady (represented by her son who happened to be the Sheriff of Vryheid) and labourers.

[48] Sales 17 and 18 (the subject properties)

Details concerning the purchase of the subject properties by the first respondent and a description thereof are contained in paragraphs [13] to [16] above.

EVIDENCE OF VALUERS

[49] Both Griffiths and Teversham employed the comparable sales method of valuation. Griffiths, for the Department of Land Affairs, relied on one comparable sale only, that of 16 above, and the prices for which the first respondent had acquired the subject properties, and valued the subject properties at R230 000 (that is R220 per hectare). Teversham, by contrast, relied on comparable sales 1 to 4, 7, 8, 10 to 12, 14 and 15 and valued the subject properties at R780 000 (that is R750 per hectare).

Testimony of Griffiths

[50] Griffiths testified as follows about his qualifications: that he has a National Diploma in Property valuation, is a valuer registered in terms of the Valuers Act,⁵³ is a non-practicing attorney, a member of the South African Institute of Valuers and has been practicing as a valuer since 1985. He also testified that he had a certificate to the effect that he had attended a week's course in farm valuations at the University of Natal, but that he had no other agricultural training or qualifications and this was his first valuation experience involving labour tenants. He said that he does not generally operate in the Kwa-Zulu Natal area.

[51] Griffiths testified that the prices at which the first respondent acquired the subject properties in 1996 and 1997 are a good indication of their market value. This was so because no special circumstances prevailed at the time of these sales, to justify excluding them as an indication of market value. In addition he stated that nothing substantial had changed in the farm property market in the area since the sale of subject property 1 in 1996. He had formed these views on the basis of his discussions with a Mr HGB Scheepers who had sold subject property 1 to the first respondent on 21 June 1996 for R110 000 (that is R200 per hectare). Griffiths said he had tried to ascertain if there were any special circumstances which would exclude these transactions from being used as comparable sales, and he had found none. Griffiths

53 Above n 8.

was unable to find the seller of subject property 2, one JJ Van Rensburg, but was satisfied from his discussion with Scheepers, who had rented this property over many years, that this was a comparable sale. Griffiths testified that he had not spoken to the first respondent about the purchase price of the subject properties, because he thought the latter would be biased. For similar reasons he did not speak to Mr Venter, the estate agent who had valued the property for the first respondent.

[52] During cross-examination Mr De Wet, for the first respondent, told Griffiths that he had been instructed by first respondent to inform him (Griffiths) that the purchase price of subject property 1 was R180 000, and not R110 000 as registered in the title deed, and that of subject property 2 was actually R150 000 and not R100 000 as registered. Griffiths conceded that if the purchase prices of both properties were in fact higher than reflected in the title deeds his valuation would have been somewhat higher,⁵⁴ given that his valuation was based on the prices that appeared on the title deeds.

[53] Teversham also testified about a difference in the actual and recorded purchase prices of the subject properties. It is convenient that this aspect of his testimony be dealt with here. Teversham said that he had spoken to the first respondent about the purchase price of the subject properties, and the latter had informed him that the prices reflected in the title deeds were not the full purchase prices. Teversham said that he became suspicious about the sales when he saw the low purchase price reflected on the title deeds, because, he said “you don’t buy farms for R200 per hectare unless there is something suspicious about the sale”. He said that on examination of the title deed, he discovered an endorsement to the effect that subject property 1 had been mortgaged in April 1998 for R230 000, which he understood to be about 120% of the combined purchase prices reflected in the official documentation. This suggested to him that the property would have to be worth at least R230 000 for a mortgage in that amount to have been granted. His suspicions, he said, were confirmed when the first respondent informed him that the price disclosed on the title deed was not the full purchase price. He said he had then concluded that these sales were not open

54 Record page 334.

market transactions,⁵⁵ but he had not bothered to ask first respondent what the actual purchase prices were, nor did he disclose this information to his client, the Department of Land Affairs. Teversham's valuation report, I note, makes no mention of the purchase price paid for the subject properties by first respondent.

[54] From the above it is clear that there is a dispute both about the purchase price of the subject properties and whether these were open market transactions. This is a dispute about which, I believe, it is not necessary for me to make a finding. I am obliged to rely on the purchase price as reflected on the title deed and to accept this as proved.⁵⁶ It was open to the first respondent to testify and convince me otherwise about the variance in the purchase price but he chose not to do so and must abide the consequences.

[55] Apart from the sale of the subject properties to the first respondent, Griffiths testified that he found only one other comparable sale helpful in determining the market value of the subject properties. This was comparable sale 16. Griffiths viewed this as an open market sale to labourers including labour tenants. He considered this farm to be more valuable than the subject properties because it has better access, 54 hectares of contoured lands, two Eskom power points and the Kwagwenpe River running through it. These features accounted for the higher purchase price of this property, he said and justify a lower value on the subject properties.

[56] Griffiths stated that in preparation for the hearing he had visited the farms comprising Teversham's comparable sales 1 to 4, 7 and 8, and had spoken to people about these sales, but concluded that they were not open market or were for some or other reason not comparable transactions. His testimony helped to shed some light on the scant information about these sales in Teversham's report. However the following extract from his evidence (in which he emphasises that comparable sale 16 should be used as an indicator

55 See the definition of an open market transaction above n 25.

56 *Van Zyl v Stadsraad Van Ermelo* 1979 (3) SA 549 (A) at 569-570; *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 615; *Southern Transvaal* above n 37 at 956D.

of market value as opposed to other comparable sales), suggests that he did not fully investigate these transactions, having decided at face value that they were not relevant:

“ . . . if you are doing a valuation in a residential area and you find in your block the sale of the property itself and a good sale adjacent to that, that leads you to believe that that is the market value, then it’s not necessary for you to go many blocks away and look for the sales there but I found no other sales that really were better than this, or that helped me. . . . I only found out on Friday that Mr Teversham is going to come and testify, but during my investigations I have looked at these sales, I have had reason to believe that they were not comparable.”⁵⁷

[57] It emerged during the hearing that Griffiths was aware of a number of sales in the area, some involving labour tenants, communities, and the Department of Land Affairs, namely comparable sales 1, 4, 8, 9 and 10 above,⁵⁸ but did not bring these to the attention of the Court, as he did not consider them to be relevant.

[58] Griffiths had not investigated comparable sales 11, 12, 14 and 15 which were introduced by Teversham in his testimony as proof of the value of grazing in the area. The Department of Land Affairs did not avail itself of the opportunity to recall Griffiths at a later stage to testify about those sales, presumably because it considered these, like the comparable sales in the report of Teversham, to be irrelevant for the purpose of determining the value of the subject properties.

Griffiths’ evidence pertaining to labour tenants

[59] Mr Griffith’s evidence pertaining to the labour tenants on the farm proved useful. He had enquired from Scheepers, the former owner of subject property 1, about the use and occupation of the properties

57 Record page 192.

58 Two of these comparable sales, namely 4 and 10 are considered by me to be relevant sales for the determination of market value at para [84] below.

by labour tenants during his ownership. He also attended a meeting on the premises at which labour tenants were present, and ascertained what their current use and occupation rights were.

[60] He had established the following from his conversation with Scheepers:

- Subject property 1
- Scheepers had bought subject property 1 for housing his labour tenants.
- When Scheepers bought the property there were labour tenant families living there who enjoyed grazing rights. This agreement had continued after the first respondent became the owner of the property. Scheepers had tried farming there but as it was not a good farm, it was used mainly for the housing of labourers.
- Scheepers had sold subject property 1 to the first respondent because he did not want it any more.
- Scheepers was of the opinion that the market value of grazing in the area was between R300-R350 per hectare but he had sold the farm to the respondent for R200 per hectare because it was, allegedly, not really suitable for farming, is rocky and uneven, (“klipperig en ongelyk”) and because of the presence of labour tenants.
- The first respondent was aware that there were labour tenants on the farm when he bought it, and knew exactly how many there were and who they were.
- Scheepers guessed that if there had been no labour tenants he would have been able to sell subject property 1 to first respondent for between R150 000 and R200 000, which Griffiths worked out to be R363 per hectare.
- Subject property 2
- Scheepers had rented subject property 2 from its former owner, Mr van Rensburg, to house labour tenants.
- Subject property 2 had been offered to Scheepers more than once and for less than the R100 000 which first respondent had paid for it. There was in fact an open offer to him to buy it whenever he wanted.

[61] Griffiths obtained the following information about the current presence of labour tenants on the subject properties from the meeting with labour tenants which he had attended on the property:

- Fourteen labour tenant families had the right to graze 16 head of cattle each as well as an unspecified number of goats.
- Each family would have to supply one labourer to work for six months of the year and then another labourer for the following six months, so that each family would in effect supply one person to work per year.
- The labour tenants had the use of the whole farm to the exclusion of the first respondent who had left the farm at some point.

From this information Griffiths had worked out that 14 families grazing 16 head of cattle each on the basis of 5 hectares per large stock unit (relying on information from Scheepers, Griffiths was of the view that the grazing capacity was 5 to 6 hectares per large stock unit) would occupy 1120 hectares, which was a larger area than the 3 combined portions of the subject property.⁵⁹

[62] Griffiths was of the view that the mere presence of labour tenants had a negative bearing on the value of the subject properties and the extent of such negative impact depended on the number of labour tenants and the number of cattle they grazed as well as the size of the farm. Given the details in this case, he said, the labour tenants impacted negatively on the value of the properties.

[63] He said that if there were no labour tenants, the subject properties could be accorded an average open market value of between R300 and R350 per hectare taking into account other factors such as mountainous conditions, poor access, poor fencing and the fact that the whole terrain does not comprise good grazing (his view being that 20% of the land fell in the good grazing category, 30% between reasonable and good, and that the rest of the land was rocky and mountainous) . His valuation of R200 and

59 Record pages 262 - 264.

R203 per hectare had been arrived at taking into account these other factors and the presence of labour tenants on the properties. He explained that he had adjusted these figures upwards to R220 per hectare on the basis of inflation of approximately 8% over a period of 1,25 years (the time between the sales of the properties to the first respondent and the date of valuation). Griffiths explained that the increase for inflation was a concessionary adjustment he was making, despite his view that there had been no real change in the property market, because of the lack of real evidence about what has really happened in the market.⁶⁰

[64] Whilst Griffiths testified that the rights of the labour tenants (to use and occupy the subject properties in terms of the Act) impacted negatively on the value of the properties, he did not assess what impact their obligation to supply labour had on the value of the subject properties. His evidence suggested that the labour tenants had rights almost to the exclusion of the rights of first respondent and were in fact not providing any labour.

[65] The evidence of Griffiths pertaining to the occupation and use of the subject properties by the labour tenants was largely unchallenged, and I accept it. I accept also that when the first respondent bought the properties their values had already diminished due to the presence of the labour tenants and the scheme of the Act which provides them with the rights and protections to which I have referred. However, in keeping with the Pointe Gourde principle⁶¹, articulated above, for the determination of market value I will disregard the consequential devaluation of the properties.

[66] With regard to Griffiths' valuation of the subject properties at R230 000 I thus find I am unable to accept this valuation given that the selling prices of the subject properties as well as the only comparable sale he relies on, were depressed by the presence of labour tenants as a result of the Act. Another reason

60 Record page 247 - 248.

61 The essence of which is defined above in para [25].

I choose not to accept his valuation is his reliance solely on one comparable sale in the light of several other sales found by me to be relevant.⁶²

Evidence of Teversham

[67] Teversham is a registered valuer with the South African Council of Valuers. He testified that he practised as a land surveyor in Northern Natal from 1953, based in Dundee and went on to obtain a national diploma in property valuation in 1976. He said he has been working as a valuer since 1977, predominantly in northern Natal, and he has become well acquainted with the conditions of veld grazing in the area. He testified that he had undertaken about 8 to 10 farm valuations for the Department of Land Affairs, at least 4 or 5 of which involved labour tenants. Teversham said that he did not have any agricultural qualifications and that his knowledge had been gained from reading and being in contact with officials of the Department of Agriculture and farmers.

[68] As I have mentioned, Teversham referred to comparable sale transactions 1 to 4 and 7 to 8 in his valuation report, and comparable sales 11, 12, 14 and 15 which he introduced during the trial specifically to show that grazing in the area of the subject properties bore a value of between R600 to R700 per ha. He was open about the fact that his investigation of sales 1 to 4 and 7 to 8 had been less thorough than it might have been. He said he had obtained the purchase prices of those properties from their title deeds. Thereafter he had looked at these farms from the roadside. He had not spoken to the sellers or the purchasers.⁶³ Teversham said that he had conducted fuller investigations of comparative sales 11, 12, 14 and 15 and had spoken to owners of those properties.

62 See below para [84] to [88] .

63 The extent to which the information was supplemented in the course of the court proceedings however allows the Court to rely on some of the sales for purposes of its decision.

[69] Teversham testified that he had not taken the presence of the labour tenants into account for the purposes of his valuation of the subject properties. He said he was aware of their presence but did not have discussions with them regarding their use of the farm.⁶⁴ Instead he had relied on information obtained from the first respondent.

[70] Teversham stated that he had only become aware of the one comparable sale relied on by Griffiths, (comparable sale 16) on the day he gave evidence, namely 3 August 1999. This sale had therefore not been factored into his valuation. He explained this omission on the basis that this sale did not feature on the deeds office print-out from which he identified comparable sales for the valuation of the subject properties in May 1998.

[71] I am unable to accept Teversham's valuation of the subject properties for various reasons. Firstly, he relies on certain sales which I reject as being truly comparable. Secondly, he reaches conclusions with which I do not agree on the basis of those sales which I accept as comparable. Thirdly, he did not take into account comparable sale 10 which I do consider to be comparable. Those of the sales which I reject (and the reasons for such rejection) and those which I accept appear from paragraphs [74] to [88] below.

VALUATION BY THE COURT

[72] Having rejected the valuations of both Griffiths and Teversham I must determine firstly the market value of the subject properties, and then the compensation to which the first respondent is entitled,⁶⁵ based on the evidence placed before me. I must, therefore, attach a value to the subject properties in much the same manner as a competent valuer with the necessary training, experience and knowledge would do. To

64 Page 404 Record

65 This exercise requires me to consider if the determined market value must be adjusted, taking into account section 25(3) of the constitution, to arrive at just and equitable compensation.

do so I am required to don the mantle of the super valuer referred to by King AJ in *Southern Transvaal (Tvl) Buildings (Pty) Ltd v Johannesburg City Council*⁶⁶:

“The law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and willing buyer, both well informed, and I must arrive at a price in a market that did not exist at the time of expropriation. This is so because I must ignore any enhancement or diminution in value flowing from the expropriation or the scheme causing the expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuers make the task of the super valuator seemingly ‘curiouser and curiouser’.”⁶⁷

[73] The task is not made any easier in this matter by the fact that, whilst there are a large number of comparable sales, the investigation into those sales could have been more thorough. However, I must do the best I can with the available evidence. Because I have been presented with so many comparable sales, I shall focus on the sales which I believe to be relevant and I shall disregard those which are clearly dissimilar and would require too many adjustments for a comparison with the subject properties.

Comparable Sales to be disregarded by the Court

[74] Comparable Sale 1

Too many adjustments would have to be made for this sale on account of it having irrigated land, fencing, 3 dwellings and also because it is a considerably older sale than the subject properties (this sale occurred in 1995). There was also uncertainty as to whether the price on the title deed was the real price paid.

66 Above n 37.

67 Above n 37 at 955-6; See also *Davey’s* case above n 35 at 475D; *Dormehl v Geemeenskapsontwikkelingsraad* 1979 (1) SA 900 (T) at 909C-D.

[75] Comparable Sales 5 and 6

These sales are disregarded because they merely came up in passing and there is insufficient evidence pertaining to them.

[76] Comparable Sale 7

Too many adjustments would be required for a comparison with the subject properties as this property has a shop and the topography and arable components differ from the subject property. This sale is also considerably older as it occurred in 1995.

[77] Comparable Sale 8

This sale is disregarded because it was an auction sale and it was agreed by the parties that it was not an open market transaction.

[78] Comparable sale 9

This sale is disregarded because it was a sale to labour tenants of land which they were occupying, and the low price (R296 per hectare) would appear to reflect the impact of the scheme of the Act. This price is completely out of line with prices for farms where there were no labour tenants, such as comparable sales 2 and 3.

[79] Comparable Sale 11

This sale is disregarded because of the adjustments which would have to be made for its improvements consisting of a house and outbuildings.

[80] Comparable Sale 12

This sale is disregarded because of adjustments which would have to be made for improvements, comprising a shop and a dwelling.

[81] Comparable Sale 15

This sale is disregarded because it occurred in 1995 and the price per hectare is completely out of line with the trend amongst those properties which I find to be comparable. It is much smaller and considerably dissimilar to the subject properties.

[82] Comparable Sale 16

This sale is disregarded because the property was sold in a private open market transaction where the presence of labour tenants and the scheme of the Act must have depressed the price. The sale took place after the Act had come into force. The sale is dissimilar to all the other sales to labour tenants in the area in that it was not done in conjunction with the Department of Land Affairs. Sales in which the Department of Land Affairs was involved (on the basis that the Department had the land valued beforehand and was to provide subsidies for the transactions) were based on valuations which were probably done in a similar fashion to the valuation of the subject properties by Teversham in so far as he disregarded the negative impact on value of the presence of the labour tenants and the scheme of the Act.⁶⁸ That the presence of labour tenants and the scheme of the Act impacted on the price is apparent from the fact that the purchase price is markedly lower than that reflected in sales where labour tenants were not involved or where the Department was involved on the basis which I have suggested.

68 The only exception in this regard was comparable sale 9, where there was a low price despite the involvement of a valuer instructed by the Department.

[83] Sales 17 and 18

The purchase prices paid for the subject properties by the first respondent (which I have accepted above to be the prices as reflected on the title deeds) must be disregarded for similar reasons for the rejection of comparable sale 16, namely, that these too were sales where the presence of labour tenants and the scheme of the Act must have depressed the prices. I cannot have regard to them in the determination of market value.

Comparable Sales Accepted by the Court

[84] Having disregarded the comparable sales mentioned above, I am left with sales 2, 3, 4, 10 and 14. I consider these to be the most relevant comparable sales transactions, and therefore applicable to the determination of market value, for the reasons which appear in my assessment of each, below. Before proceeding with my assessment, there are two general observations which I must make. The first is this. Sales 10 and 14 involved farms on which there were labour tenants and took place after the Act had been promulgated. Nonetheless, as I have pointed out, the sales were based on valuations by valuers appointed by the Department of Land Affairs and the probabilities are that they followed the modus operandi of Teversham in ignoring the negative impact of the presence of the labour tenants and the scheme of the Act. This is reflected in the higher prices paid for these properties when compared with comparable sales 16, 17 and 18. Based on my finding that the Pointe Guard principle applies, an approach which ignores the impact of the labour tenants and the scheme must be preferred. Also relevant in this regard is the principle that prices paid by an expropriator, even though they might not be open market prices, may be used against the expropriator unless the latter can show that those prices are clearly wrong.⁶⁹ Although the Department was not the direct acquirer of the properties, it is in a position akin to that of the expropriator in that it provided the valuations on the basis of which the prices were determined and must have overseen the sales. It is also the Department responsible for implementing the legislation relating to labour tenants. In my view

⁶⁹ See for example *Estate Marks* above n 35 at 254G; *LAWSA* above n 25 at paragraph 198.

there has not been sufficient evidence to show that those prices are clearly wrong. The fact that Teversham's valuation of the subject properties might have been less than thorough is not a basis for concluding that the prices based on other valuations by the Department of Land Affairs were wrong.

[85] The second observation is this. Comparable sales 2 and 3 involved the Impala Irrigation Board which had expropriating powers. Comparable sales 10 and 14 can also be seen as sales to expropriating powers, given that, in the absence of a settlement agreement with labour tenants, they can seek a compulsory award of the land they used and occupied under chapter III of the Act.⁷⁰ As I have pointed out, a sale by an owner to an authority having expropriating powers is usually not a reliable indication of market value and must be treated with caution. The reason for the caution is that the owner knows that expropriation may follow if no agreement is reached.⁷¹ However, this is something which would tend to have a depressing effect on price⁷² because it increases the bargaining power of the expropriator. Contrary to this phenomenon, Griffiths testified that he had been informed by an official of the Impala Irrigation Board that they had paid a premium for properties purchased for purposes of the Paris dam in order to achieve amicable settlements. For this reason he disregarded sales involving the Board. I do not agree with this approach. Whilst a premium may have been paid, the extent of the premium is likely to have been substantially tempered by the superior bargaining position of the Board, along with their duty not to abuse the public purse. It is therefore my view that those sales do not stand to be rejected on the basis of the premium paid. However, if they are comparable, there must be a slight downward adjustment for any such premium

70 Section 16 of the Act.

71 LAWSA above n 25 at para 198.

72 *Van Zyl* above n 57 at 568D.

[86] Comparable Sales 2 and 3

These sales are considered by me to be relevant because they are in a similar location to the subject properties, were bought around the same time and are of similar size. Comparable sale 2 was bought just four months prior to subject property 1 and is only slightly smaller than the combined size of the subject properties. Comparable sale 3 was sold one month prior to subject property 2 and is similar in size to the subject properties. The topography of these properties is similar, but even steeper than that of the subject properties. The evidence was also that, like the subject properties, they suffered from problems with access before construction of the dam began. Griffiths disregarded these sales because he was told that a premium had been paid for them. I have given my reasons why I differ with him in this regard.

[87] Comparable sale 4

This is a relevant sale because little or no adjustment is required for time, improvements, productivity or size when this property is compared with the subject properties. This transaction occurred 3 months before the sale of subject property 2 and like the subject properties has no significant improvements. The topography and arable portions are similar to the subject properties. Given that this property is only slightly smaller than the subject properties, no adjustment is necessary for size. Griffiths disregarded this sale also because he had been told a premium had been paid. It must also be borne in mind that the Irrigation Board, whilst involved, did not have expropriation powers in respect of this sale. For this reason, I am prepared to make a substantial downward adjustment, but not a complete rejection of the sale.

[88] Comparable Sale 10

When comparing this sale to the subject properties few if any adjustments are required for time, improvements, location or productivity. This sale occurred eight months before the fixed date of valuation and thus no adjustment is considered necessary for time. Like the subject properties there are no improvements on this property. The location is very similar to the subject properties and access is equally difficult. This is also a grazing farm with similar carrying capacity to the subject properties. This property, like the subject properties, adjoins the Swissafari game farm and was bought by a community of labour tenants in a sale involving the Department of Land Affairs. A downward adjustment is required for size, Griffith's evidence being that smaller properties reflected a disproportionately higher price per hectare.

[89] Comparable Sale 14

This is a grazing farm, like the subject properties, and little adjustment is required for time, location, improvements and productivity. The sale took place 2 months before that of subject property 1, the property is unimproved, and is situated in the same neighbourhood. A downward adjustment is required for size, this farm being less than half the size of the subject properties and because the price is out of line with the general trend of the other properties.

Conclusions relating to market value

[90] Regard being had to the prices per hectare fetched by the sales which I consider comparable, namely R506 per hectare for comparable sale 2, R500 per hectare for comparable sale 3, R613 per hectare for comparable sale 4, R555 per hectare for comparable sale 10, and R672 per hectare for comparable sale 14, as well as the adjustments which are required, I am of the view that a fair market value of the subject properties should be fixed at R480 per hectare which I have calculated (with rounding) to be R500 000.

[91] In determining the market value of R500 000 I have attached no value to the improvements on the subject properties, it being common cause that these structures were in a seriously damaged state at the date of valuation.

[92] I have, moreover, attached no value to the game farm potential of the subject properties or plottage⁷³ of which Mr De Wet was an ardent proponent, as no evidence was presented to the effect that the Swissafari Game farm wanted to incorporate the subject properties into their operation or would have paid a higher price for them. Nor have I accepted Mr De Wet's characterisation of labour tenants as special purchasers for the purpose of determining market value. The term "special purchaser", as I understand it, is applicable to a purchaser such as the owner of a neighbouring property, for whom a property has a value which is greater than the current land value because of its proximity. In such an instance compensation must be paid for such greater value, but only if it is an inherent potential of the property itself.⁷⁴

OTHER CONSTITUTIONAL FACTORS RELATING TO COMPENSATION

[93] It now falls upon me to embark on the second stage in the process of determining compensation, namely to consider to what extent the market value determined by me must be adjusted according to the dictates of the other factors referred to in paragraphs (a), (b), (d) and (e) of section 25(3) of the Constitution.⁷⁵ I have already had regard to constitutional factor (c) when I determined market value. The

73 "Plottage" is the enhancement of value that a piece of land may have over and above its individual value when sold as part of a larger block. See *Jacobs* above n 57 at 612B. If there is a reasonable possibility that the joint development of the larger block will take place, and if the individual property has a higher value as a result, the higher value must be paid. See LAWSA above n 25 at para 177.

74 LAWSA above n 25 at para 174.

75 Quoted above para [23].

circumstances set out at factor (d) have no bearing on the matter at hand, given that there was neither state investment nor subsidy involved in the acquisition or improvement of the subject properties.

[94] With regard to constitutional factor (a), the current use of the property by labour tenants has been referred to in the determination of market value. However for the enquiry into market value, I found, in keeping with the Pointe Gourde principle, that no regard should be had to the influence on the value of the properties of the rights accorded to labour tenants by the Act, it being the scheme underlying the expropriation. For the purposes of this stage of the enquiry I note that the subject properties are to all intents and purposes currently used and occupied exclusively by the labour tenants. The fact that the applicants are almost completely protected against eviction⁷⁶ means that, practically speaking, their obligation to provide labour cannot be enforced. Their latent obligation to work thus adds no value to the properties and the first respondent has, from the time of the submission of their applications, been unable to derive any benefit from the property. These circumstances, in my view, warrant a limited upward adjustment.

[95] With regard to constitutional factor (b) (the history of the acquisition and use of the properties), as indicated in paragraph [27] above, the market value of the properties must have been adversely affected by the rights accorded to labour tenants with the advent of the Act in 1996. The Act impacted on ownership rights and that impact was passed on to the first respondent when he purchased the properties. Their values were already depressed and expropriation was likely. The first respondent was therefore not in the position of a person who bought the properties before the scheme (which devalued them) was introduced, and who suffered a loss as a result of the scheme. The loss in value had already been incurred prior to his purchasing the properties and this was reflected in the purchase price which he paid. This, in my view requires a substantial downward adjustment.

76 Section 14 of the Act.

[96] The first respondent chose not to testify so I do not know what his reasons for buying the properties were. I do, however, know that he bought them for well below the R500 000 market value determined by me.⁷⁷ If, in the circumstances, I was to compensate him at market value he would be getting an extraordinarily large windfall, regard being had to the price he paid for the properties. This would be unfair to the fiscus⁷⁸ and would certainly not reflect an equitable balance between the public interest and the interests of those affected. On the other hand, I also know that he bought the properties for a low price, even if the underlying scheme of the Act is factored in. This is apparent when the prices in respect of comparable sales 17 and 18 (ie the subject properties) are compared with comparable sales 9 and 16. If I compensated him only in the amount he paid for the properties, it would be unfair to him, taking into account the prices fetched for the six comparable sales. I would in effect be punishing him for having bought at a low price. This must be taken into account in limiting the extent of the downward adjustment.

[97] Before going on to fix an amount for compensation, I pause briefly to consider what Mr De Wet submitted must be taken into account in this case in determining just and equitable compensation under section 25(3) of the Constitution. Mr De Wet urged the Court to take the following into account:

- The parties agreed to sell and purchase the subject properties for R1.2 million, a price that was patently based on Venter and Teversham's reports. Given the agreement that the land would be sold for R1.2 million the first respondent willingly locked himself into the Chapter III procedure.
- The respondent's reasonable expectation in this regard is an equitable consideration which the Court must take into account. The respondent would patently not have entered into any agreement or locked himself into the Chapter III procedure had he not been presented with an acceptable offer.

77 The total of the purchase prices was R210 000.

78 Given the possibility that the sale will be financed by the state in terms of sections 26 and 27 of the Act.

- It was highly inequitable of the Department of Land Affairs to present a valuation at the outset only to resile from that valuation some days before the matter came to trial.

[98] I do not believe these are factors to be taken into account in determining just and equitable compensation. Equity to all concerned requires that the first respondent accept the consequences of his decision to willingly lock himself into the Chapter III procedure. Equity does not require that in determining compensation special allowances are made for first respondent's expectations, his motives for entering into the Chapter III procedure or the fact that the consequences thereof proved not to be to his liking.

[99] Taking all of the above into account, including the purpose of the expropriation,⁷⁹ I am of the view that it would in the circumstances be just and equitable to make a downward adjustment of R100 per hectare to R380 per hectare as the net effect of the further constitutional factors referred to in paragraphs (a) and (b) of section 25(3). With rounding, this translates into an award to the first respondent of compensation in the sum of R400 000 for the subject properties. If compensation in this amount is viewed by the first respondent to be inadequate, he must assume some responsibility for the award through his decision not to testify and personally motivate for a higher award.

[100] I am of the view that the compensation determined by me is just and equitable, regard being had to all the circumstances, the dictates of section 23 of the Act and section 25(3) of the Constitution.

[101] Mr De Wet (against his better judgment and on the insistence of first respondent, as he stated) also asked that I award compensation for damages to the buildings on the subject properties. The issue of damages to these improvements is delictual in nature and does not fall to be determined by me in these proceedings. I accordingly make no compensation award in this regard.

79 Section 25(3)(e) of the Constitution.

COSTS

[102] Mr Rautenbach, for the Department of Land Affairs, and Mr Loots, for the applicant, argued that the first respondent be ordered to pay those wasted costs occasioned by the bringing of its point in limine.⁸⁰ Mr Loots argued that these points in limine were without foundation and had no prospects of success as was the first respondent's subsequent application for an adjournment of the case. He argued further that both these applications were attempts to avoid the consequences of what the first respondent had specifically agreed to at a pre-trial conference.

[103] Arguing against the award of such a costs order, Mr De Wet pointed to the fact that this was the first matter of this nature, that even the applicants had expressed unhappiness at the way in which the application (for an award in land) had been referred, and in the light thereof a cost order should not be awarded against the first respondent.

[104] The Court is mindful of the fact that this is the first application of its kind, it is one of considerable complexity and there was no precedent to guide the parties. The first respondent's point in limine and his application for adjournment must be seen in this context. In the circumstances there is no order for wasted costs against the first respondent.

[105] Both Mr Loots and Mr Rautenbach asked for an award of wasted costs against the third respondent, the First National Bank, arising out of its application for a postponement of the hearing. The third respondent participated in the case from the outset but only as an interested party who would abide the decision of the Court. It was not represented at the hearing during the first two days. However on the morning of the third day of the hearing it brought an application both to intervene as a full party and for a postponement of the hearing to enable it to obtain its own valuer. I granted the application to intervene but refused the application for a postponement. In my finding pertaining to the postponement application, I

80 See paragraph [8].

stated that the question of wasted costs incurred by the late bringing of the application by the third respondent would stand over for determination at the end of the proceedings.

[106] In motivation of a costs order against third respondent Mr Loots argued as follows:

- The third respondent participated in the case by way of representation by a bank official at the pre-trial conferences from the outset, despite its notice to abide the decision of this Court.
- The third respondent's extremely belated application for an adjournment of the matter was unfounded and unreasonable. The third respondent's application was rightly dismissed and it would only be fair and just if the third respondent is to be ordered to pay the wasted costs occasioned by the application.

[107] I agree with Mr Loots and accordingly intend to order the third respondent to pay the wasted costs occasioned by its application for adjournment.

[108] Apart from wasted costs there was no motivation for an award of costs against any party. Mr Loots addressed this point most succinctly when he stated:

“in view of the uniqueness of this case, the importance of the issue to all persons affected by the Act and the general approach of this Court to costs, the applicants will not seek an order of costs of the case against any of the respondents.”

The parties are to be commended for their stance on this issue.

[109] I have chosen not to make the agreement to purchase the subject properties entered into between the applicants and the first respondent an order of Court. Section 23(3) of the Act also requires me to

determine a just and equitable manner of, and time for, payment of compensation. No submissions were made by the parties in this regard. However, I will take into account the urgency which was conveyed at the pre-trial conference. I also draw the attention of the parties to section 25 of the Act which deals with payment of compensation where the property concerned is subject to a registered mortgage bond, as is the case here. Regard being had to all the circumstances, I make the following order:

- (i) In terms of section 22(2) of the Land Reform (Labour Tenants) Act No 3 of 1996, the subject properties, being Portion 2 of the farm Kliprif 111 registration division HU in extent 492,0147 hectares and Portion 3 of the farm Basan 382 registration division HU in extent 59,3434 hectares held under deed T24647/1996 and the Remainder of Kliprif 111 registration division HU in extent 492,0147 hectares held under T14145/1998 by the first respondent, Wessel Hendrik Potgieter, are awarded to a communal property association to be formed and registered by the applicants, in accordance with the Communal Property Associations Act 28 of 1996.
- (ii) Compensation in the sum of R400 000 is determined for the subject properties in terms of section 22(4)(d) and 23 of the Land Reform (Labour Tenants) Act, read with section 25(3) of the Constitution of the Republic of South Africa;
- (iii) The applicants must pay the compensation in full in accordance with the provisions of the Land Reform (Labour Tenants) Act within two months of the date of this order, or such extended period as the Court may, on good cause, allow.
- (iv) The third respondent must pay the wasted costs occasioned by its application for a postponement.

[110] Finally, I note my concern that the transcription record of the hearing in this matter is inaccurate in parts. Words are sometimes incorrectly attributed to the Judges instead of to the assessor or the legal representatives.

JUDGE YS MEER

I agree:

JUDGE A DODSON

Assessor appointed in terms of section 28(6) of the Restitution of Land Rights Act No 22 of 1994:

Mr A Stephenson

For the applicants:

C Loots of Loots Attorneys, Pietermaritzburg

For the 1st respondent

Adv A De Wet instructed by J L Boshoff Attorneys, Pietermaritzburg

For the 2nd respondent:

Adv J G Rautenbach instructed by The State Attorney, Johannesburg

For the 3rd respondent:

Unrepresented.