IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2137/2020

(1) REPORTABLE: **NO/YES**

(2) OF INTEREST TO OTHER JUDGES: **NO/YES**

(3) REVISED.

[redacted] 19/01/2024

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD PLAINTIFF

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY AND ANOTHER FIRST DEFENDANT

THE MINISTER OF THE NATIONAL DEPARTMENT OF TRANSPORT SECOND DEFENDANT

**JUDGMENT**

DIAMOND AJ:

INTRODUCTION

[1] Hoedspruit is a town situated in the Limpopo Province. It is situated adjacent to the National Kruger Park which is on the town's eastern side. The town falls within the area of jurisdiction of the Maruleng local municipality (the "Municipality").

[2] There is a main road, the R40, running along, in a general direction, from north to south, and roughly parallel to the border of the Kruger National Park.

[3] Another road, the R527 intersects the R40, in Hoedspruit, and the R527 runs in a general east/west direction.

[4] The Plaintiff ("NAD") was the registered owner of an erf, viz Erf 215, Extension 6, Hoedspruit (the "Property"), which it held by Deed of Transfer number T 16933/2015.

[5] The Property is situated virtually on the intersection between the R40 and the R 527 and the following diagram illustrates the position of the Property relative to the intersection:

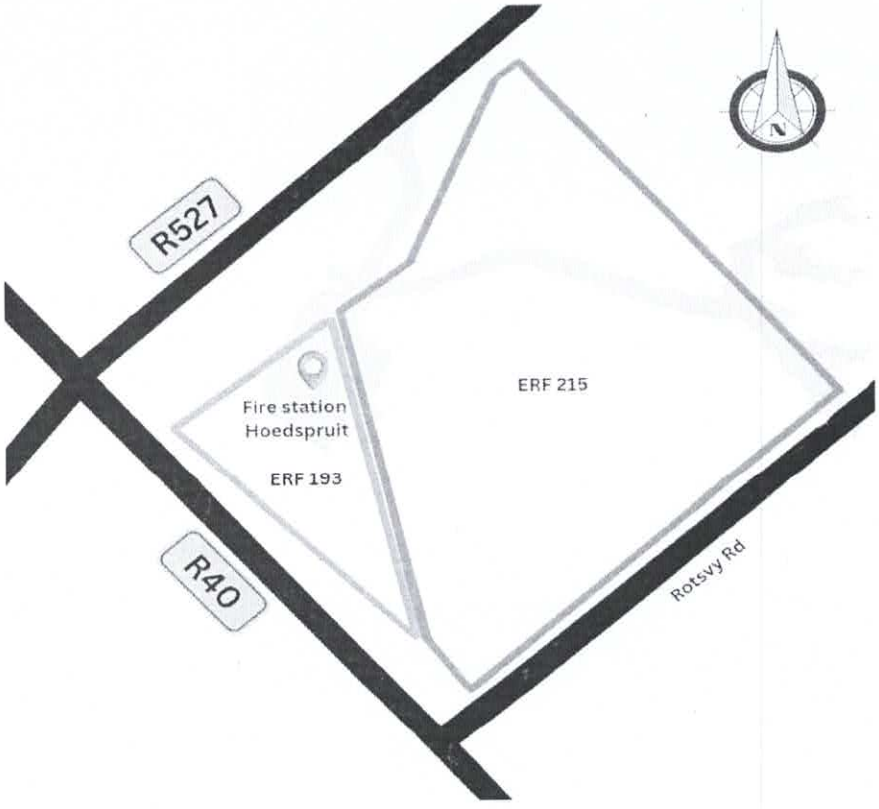


*Figure 1*

[6] The Second Defendant, the Minister of Transport expropriated a certain portion of the Property by way of a notice dated 8 June 2016, with an acquisition diagram DP/R40/393/52/1, and with an effective expropriation date of 25 July 2016. The South African National Roads Agency Limited ("SANRAL") requested her to do so, in terms of legislation.

[7] The area of the expropriated portion is depicted on the acquisition diagram as Figure a,b,c,d,e,f,g,h (the "Expropriated Portion") and if this figure is superimposed on Figure 1, the expropriated portion can roughly[1] be depicted as follows:

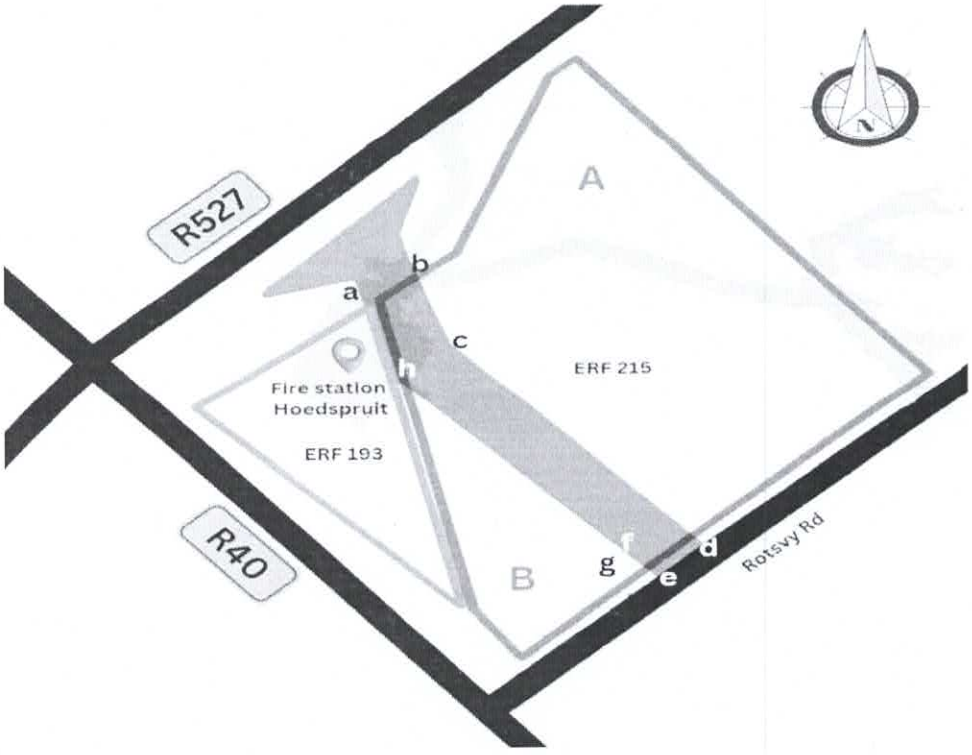


*Figure 2*

[1] Figure 1 and 2 are very simplified sketch diagrams, specifically prepared for this judgement, based on the diagrams presented as evidence during the trial, and are not on scale. Attached to this judgement is Annexure **"A"**, which is an aerial photograph on which the erf boundaries and the extent of the Expropriated Portion is superimposed. Annexure **"A"** represents an accurate view of the Property and Exprpriated Portion. Annexure **"A"** was obtained from the public Website of the Surveyor – General, viz https://csggis.drdlr.gov.za/psv/, on 19 December 2023.

[8] The expropriation took place in terms of the stipulations of section 41 of The South African National Roads Agency Limited and National Roads Act, 1998.[2] (the Sanral Act"), and section 41 stipulates as follows:-

"*41. Expropriation of land for purposes of national road.—(1) Subject to subsection (2) and to the obligation to pay compensation, for which the Agency will be responsible, the Minister, if satisfied on reasonable grounds that the Agency reasonably requires—*

*(a) any land for a national road or for works or other purposes connected with a national road, including any access road, the acquisition, excavation, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of any plant, vehicles, machines, equipment, tools, stores or material, may expropriate that land for the Agency;*

*(b) gravel, stone, sand, clay, water or any other material or substance on or in land for the construction of a road or for works or any of the purposes mentioned in paragraph (a), may take it for the Agency or authorise the Agency to take it;*

*(c) the right to use land temporarily for any of the purposes for which the Minister is competent to expropriate land under paragraph (a), may take that right for the Agency or authorise the Agency to take that right.*

*(2) The Minister may not exercise a power in terms of subsection (1) unless satisfied on reasonable grounds that the Agency is unable to acquire the land or anything mentioned in paragraph (b) of that subsection, or the right to use the land temporarily, by agreement with the owner of the land or the holder of any relevant right in respect of the land, as the case may be.*

*(3) Subject to the obligation to pay compensation, and if satisfied on reasonable grounds that any land is or will be divided by a road contemplated in paragraph (a) of subsection (1) in such a manner that the*

---

[2] Act No. 7 of 1998.

*land or any part of it is or will be useless to its owner, the Minister may expropriate that land or the relevant part thereof.*

*(4) Where the Minister expropriates any land for the Agency in terms of subsection (1) or (3), the Agency becomes the owner thereof on the date of expropriation of the land concerned.*

*(5) Subject to this section, the provisions of sections 7 to 24 of the Expropriation Act, 1975, will apply with regard to any expropriation in accordance with subsection (1) or (3), reading in the changes necessary in the context. However, any reference in those sections of the Expropriation Act, 1975, to "section 2", must be understood as a reference to this section.*

[9] Section 12 of the Expropriation Act, 1975[3] (the "Act"), which applies to this expropriation under section 41(7) of the Sanral Act, determines the basis on which compensation for expropriation is to be determined and paid.

[10] The entire cause of action as contained in the Particulars of Claim of NAD, is based on the application of section 12 of the Act.

[11] Section 12 of the Act reads as follows:

*"12 Basis on which compensation is to be determined*

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

---

[3] Act 63 of 1975.

*(a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of-*

*(i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and*

*(ii) an amount to make good any actual financial loss caused by the expropriation; and*

*(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:*

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

*(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or*

*(bb) in any other suitable manner.*

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

*(a) ten per cent of such total amount, if it does not exceed R100 000; plus*

*(b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus*

*(c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus*

*(d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.*

*(3)(a) Interest at the standard interest rate determined in terms of section 26 (1) of the Exchequer Act, 1975 (Act 66 of 1975), shall, subject to the provisions of subsection (4), be payable from the date on which the State takes possession of the property in question in terms of section 8 (3) or (5) on any outstanding portion of the amount of compensation payable in accordance with subsection (1): Provided that-*

*(i) in a case contemplated in section 21 (4), in respect of the period calculated from the termination of thirty days from the date on which-*

(aa) the property was so taken possession of, if prior to that date compensation for the property was offered or agreed upon; or

(bb) such compensation was offered or agreed upon, if after that date it was offered or agreed upon,

to the date on which the dispute was settled or the doubt was resolved or the owner and the buyer or the mortgagee or the builder notified the Minister in terms of the said section 21 (4) as to the payment of the compensation money, the outstanding portion of the amount so payable shall, for the purposes of the payment of interest, be deemed not to be an outstanding amount; and

(ii) if the owner fails to comply with the provisions of section 9 (1) within the appropriate period referred to in the said section, the amount so payable shall during the period of such failure and for the purpose of the payment of interest be deemed not to be an outstanding amount.

(b) Interest payable in terms of paragraph (a) shall be deemed to have been paid on the date on which the amount has been made available or posted to the owner concerned.

(c) Any deposit, payment or utilization of any amount in terms of section 11 (1), 20 (2) or 21 (1) or (4) shall be deemed to be a payment to the owner, and no interest shall in terms of paragraph (a) be payable on any such amount as from the date on which it has been so deposited, paid or utilized.

(4) If the owner of property which has been expropriated occupies or utilizes that property or any portion thereof, no interest shall, in respect of the period during which he so occupies or utilizes it, be paid in terms of subsection (3) on so much of the outstanding amount as, in the opinion of the Minister, relates to the property so occupied or utilized.

(5) In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely-

(a) no allowance shall be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;

(b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;

*(c) if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;*

*(d) improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;*

*(e) no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;*

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

*(g) .....*

*(h) account shall also be taken of-*

*(i) any benefit which will enure to the person to be compensated from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate him in whole or in part for any financial loss which he will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;*

*(ii) any benefit which will enure to such person in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;*

*(iii) .....*

*(iv) any relevant quantity of water to which the person to be compensated is entitled, or which is likely to be granted to him, in terms of the provisions of the Water Act, 1956 (Act 54 of 1956), or any other law.*

*(i) .....*

*(6) .....*

[12] SANRAL offered the amount R 190 777-40 as compensation for the Expropriated Portion.

[13] In terms of the initial[4] Particulars of Claim, NAD claimed an amount of R 15 484 382.00 (Fifteen Million Four Hundred and Eighty-Four and Three Hundred and Eighty-Two Rand) being the alleged market value of the Expropriated Portion (R 15 400 000,00) in terms of section 12(1)(a) of the Act, which amount also includes an amount for actual financial loss allegedly directly caused by the expropriation in terms of Section 12 (1)(a)(ii) (R 29 382,00) as well as a further amount in terms of Section 12(2) (R 55 000 – 00).

[14] In terms of the initial plea, SANRAL denies the amount of compensation payable as alleged by NAD and pleads further that NAD obtained the business zoning of the property unlawfully, and that this factor should be taken into account in terms of section 25(3)(b) of the Constitution.

[15] The parties tried to negotiate and agree on a compensation amount, but they were not able to agree on an amount.

---

[4] NAD amended its Particulars of Claim and I will revert to the amendment later in this judgment.

[16] It is therefore clear that the parties cannot be further apart[5].

[17] This court is therefore called upon to determine compensation to be paid by SANRAL to NAD for the expropriated portion, under Section 14 of the Act.

## APPROACH OF THE COURT

[18] A few remarks are apposite, at this stage, regarding the proper approach that a court should take when applying Section 12 of the Act.

[19] The Act was assented to on 20 June 1975, and the date of commencement was 1 January 1977.

[20] The Act was amended on several occasions, and the last time that several amendments were effected, was by way of the Expropriation Amendment Act, 1992 (Act no 45 of 1992)[6].

[21] In terms of section 12 of the Act:

---

[5] Despite further amendments to the pleadings, the parties remained very far apart.
[6] The last amendment was effected by way of Proclamation R41 of 25 March 1994, which proclamation amended the definition of the word "Minister".

[22] the amount of compensation to be paid to an owner in respect of expropriated property shall not exceed;

[23] the amount which the property would have realised if sold on the date of the notice in the open market by a willing seller to a willing buyer;

[24] and an amount to make good any actual financial loss caused by the expropriation;

[25] provided that where the property expropriated is of such a nature that there is no open market therefore, compensation may be determined based on the amount it would cost to replace the improvements on the property expropriated having regard to the depreciation thereof, or in any other suitable manner.

[26] Since the commencement of the Act, and its subsequent amendments, section 25 (3) of the Constitution came into being. Section 25(3) stipulates as follows:

> "(3) *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—*
>
> *(a) the current use of the property;*
>
> *(b) the history of the acquisition and use of the property;*

*(c) the market value of the property;*
*(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
*(e) the purpose of the expropriation.*

[27] The Constitutional Court cautions in *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank V Minister Of Finance*[7] ("*First National Bank*") that judgments on expropriation must be read circumspectly because such judgements are not necessarily reliable when it comes to interpreting the property clause is on the interim and 1996 Constitutions.

[28] The Supreme Court of Appeal established the following approach in *Haakdoornbult Boerdery CC and Others v Mphela and Others*[8] *("Haakdoornbult")*:

> *"In this regard, I wish to paraphrase and adopt the approach of Gildenhuys AJ in Baphiring Community v I Uys. Compensation, to be fair (he said), must recompense. The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same .position as if the land had not been taken. Fair compensation is not always the same as the market value of the*

[7] 2002 (4) SA 768 (CC), par 59.
[8] 2007 (5) SA 596 (SCA), par 48.

*property taken; it is but one of the items which must be taken into account when determining what would be fair compensation"*

[29] Gildenhuys and Grobler [9] elaborate on this approach and they cite the following remark by Duard Kleyn[10], which they say is important to bear in mind:

> *"The purpose of damages in private law is to undo the consequences of an unlawful act. In determining the amount to be awarded, the affected party must be placed in the hypothetical economic position he/she might have been in had the act not taken place. The object is to award full damages, including loss of future income and profits. Expropriation, on the other hand, is a lawful taking of property in the public interest. The purpose of awarded compensation is not that it should make up for all losses suffered; it is rather to replace the object with its value. The property guarantee is transformed into a value guarantee. The value of the property is determined in the light of factors that are relevant to the law of expropriation. The aim is to put the affected party in the position to obtain an equivalent object."*

[30] It is therefore clear that the market value of the expropriated property is but one factor, to be considered, with, at least[11] the other factors mentioned in Section 25(3), and every court which is tasked with the obligation to determine compensation, is duty-bound, in terms of the Constitution, to do so.

---

[9] In 'LAWSA Expropriation (Volume 10(3) - Second Edition)' (LexisNexis Butterworths), Par
[10] (1996) 11 SAPR/PL 402 442.
[11] And maybe more circumstances since the list in section 25(3), is not a closed list.

[31] In the end, the purpose is to award an amount of compensation to the expropriatee, an amount which is just and equitable, given all the circumstances of the expropriation.

[32] The Appellate Division ruled, in *Estate Marks v Pretoria City Council* [12] "("*Marks*") concerning the nature of an order for compensation in terms of the repealed Expropriation Act, 1965 (Act no 55 of 1965), that such an order for compensation is not a discretionary decision, but it is a valuation, based on fact. The court remarked that although the making of the valuation relates to matters that may be so uncertain that no one can be dogmatic about them, nonetheless, a finding of factors to be made, is a logical deduction[13] from the factual data.

[33] In my view, this is an example of a remark that needs to be read, in light of the judgement in *First National Bank*, with circumspection. That remark was made against the backdrop of an expropriation compensation regime which necessitated, as a core component, the determination of the market value of the expropriated property.

---

[12] 1969 (3) SA 227 (A).
[13] The term used by the Appellate Division. It would in many instances be more appropriate to refer to inferences from the data.

[34] Post-1994 and 1996, the market value of the expropriated property is no longer a core consideration. It is but one consideration and the weight that should be attached to it is to be determined in the light of the circumstances of each case and finally in the light of what is "just and equitable", as is prescribed in section 25(3) of the Constitution.

[35] Hence, the power to determine a final consideration for expropriation, is, in the end, bounded by considerations of justice and equity. This means, in my view, that the final determination of a compensation amount takes place by way of a discretionary power of the court.

[36] The Constitutional Court stated the following, *in State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd ("Gijima")* about the exercise of a discretion:

*"A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible. In contrast, where a*

*court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense-*

> *'means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'."*

[37] A court exercises a judicial discretion, that is a discretion in the true sense of the word if it

"*exercises its power on correct principles, and based on a correct assessment of the facts; and*

*where the discretion results in an outcome which can be justified by a court which properly directs itself to all the facts and all the principles in the case.*[14]

[38] In my view, what all of this means in a case where a court has to determine compensation for expropriation in terms of the Constitution read with the Act, is the following:

---

[14] Gijima, Par 11.

[39] Since the court is duty-bound to consider, amongst others, the market value of the property[15], the determination of such a market value is a valuation and not the exercise of a discretion, but it is a valuation based on the facts.[16]

[40] beyond this, however, the court exercises a judicial discretion that is true discretion, when it determines a compensation which is just and equitable given all the circumstances. While considering what is just and equitable, a court may determine that the market value should be paid as compensation, since it is just and equitable given all the circumstances. A court may however also determine that less (or for that matter perhaps more[17]) than market value is just and equitable within the circumstances. A court may conceivably conclude it is just and equitable for the state not to pay any compensation, because the expropriatee, for instance initially obtained the land by way of a government subsidy and has in the meantime not effected any capital improvements[18].

---

[15] As is mentioned in section 25(3)(c) of the Constitution.
[16] As was ruled in Gijima.
[17] In which event there may in certain circumstances be questions of the constitutionality of the stipulations of Section 12 of the Act.
[18] Section 25(3(d) of the Constitution.

[41] One aspect remains concerning the general approach that this court is bound to follow.

[42] Both parties relied heavily on expert opinion, but the opinions of the expert witnesses were diametrically opposed to each other, in some respects.

[43] Apart from this, NAD even argues that the First Respondent failed to prove that one of the persons he called as a witness, was indeed an expert in the field of property valuation.

[44] Against the backdrop of the above, this court must decide whether the particular witness has sufficient qualifications to assist the court in the determination of the market value of the property. This is done by measuring his qualifications and experience to determine that they are sufficient to enable him to give the relevant evidence.[19]

[45] Concerning the conflicting evidence, it is important to note that the expert witnesses are not the judges of fact about which they express an

---

[19] Zeffertt DT and Paizes AP, The South African Law of Evidence (Third editon, LexisNexis 2017), P.337.

opinion, and a court should be careful not to allow the opinion of expert witnesses to take the place of their own finding of fact.20

[46] The following general approach that a court should follow when assessing expert testimony was stated *in Mv Pasquale Della Gatta; Mv Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa*[21]("*Imperial Marine*"):-

> *"In my view the court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis then the court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied. This is so even though that is not the only opinion that can reasonably be expressed on the basis of those facts. However, if the opinion is far-fetched and based on unproven hypotheses then the onus is not discharged".*

[47] What follows from the *Imperial Marine* judgement is that a court should establish whether the opinion of an expert is based on prima *facie-proven* facts. If so, the court must examine the reasoning of the expert

---

[20] Rv Jacobs 1940 TPD 142 at 146 – 147.
[21] 2012 (1) SA 58 (SCA) Par 26.

and determine whether it is logical in light of those facts. If the opinion of the expert fails the scrutiny on either one of the above steps, the opinion has no evidential value and can even be said to be irrelevant.

[48] I will now proceed, against the backdrop of the above-mentioned general approach, to consider an award for compensation, of the Applicant, in the circumstances of this case.

FACTUAL MATRIX, AND SEQUENCE OF EVENTS.

[49] A property developer, Boschpoort Ondernemings (Pty)Ltd, applied to establish a town under the provisions of the Transvaal Town Planning and Townships Ordinance, 1986, on the property known as the remainder of the farm Amsterdam 208 T. The application was approved in January 2005, and a town called Hoedspruit Extension 6 was eventually proclaimed on the farm.

[50] The town became known as the HOEDSPRUIT WILDLIFE ESTATE, a non-profit company known as the Hoedspruit Wildlife Estate NPC No 2004/010767/08, was established and is active from the inception as the Home Owners Association of the estate.

[51] The developer of the township donated the Property, in terms of Clause 2.4 of the Conditions of Establishment of the Town, to the Municipality. It was a condition of the township that the Municipality had to develop a secondary school within five years of the date of proclamation of the township and if not, the property would have reverted to the developer.

[52] The Municipality did not establish a secondary school on the Property, and the Property reverted to the Developer. The exact date on which the Property was transferred back into the name of the developer, or its successor in title, is not known.

[53] At the beginning of 2013, an engineer in the employment by SANRAL, a Mr Klaus Gerhard Schmidt ("Schmidt"), received a visit from Ms. Christine du Preez, and she indicated to Schmidt that there were serious traffic congestions on the existing access road from the R40 into Hoedspruit Extension 6.

[54] After this visit, Schmidt went to the site, where he met with Christine du Preez and municipal officials to assess the situation.

[55] SANRAL had a traffic impact study done, of the traffic situation at the R40 R297 interchange, and certain recommendations were made, in a report dated simply May 2013.

[56] The net effect of this visit and traffic impact study was captured in a letter dated 13 August 2013, sent by SANRAL to the Municipality. This letter indicated that a certain Mr Charl Auret ("Auret"), deliberated with SANRAL on the traffic issues and that Auret represented the owners/developers of Erf 215.

[57] A Close Corporation, Overine 145 CC ("Overine"), took transfer of the property in 2014 by way of Deed of Transfer T 5987/2014.

[58] NAD and Overine signed a Deed of Sale on 22 January 2015, in terms of which NAD purchased the property from Overine for R 7 750 000-00.

[59] A practising Town and Regional planning firm, a certain Jacques du Toit and Associates, applied for the rezoning of the Property, on 20 February 2015. He filed a single application regarding the Property, on behalf of Overine CC, and at the same time the rezoning of Portions 1 and 2 of Erf 712, Hoedspruit Extension 6, on behalf of a Close Corporation called Silver Moon Investments 160 CC.

[60] Registration of the transfer of the Property in the name of NAD took place on 13 March 2015.

[61] Proclamation of the amendment scheme that amended the zoning of the Property from Educational to Business 1 took place on 12 June 2015.

[62] SANRAL wrote a letter to the Municipality, on 17 July 2015. In this letter, SANRAL referred to their letter dated 13 August 2015 and stated that SANRAL was became of the change of ownership of the Property and that it was aware that NAD intended land use for the Property that would imply a rezoning of the Property, and SANRAL requested that before the rezoning or the approval of site development plans took place, consultation with SANRAL should take place.

[63] NAD filed a site development plan, concerning its intended development of the Property, on 1st September 2015.

[64] On 5 November 2015, the Municipality wrote a letter to NAD, requesting SANRAL's comments on the site development plan as well as a traffic impact assessment report by an engineer.

[65] NAD wrote a letter to the Wildlife Estate, on 10 December 2015, indicating that they were in consultation with NAD, regarding the finalisation of the access road over the Property.

[66] The attorneys of NAD, Messieurs Ivan Pauw and Partners ("Ivan Pauw"), wrote a letter on 9 March 2016, to the Municipality, indicating that NAD regarded the request of the Municipality to provide the Municipality with the comments of SANRAL, as unlawful. The firm also indicated that the Municipality's request for Traffic Impact Assessment, was to be considered before the rezoning application and that the client was under no legal obligation to procure such a study. They requested the municipality to approve the site development plan within fourteen days of the date of the letter failing which the firm stated that they held instructions to proceed with further action against the Municipality.

[67] The Second Defendant signed an expropriation notice in terms of the Act, on 8 June 2016, and indicated that the effective date of the expropriation would be 25 July 2016. It is consequently from 25 July 2016, that SANRAL became the owner of the Expropriated Portion.

[68] The director and chief executive officer of NAD, Johannes Petrus Jacobus van Niekerk signed a founding affidavit on 23 August 2016, an

affidavit that would be used in support of an application compelling the Municipality to approve the site development plan.

[69] NAD issued its application to compel the Municipality to approve the site development plan, on 31 August 2016.

[70] Ivan Pauw wrote a letter to SANRAL on 12 November 2019, in which they reiterated NAD's position that the Municipality had to approve the site development plan and not SANRAL. Despite that, they indicated that they would be willing to circulate the site development plan to SANRAL for comment by SANRAL, before final approval by the Municipality. They confirmed that the site development plan will provide for access to the respective erven before the construction of the interchange and access road and consequential closure of Rotsvy Street (the street that intersects with the R40), which gives access to the Property and other erven of the Wildlife Estate.

[71] NAD issued the current summons on 11 March 2020.

[72] NAD sold that part of the Property which had remained after the expropriation of the Expropriated Portion, on 25 January 2022, to Hebrides Investments Proprietary Limited ("Hebrides"), for a total

purchase price of R 14 500 000,00 plus VAT of R R 2 175 000,00 totalling a consideration of R 16 675 000,00.

[73] Hebrides took the transfer of the Property on 23 March 2022, by Deed of Transfer 2537/2022.

[74] The trial commenced on 25 July 2022.

THE TRIAL

[75] The trial commenced on 25 July 2022 and became partly heard on that day. The trial unfolded over a further eleven days and concluded on 28 July 2023.

[76] During the trial, the court was called upon to adjudicate on interlocutory applications, and the court also had to make certain rulings regarding the proceedings. The court indicated that it would provide its reasons, and orders for costs, if any, in such interlocutory proceedings in the rulings, in this judgment.

[77] NAD presented the evidence of two expert witnesses, firstly Mr Stafanus Gabriel Makkink ("Makkink"), a professional Town and Regional Planner, and Mr Peter Parfitt ("Parfitt"), a professional property valuer. NAD did not call any lay witnesses to testify on its behalf.

[78] SANRAL called three lay witnesses, an erstwhile employee of SANRAL, Schmidt, and two municipal officials, Ms Khesani Veronica Sithole and Mr Moshele Given Mailula. SANRAL also called two expert witnesses, Mr André Albertus Jansen van Nieuwenhuizen ("van Nieuwenhuizen"), a professional Town and Regional Planner, and Mr Christian Lourens Winckler ("Winckler"), a property valuer.

[79] Both parties concerned themselves for all practical purposes almost exclusively with the question regarding the market value of the Expropriated Portion and only referred in passing to the other issues mentioned in section 25 (3) of the Constitution if they did so at all.

[80] I will first deal with the question of the determination of the market value of the Property, after which I will consider all the factors mentioned in section 25 (3) of the Constitution. I will then conclude with my reasons for interlocutory orders and rulings followed by the order.

## MARKET VALUE OF THE PROPERTY

[1] Parfitt started his testimony by explaining the four different internationally accepted methods of land valuation, *viz*: firstly, the depreciated replacement cost method; secondly, the residual value

calculation method; thirdly, the income capitalisation method and fourthly, the comparable sales method.

[2] At the beginning of the trial, Parfitt, on behalf of the Plaintiff, started off to value the Expropriated portion based on the income capitalisation method. Winkler, on behalf of the First Defendant, started, with what Parfitt opined, was the residual value method.

[3] During the litigation, the experts filed addendum reports and had further meetings of experts during which they exchanged viewpoints.

[4] In the end, the two experts converged on the same method, viz, the comparative sales method, and they duly filed addendum reports in this regard.

[5] It is important to note that the comparative sales method, which both experts employed, was employed in a specific manner, *viz* the so-called "before and after method".

[6] The rationale of the so-called before and after the method was explained in *Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal*[22]("Ingersoll -Rand"), as follows:

> "*Why it is important to do a 'before and after' valuation is because it often happens that there can be a concentration of value on a property. The street frontage portion of a business lot may be worth much more than a pro rata portion further away from the street, just as irrigated lands may be worth much more per hectare than pasture on the same farm. By declaring a road over a property that can be developed in a town area it is quite conceivable that the remainder may be so adversely affected that it can no longer be developed in this way. By now imagining two sales between imaginary willing buyers and sellers, the objective market value of the part expropriated, taking into account the integration potential, can be reliably determined. A sale of the property before road proclamation is contemplated. The property has town development potential and will be purchased for that purpose. Then a sale of the remainder in the open market is contemplated after road proclamation. The remainder may now be without town-establishment potential because of its size and shape or the town-establishment potential has been severely affected. The price achieved per hectare is significantly lower than it was before the road proclamation. The value of the expropriated portion will be the difference between the price calculated at the first sale without the road proclamation and the price calculated after the road proclamation. The integration potential was taken into account in it. There is not necessarily always an integration potential present. A road can, for example, be declared over a portion of land that cannot be used as beneficially as the remainder with the establishment of a town. A 'before and after' valuation may now indicate a lower price per hectare for the expropriated portion than for the entire property before the road declaration. There was no integration potential, and the valuation shows it.*[23]

---

[22] 1991 (1) SA 321 (T).

[23] This is my translation of the following Afrikaans text, on P. 329 of the judgment as per Hartzenberg J: "Hoekom dit belangrik is om 'n 'voor en na' waardasie te doen is omdat dit heel

[7] Using a comparative "before and after valuation", Parfitt values the expropriated portion to be R 17 064 382.00.

[8] Using the same method, Winkler values the expropriated portion to be R 1 723 507.90.

[9] Scrutiny of the mathematical calculations used by both valuers, reveals that both applied their calculations in a plausible and tenable manner[24]. If so, why then this big difference in valuation?

[10] The answer as to why the big difference in valuation exists can be found in the following: When valuing a property, one has to take cognisance of the value which a specific type of land use will realise from the

---

dikwels gebeur dat daar 'n waarde-konsentrasie op 'n eiendom kan wees. Die straatfront gedeelte van 'n besigheidserf kan heelwat meer werd wees as 'n pro rata gedeelte verder weg van die straat af, net soos wat besproeiingslande baie meer werd mag wees per hektaar as wat weiding op dieselfde plaas is. Deur 'n pad te verklaar oor 'n eiendom wat in 'n dorpsgebied ontwikkel kan word is dit goed denkbaar dat die restant so nadelig geaffekteer kan wees dat dit nie langer so ontwikkel kan word nie. Deur nou twee verkopings tussen denkbeeldige gewillige kopers en verkopers te veronderstel kan die objektiewe markwaarde van die geneemde gedeelte met inagneming van die integrasie-potensiaal betroubaar bepaal word. 'n Verkoping van die eiendom voor padverklaring word bedink. Die eiendom het dorpstigingspotensiaal en sal vir daardie doel gekoop word. Dan word 'n verkoping van die restant in die ope mark bedink na padverklaring. Die restant is nou dalk sonder dorpstigtingspotensiaal vanweë die grootte en vorm daarvan of die dorpstigtingspotensiaal is erg aangetas. Die prys wat behaal word per hektaar is aansienlik laer as wat dit was voor die padverklaring. Die waarde van die ontneemde gedeelte sal die verskil wees tussen die prys bedink met die eerste verkoping sonder die padverklaring en die prys bedink na die padverklaring. Die integrasie-potensiaal is daarin ag geneem. Daar is nie noodwendig altyd 'n integrasie-potensiaal teenwoordig nie. 'n Pad kan bv verklaar word oor 'n gedeelte grond wat met dorpstigting nie so voordelig soos die restant benut kan word nie. 'n 'Voor en na' waardasie mag nou 'n laer prys per hektaar aandui vir die ontneemde gedeelte as vir die hele eiendom voor die padverklaring. Daar was nie 'n integrasie-potensiaal nie, en die waardasie toon dit aan.

[24] Despite small questionmarks that may exist, to which I will revert later in this judgment.

property. It is a question of basic logic that a piece of land utilised to develop a national shopping centre, will generate more income, and consequently have a higher market value, than a piece of land utilised for extensive cattle grazing.

[11] This is the point on which the valuations differ. Parfitt opines that the highest and best use of the Property, before the expropriation, was to develop a community shopping centre on. Winkler opines on the other hand, that the highest and the best use for the Property will be a retail small business development.

[12] In the instance of a community shopping centre, so Parfitt argues, the market valuation of the property will be driven by factors specific to a community shopping centre. The income potential of such a development is of such a nature that it will attract province-wide and perhaps countrywide investors.

[13] On the other hand, a small business retail land use envisaged by Winkler, will attract investors primarily from the Hoedspruit area, and history has shown that the demand in the area for this type of business development, is subdued with the result that there will be a much lower

valuation for such a property compared to the situation where the property could have been utilised as a community shopping centre.

[14] A further factor comes into play: Parfitt opines that due to the awkward nature of the expropriation, the property of the expropriation is rendered useless for purposes of a community shopping centre. He argues that if one looks at Figure 1 above, it is clear that the entire property can be developed, and that the property is advantageously located, very close to the intersection of two prominent roads, giving prime visibility, of the shopping centre, one of the minimum requirements of such a shopping centre. Furthermore, so the argument goes, the "B" portion of the land after expropriation cannot be integrated into a development on the "A" portion of the land, leaving the "A" portion too small to develop a community shopping centre on.

[15] After the expropriation, however, it is clear that the expropriation bisected the property in a very awkward manner, and the development potential of the Property was substantially adversely affected. Parfitt opines further that had the Expropriated portion be situated all along any of the borders of the Property, the impact on the development potential of the Property would have been much less, to the extent that

it would still be possible to develop the centre as a community shopping centre.

[16] This being the case, the explanation given in *Ingersol–Rand*, quoted above comes into play. Parfitt states that the awkward manner of the expropriation renders the development of a piece of land impossible for purposes of the community shopping centre and that for that reason it would be inappropriate to focus on the value of the Expropriated portion, which has no market value in any event. The only viable way to approach the valuation is with a "before and after valuation".

[17] What is pivotal then, is to keep the principles in mind when it comes to the determination of the "highest and best use" of land for purposes of property valuation.

[18] It was ruled in *Port Edward Town Board v Kay* ("Kay") that the following principles apply when assessing the potential future use of a property:[25]A party who asserts that a property has a particular potential must prove it; by potential use is meant additional use over and above its current use, for which the property is suited and reasonably capable of being put in the future. Such proof has three components, viz 1) that

[25] 1996 (3) SA 664 (A), on P. 674 and 765, in which the court referred to several judgements.

the potential exists,2) that a willing buyer and seller would have taken it into account in fixing the price, and 3) the quantum. The first component must be shown to be a reasonable possibility and component two must be proved on a balance of probabilities. Once components one and two have been established, then there is no onus in the narrow sense of the word concerning component 3.

[19] Gildenhuys and Grobler[26] state concerning "highest and best use":

> "*The International Assets Valuation Standards Committee described "highest and best use" as being "the most probable use of an asset which is physically possible, appropriately justified, legally permissible, financially feasible and which results in the highest value of the asset being valued."*[27]

[20] It is further stated in Gildenhuys and Grobler that an owner relying on a potential use different from the use to which the property is being put is entitled to select the use which is the most advantageous to him or her, *provided* that such use would have occurred to both the notional seller and notional buyer, and would have been accommodated by them in their negotiations about the price.

---

[26] *Op cit*, Par 58. See further an exploratory discussion of the topic in Boshoff DGB, '*Principles of Highest and Best Use Valuation - A South African Legal Perspective with Practical Implications*' (2016) <https://www.quaesti.com/archive/?vid=1&aid=2&kid=160401-283> accessed 13 January 2024.

[27] My emphasis.

[21] It is against the above backdrop that the evidence has to be analysed as to whether the Plaintiff, in this case, succeeded in placing evidence before the court that a reasonable possibility exists that the Property may be developed in future as a community shopping centre, and whether the Plaintiff has succeeded in proving on a balance of possibility, that the notional seller and buyer would have taken notice of such a possibility and would have been accommodated by them in the negotiation of their price.

[22] To do this, one must focus more closely on the attributes of a Community Shopping Centre.

[23] Makkink, testified that as far as the classification of shopping centres is concerned, there exists a broad typology which is captured by a publication of a certain body, the South African Council of Shopping Centres ("SACSC"). The publication is called "Major Retail Types, Classification and The Hierarchy of Retail Facilities In South Africa. The 2016 document was handed in as an exhibit.

[24] In terms of this classification, three main groups of retail types exist, viz firstly, planned shopping centres, secondly unplanned shopping centres and thirdly rural retail developments.[28]

[25] What is important, is that the Plaintiff's approach in's case is based on one of the above-mentioned three types of retail development, viz the planned retail facilities, and six core classifications exist: firstly, small freestanding and convenience centres; secondly neighbourhood centres; thirdly community centres; fourthly small regional/large community centres; fourthly, regional centres and sixthly, super-regional centres.

[26] The following is stated on page 5 of this publication:

> *"The market characteristics of each type of centre should be well understood and taken into consideration in the planning process for a specific type centre. The most important to be included are the age and lifecycle profile, socio-economic status, disposable income and expenditure levels, as well as different lifestyles of a particular area.*
>
> *The local conditions of individual markets should be considered. For example, the development of centres as part of coastal towns has different threshold values and the focus should be on the permanent residents living in the town. The peak tourist months should be*

[28] The definition of the groups of retail type centgers in the document is a bit confusing. Nothing turns on that for purposes of this judgement.

*regarded as additional support, and not part of the long-term sustainability of a centre.*

[27] The report then discusses the characteristics of each one of these six centres under five subheadings, viz, Role and function, Description and Centre Characteristics, Location Criteria, Market Characteristics and Threshold Values and, lastly Tenant Mix.

[28] Under the heading, "Role and function", the report states that the role of a community centre is to satisfy the need for shopping facilities between that of the neighbourhood and regional centre. Their role is to offer a larger variety of convenience products with more depth and variety of merchandise.

[29] Under the heading Description and Centre Characteristics, it is stated that the centres are between 12,000 and 25,000 square metres in extent, houses between 50 to 100 stores and the size of the land is between 3.6 and 7.5 hectares.

[30] Under the heading Location Criteria, it is stated that these centres are located on main arterial roads which are accessible from several suburbs located in the area. The site must offer high visibility to passing traffic and accessibility to the residents in this area. The report states

that the average radius of the primary pride area is 2.5 – 3km, the median travelling time to the centre is 6 – 14 minutes, and the access requirement is that it must be situated at least on a major arterial road.

[31] Under the heading Market Characteristic and Threshold Values, the report states that for a successful community centre, the following threshold values and market support are required: LSM 1 – 5, 44 000 – 102 000; LSM 6 – 9, 15 000 – 45 000 and LSM 10 – 10+, 5 000 – 12 000.

[32] Under the heading Tenant Mix, it is stated that the anchor tenant is required that is one or two larger supermarkets bigger than 2 500 n square metres, with typical tenants being Spar, Pick and Pay, Checkers or Shoprite. Further included in the offering should be a pharmacy, butchery, hairdresser, dry cleaner, liquor store and hardware store.

[33] The reference to the LSM needs explanation: the acronym LSM stands for Living Standards Measure, developed by the South African Advertising and Research Foundation[29]. This measure classifies the standard of living and the disposable income of individuals. It segments

[29] https://www.gcis.gov.za/content/newsroom/speeches/pcomm/transformation-advertising-marketing-industry-south-african-advertising-research-foundation.

the population into ten deciles (categories for this judgment), with category 1, being the category of those people in the population with the lowest living standard and disposable income, and category 10 being that category of the population with the highest living standards and disposable income[30].

[34] Parfitt testified during his evidence in chief, concerning the above-mentioned shopping centre classification environment, that those specifications and requirements should be understood as broad overlapping guidelines and not rigid categories.

[35] Plaintiff's opinion is, that when assessing the potential use of the Property, it will become clear that there is a reasonable possibility that the Property could, before the expropriation, have been developed as a community shopping centre as is explained in the publication of the South African Council of Shopping Centres.

[36] The question therefore is, will a community shopping centre be physically possible on this site? The current zoning of the property, viz, Business 1 with its developmental rights associated with it, will allow the

---

[30] For a detailed discussion on this topic, see Kironji E, '*Measuring Quality of Life in South Africa: A Household-Based Development Index Approach*' (PhD Thesis, University of Pretoria 2008) <https://repository.up.ac.za/handle/2263/25060> accessed 14 January 2024.

developer to erect a 35, 464-square-metre building. Apart from this aspect, it is common cause between the parties that the property is situated on the intersection of the R 40 and R 527, two major arterial roads. Seen from this perspective, it will certainly be physically possible[31], to develop a property, broadly speaking within the understanding of a Community Shopping Centre.

[37] The second question is whether the development will be legally permissible. It is concerning this requirement that the First Defendant initially, at a stage when Mr Shokoane *SC* appeared on behalf of the First Defendant, constructed its misgivings about the approach of NAD.

[38] The defence of the First Defendant at that stage, was that NAD obtained the zoning of Business 1, unlawfully and should therefore not be entitled to rely on the zoning of Business 1. In fact, at some stage during the proceedings, the First Defendant sought to amend its pleadings with the dramatic effect to include a prayer that the Business 1 zoning should be reviewed and set aside, as part of the relief sought by the First Defendant. Apart from this, during the cross-examination of the

---

[31] although other factors should also be considered.

witnesses, a substantial amount of energy was put into probing of the question whether the Business1 zoning was lawful.

[39] At some stage Mr Shokoane's instructions were terminated by the First Defendant and Mr de Villiers from thereon appeared on behalf of the First Defendant. Mr de Villiers abandoned SANRAL.

[40] In my view, the decision of SANRAL to abandon this approach was wise and well-justified. I am not going to dwell on the reasons why this is so, other than to say that the existing zoning of a property, concerning potential future use, is not determinative of the development potential of the property.[32] There are further reasons, but since this approach was abandoned by the First Respondent, it is not necessary to consider this aspect further.

[41] The second question regarding the legal permissibility of the development of the shopping centre proved to be much more substantial, in further respects.

[42] It is the case of NAD, that before the expropriation, there was a reasonable possibility that a community shopping centre could be

---

[32] See for instance *Boshoff* supra.

developed. Due to the expropriation, and the awkward way in which the expropriation was done explained above, the development of a community shopping centre is no longer possible.

[43] It is common cause between the parties that the First Defendant expropriated the Expropriated portion, to enable it and the Municipality to devise a traffic flow solution for the area of Hoedspruit extension 6.

[44] NAD took transfer of the Property on 13 March 2015 and submitted a site development plan for its proposed development on 1 September 2015.

[45] It is common cause that the Municipality refused to approve the site development plan, for the reason that they opined that NAD had to obtain the approval of the First Defendant particularly concerning the impact that the development would have on the road and traffic implications in the vicinity.

[46] SANRAL and the Municipality opined, that NAD was duty-bound to do so by Section 48 of the SANRAL Act, which reads as follows:

"48. Structures and other works on, over or below national roads or certain other land.—

*(1) Except as provided in subsection (2), no person may do any of the following things without the Agency's written permission or contrary to that permission, namely—*

*(a) on or over, or below the surface of, a national road or land in a building restriction area, erect, construct or lay, or establish any structure or other thing (including anything which is attached to the land on which it stands even though it does not form part of that land);*

*(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of, a national road or land in a building restriction area*

*(c) give permission for erecting, constructing, laying or establishing any structure or that other thing on or over, or below the surface of, a national road or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated".*[33]

[47] Subsection 2 of section 48 is not applicable to this development.

[48] Subsection 3 of Section 48, reads as follows:

" *(3) (a) The Agency, in its discretion, may give or refuse its permission in terms of subsection (1).*

*(b) When giving permission, the Agency may prescribe—*

*(i) the specifications to which the structure, other thing, alteration or addition for which permission is asked, must comply;*

*(ii) the manner and circumstances in which, the place where and the conditions on which the structure,other thing, alteration or addition may be erected, constructed, laid, established or made; and*

*(iii) the obligations to be fulfilled by the owner of the land in question if the structure, other thing, alteration or addition is erected, constructed, laid, established or made."*

---

[33] Emphasis added.

[49] The argument of NAD is that section 48 of the Sanral Act does not apply to this development. To be applicable, as the argument goes, the development must envisage a structure on the road surface or a building restriction area. For that reason, it is necessary to establish what the building is in terms of this Sanral Act.

[50] A building restriction area is defined in the Sanral Act as

> *"building restriction area" means the area consisting of land (but excluding land in an urban area)—*
> *(a) situated alongside a national road within a distance of 60 metres from the boundary of the national road or*
> *(b) situated within a distance of 500 metres from any point of intersection;"*

[51] It is clear from a mere visual inspection of Figures 1 and 2 and Annexure "A", that the Property is within 500 m of an intersection with the R40, that is the Rotvy R 40 intersection.

[52] The argument of NAD is, however, that the definition of building restriction area excludes land situated in an urban area.

[53] To establish what is meant by "urban area", one has to consider all the word definition of urban area, which is defined as follows in the Sanral Act:

*"urban area" means any area consisting of—*
*(a) a township mentioned in paragraph (a) of the definition of "township", but excluding land in that area*
*(i) which is commonage land; or*
*(ii) which is used or destined to be used mainly for farming or horticulture or the keeping of animals;*

*or*
*(iii) which consists of any other open space which has not been developed or reserved for public purposes; or*

*(b) a township mentioned in paragraph (b) of that definition which the Agency by notice in the Gazette has declared to be an urban area for the purposes of this Act.*

[54] It is therefore clear that any township, within the meaning of township as defined in the Sanral Act, is defined as an urban area and is thus excluded from the definition of building restriction area.

[55] It is common cause between the parties that Hoedspruit Extension 6, is a township as is defined in the Sanral Act.

[56] NAD argues therefore that, since the property does not fall within a building restriction area, that, for that reason, the consent and the permission of SANRAL are not necessary for its site development plan.

[57] In my view, NAD does not consider the definition of "urban area" properly. An urban area is indeed defined as being any declared township, but, as is clear from the definition, certain areas are excluded from the definition of "urban area", amongst others "any other open space"[34]. There can be no doubt that at the time of the submission of the site development plan, the Property, was such an open space.

[58] This means that the Property is excluded from the definition of urban area, meaning that it falls within the definition of a building restriction area, which in turn means that Section 48 applies to the development, meaning that the permission of the First Defendant is indeed necessary, and apart from that SANRAL has the authority to impose conditions and specifications in terms of subsection 3 of section 48.

[59] Makkink, in his evidence in chief, also confirmed that no access of vehicles via Rotsvy Road would be permissible, concerning the

---

[34] That is other than an open space developed or reserved for public purposes, which the Property clearly is not.

development, although he reiterated in the re-examination that in terms of the current zoning, there is access to the property from the R 40 via Rostvy road.

[60] In my view, if it is assumed for the argument for the moment, that the traffic implications and the expropriation of the Expropriated portion destroy the possibility that the property can be developed as a community shopping centre, then that fact was well known, even at the time that NAD bought the property from the previous owner.

[61] The Deed of Sale between NAD and the erstwhile owner stipulates clearly that at the time of the purchase, negotiations had already commenced between SANRAL and the erstwhile owner, to the extent that diagrams for a portion of land which SANRAL intended to acquire, had already been drawn. Copies of the diagrams and other documentation had been handed over to NAD.

[62] In my view, a notional buyer would have taken notice of these traffic requirements, as representing a possible constraint on the possibility of developing the property as a community shopping centre.

[63] To this, NAD offers an answer. NAD relies on the judgment Mooikloof Estate (Edms) Bpk v Premier[35] ("*Mooikoof*"), in which the following is stated:

> *"It is not unreasonable for an owner who wants to develop his property to take the position that he continues with his development in a way that suits him (obviously within the limitations that the law imposes on him) regardless of the fact that a road may one day be proclaimed over his property or in its vicinity (because a plan was drawn up officially proposing it a decade ago) taking into account the fact that it may take a number of decades before the road ' become a reality, if ever. The authority is free to curb the developer by immediate proclamation of the road but it is unreasonable on the part of the authority to paralyze all development for the foreseeable future because an engineer drew a few lines on a stretch paper."* [36]

[64] Based on this ruling NAD argues that it was entitled to proceed with the development of the property, as it saw fit even though it knew that an expropriation might follow resulting from SANRAL devising a solution for the traffic complications in the area.

---

[35] 2000 (3) SA 463 (T).

[36] This is my translation of the Afrikaans text on P. which reads as follows" Dit is nie onredelik van 'n eienaar wat sy eiendom wil ontwikkel om die standpunt in te neem dat hy met sy ontwikkeling voortgaan op 'n wyse wat hom pas (uiteraard binne die beperkinge wat die reg hom oplê) ongeag all die feit dat daar oor sy eiendom of in die nabyheid daarvan moontlik eendag 'n pad gaan kom (omdat daar reeds 'n dekade gelede 'n plan opgestel is wat dit amptelik voorstel) met inagname van die feit dat dit nog 'n aantal dekades kan duur voordat die pad 'n werklikheid word, indien ooit. Dit staan die owerheid vry om die ontwikkelaar aan bande te lê deur onmiddelikke proklamering van die pad maar dit is onredelik aan die kant van die owerheid om alle ontwikkeling lam te lê vir die onafsienbare toekoms omdat 'n ingeneur 'n paar strepe op 'n stuk papier aangebring het."

[65] I do not agree that *Mooikloof* supports NAD in this case. *Mooikloof* refers to a situation where planning documents foresee the possibility of a road, clearly based on the assessment of an engineer of the development scenarios that may unfold in future. It is of course logical that the assumptions may prove not to materialise, in such an instance the roadway never comes into being.

[66] In this case, however, the opposite is true. Schmidt received a visit from a councillor of the Municipality, complaining of an existing and concrete traffic problem. He visited the site, with the councillor, and a staff member of the Municipality. SANRAL had a traffic study done after which they initiated the process that resulted in the expropriation of the Expropriated portion.

[67] Schmidt testified that he and a representative of Overine had more than one discussion and that they jointly demarcated the borders of the Expropriated area, and they agreed that the area so marked by them represents the most practical and the only practical way for a road area.

[68] Apart from this, Overine handed all diagrams, and other documentation over to NAD, and alerted NAD in the Deed of Sale, of the possibility of the expropriation of the portion.

[69] Schmidt also testified that he had a meeting with a representative of NAD and with an expert employed by NAD, a certain Dr Herman Joubert. Dr Joubert apparently undertook to make an alternative proposal to SANRAL. SANRAL waited to receive this alternative proposal, but they never received the proposal. SANRAL eventually proceeded with the expropriation.

[70] Apart from the above, the town and regional planner that applied for the rezoning of the property from "Educational" to "Business1" indicated clearly, in the cover letter, that the owner of the Property at that stage was aware of the possible SANRAL intervention and that they would consult directly with SANRAL.

[71] The sequence of events involving SANRAL, cannot be equated with an engineer drawing "*a few lines on a stretch of paper*" "*a decade earlier*".

[72] In my view, any reasonable purchaser of land contemplating the purchase of the Property, having all the information at the disposal of NAD, would have realised that some action from the side of SANRAL to acquire the Expropriated portion, was probable and imminent.

[73] The last factor to be considered, when assessing the potential use of land, is the question of whether there is prima facie evidence pointing to a reasonable possibility that the community shopping centre could be financially viable on the Property.

[74] In this regard, the guidelines laid down by the SACSC guideline document describe the community shopping centre as a community shopping centre which is accessible from a number of suburbs located in the area. It specifies also a LSM profile market support, viz LSM 1 – 5: 44 000 – 102 000 -00 households, LSM 6 – 9: 15 000 - 45 000 households and LSM10 – 10+ 5 000 – 12 000 households.

[75] About Hoedspruit, Parfitt testified as follows:

" *Hoedspruit is probably one of the best gateways to the Kruger Park and has some of the best game lodges in that area, but that is what is driving it.*"

[76] It testified further that there are plus minus 150 bush lodges in the area, representing approximately 7 000 beds.

[77] He also testified:

"*But there is a lot of tourism, that is what is driving this locality*".

[78] Parfitt identified a second change in the social economic dynamics operative within the area and that is the social grant dispensation. It testifies that there was a massive increase in social grants, in the area. He however stated that the retail facilities that satisfy such needs are "*like little retail centres*", to a large degree "*glorified distribution centres*". The designs of these centres are industrial designs.

[79] In Parfitt's expert report the following remark appears:

"*This (sic) nature of the locality is rural agricultural community. Its location is south of Phalaborwa. The land sits in the central business area of Hoedspruit. The land front entrance of the Hoedspruit wildlife estate, and also adjoins other business developments, making it a very appealing location for retail development. This property is, located alongside the main Pick and Pay shopping centre with growing retail potential. The area has an increasing presenting local population as well as serving the alp demographic by being a commuter/taxi hub. This area has been growing at the population rate of approximately 11% per annum over the last 8 years and additional retail development is needed to supply the area with consumer goods at locality close to the consumers."*

[80] Parfitt also testified as follows with regard to future potential of land use other than the current land use:

"*MR VENTER: And if you have got a piece of land that is zoned agricultural, will there be potential, do you take into account the potential of that piece of land being something different?*

*MR PARFITT: You could take that into potential, when I was involved with developers for Mall of the North, Brits Mall as well, Flanagan and Gerard who I used to work for some years ago, effectively where they make their money is they look at the major highway, they look at the frontage, they look at that field and they say there is potential. They do an analysis of the demographic of the existing retail rights and demand and spend, but remember they are plugged in to all the retailers so they have got information as to what is being spent in the area, so they know there is better potential than what most other people know. But this only comes with years of experience, knowledgeability and all the rest of it and they say there is potential in that. "*

[81] Parfitt also testified as follows:

*"MR VENTER: Is there anything that you want to add to what your report says, as far as locality is concerned?*

*MR PARFITT: M'Lord, can I just amplify a little but on my locality over here and that is that, you know what, in assessing a retail centre, having been involved and very, very fortunately with intellect which has actually put together 1, 2, 3 billion rand shopping centres. And having learned from that, one of the things that you look at is what drives, what drives a development to the point that it is actually feasible, that it works? That once you put R500 million to the ground, it is actually going to work and even big companies get that wrong, I am just busy dealing with the demise of a company that is worth about 12 million, that actually owes about 13 billion, because they got this wrong and I am busy with a business rescue part on exactly that."*

[82] When coming to the rezoning of land use rights, Makkink testified that there is an application to be followed at the added such a process, which he described as "*an intensive process*", a process which is "*intricate*"

including specialist studies public participation and the procurement of comments.

[83] Van Nieuwenhuizen echoed these remarks by Makkink. He indicated that the rezoning application is accompanied by detailed studies to indicate that there is a need for the type of land use proposed by the developer. He added that in this rezoning application, no expert reports pointing to a need to develop this property, were submitted by the town planner. This statement of van Nieuwenhuizen was not disputed.

[84] If one analyses the cover letter that accompanied the rezoning application, one simply finds that attached to the letter was a complete application and approval of bank transfer of the application monies. There are no references to any specialist reports.

[85] The Memorandum that accompanied the application deals with the subject of the Need and the Desirability of the rezoning of specifically the Property, under paragraph 6:

> "*The establishment of a business component in Hoedspruit Ext 6 has proved to be viable and popular with the development of a wide range of shops, restaurants offices and a national food chain. The Estate could be considered a huge success and contributed directly to the economic growth of Hoedspruit and Maruleng.*"

and

" *The proposal makes provision for a school on 6 ha, and enough space on Erf 215 to develop a minimall which would enhance and strengthen the retail node at the entrance to the Hoedspruit Wildlife Estate*".

[86] Winkler also testified and reiterated on the cross-examination that in his view, no facts pointing to the conclusion that a community shopping centre will be successful on the site, exist.

[87] The question therefore is: against the backdrop of what is required, as set out by, for all practical purposes the testimony of all the expert witnesses, to conclude that there is a reasonable possibility that Erf 215 can successfully be developed as a community shopping centre - did NAD succeed in placing such facts before this court?

[88] In line with all the requirements set out above, one would at least have expected evidence to the following effect: some tangible evidence concerning the total retail demand in the catchment area of the to-be-developed shopping centre; how much of that demand is currently satisfied by the current retail facilities in the area and from that, what is the deficit in terms of retail offering that can be followed by a shopping centre. Apart from that one would have expected clear evidence

regarding the retail profile of the consumers in the catchment area of the to-be-developed shopping centre

[89] NAD did not place any such evidence before the court. It seems also no such evidence was placed before the tribunal considering the rezoning application.

[90] NAD relies on the bald statements of Parfitt, that the "demographics" of the shopping centres, which are similar to the shopping centre that NAD wanted to develop, as comparative land values, are similar.

[91] The only other statements by Parfitt, are the very general statements that tourism is the primary driver of economic demand in the area and that there are plus minus 150 lodges, that 7 000 beds in the area. How these remarks translate into economic demand, within the context above, is not explained.

[92] In the past, the courts have signalled a cautionary note concerning the value to be attached to the potential use of land. It was stated in *Davey v Minister of Agriculture*[37] ("*Davey*") that a buyer will be circumspect and conservative in attaching value to potential use, for several reasons.

---

[37] 1979 (1) SA 466 on P. 470.

Despite these remarks, the court said, some value should be attached to proven potential. Important in this judgement is, that the potential must be proven, and lastly that "*some value*" should be attached to it.

[93] The conclusion of this court is therefore as far as the potential use of the property is concerned: NAD had to tick the boxes in the evidence that it presented: Firstly, is a development physically possible? In my view, NAD ticked this box in terms of the evidence presented. The locality of the Property certainly lends itself to a community shopping centre. Over and above this, the extent of the Property, and the development rights afforded to the Property, before the expropriation, make it possible to develop a Community Shopping Centre. The second box, is the question of whether the development is legally permissible. Once again, in terms of the land use scheme, the development is legally permissible. It is much less clear whether any purchaser would obtain the permissions of SANRAL for its development proposal, and the uncertainties in this regard were well known to NAD before the purchase. If SANRAL's expropriation and requirements concerning traffic indeed make the development of a community shopping centre

impossible[38], as is submitted by NAD, then in my view, NAD did not tick the second box, that is place sufficient evidence before the court to conclude that the community shopping centre is a reasonable possibility. The last box is whether the development of a community shopping centre is financially viable. In my view, there is a paucity of evidence on this aspect for the reasons set out above, to such an extent that it cannot be set that NAD placed enough evidence before the court to conclude that the development of the shopping centre is a reasonable possibility. I find therefore that, based on the evidence presented, the development of the shopping centre as a community shopping centre, was not reasonably possible.

[94] The second aspect is the question of in what way and to what extent the future possible land use as submitted by NAD would be taken into account in the price negotiations.

[95] Parfitt testified that he did not use the purchase price of the Property in 2015, amongst others, as a property in his basket of comparative sales, because there was uncertainty as to the obligations between all the different parties involved in this transaction. He testified that it was not

[38] And this court is by no means convinced of that, but in the light of the findings reached with regard to the financial viability of a community shopping centre, I do not elaborate on this aspect.

clear who of the parties attracted what obligations. He typified the situation as having "*too many moving parts of unknown quantum attached to the original acquisition of this land*".

[96] This statement of Parfitt was certainly odd. After all, NAD employed Parfitt to place an expert opinion before the court. All the factors leading Parfitt to conclude that the transaction has "*too many parts of unknown quantum*", are all within the knowledge of NAD. One would have expected NAD to give Parfitt full instructions, and lead evidence, on these factors. These factors refer to the cost of rezoning, and the cost of the relocation of the school and, so it seems, also possibly, the cost of upgraded services of the Property.

[97] I have to agree with Parfitt, the nature of this transaction is certainly opaque.

[98] In light of these factors, I conclude consequently that NAD failed to place evidence before the court, and to prove on a balance of probabilities, that a willing buyer and seller in the open market would have concluded that a community shopping centre is viable as a development option for the Property, and that they would have taken

that into account, within the context of this transaction in negotiating a purchase price.

[99] The entire report testimony of Parfitt is premised on the assumption that the development of a community shopping centre is viable on the Property. Parfitt did not consider any comparative sales in the Hoedspruit area, for the reasons given above. In my view, the opinion of Parfitt does not assist in determining the value of the Expropriated area.

[100] It is therefore not necessary to analyse the logic of Parfitt's comparative analysis of properties in towns in Limpopo, which he opined were similar to the intended development on the Property.

[101] There are indeed strange aspects in his opinion. From this analysis presented to the court, he selected properties that were serviced. He adjusted the property values of properties for properties that were not serviced, to reflect the value of the serviced property. However, in his testimony, he responded to a question of the court that the property should be regarded as an unserviced erf. It is not clear from the evidence if a serviced erf was sold to Hebrides. The probabilities point in the direction that it was an unserviced erf, since NAD was never in a

position to commence with the development of the erf, because the site development plan was never approved.

[102] There is a second curious aspect. Parfitt selected a list of properties, extracted land values from the list, adjusted the values in the light of certain assumptions and then calculated an average land value per square metre from these figures. He arrived at his valuation by simply signing this value to the Property. This approach, in my view, is incorrect. When it comes to future potential use, *Davey* stated that "some value" should be allowed for the future potential of a property. In my view, therefore any valuation which takes cognizance of future potential use of the property, cannot regard the local economic factors to be irrelevant. The fact that a developer, even a national developer, can obtain land in an area, at a price which is a substantial discount compared to other developed shopping centres, may prove to be one of the factors that contribute to the overall financial viability of the future development. In other words in my view, even if NAD had made out a case that a Community Shopping Centre was feasible, that would not mean that the notional buyer would have offered a price for the land on par with land values of other developed shopping centres in the Province. It is of course possible that a purchaser would be willing to do

so, but then satisfactory evidence to that effect should be placed before the court. (See also the criticism of the court in *Ingesol-Rand* of the approach of the valuer in that case that the approach the valuation of the subject property, in a before and after valuation, on the basis that the values of the adjacent properties were irrelevant)[39].

[103] A further aspect of the case of NAD remains unanswered. Although NAD denies, that it never received the expropriation notice, it is clear that even on their version, they were aware of the expropriation before 31 August 2016, the date on which they filed their application for an order to compel the Municipality to approve its site development plan. For a full three years after this date, they still attempted to negotiate with SANRAL to approve the site development plan, in fact on 12 November 2019 NAD wrote a letter to SANRAL to indicate that they would file the site development plan to SANRAL, albeit for comments. NAD thereafter sold the Property. So the question is, was it the awkward way in which the Expropriated portion is situated on the property that prevented further development, or was it the conditions that SANRAL required in terms of road construction and access to the property that

[39] P. 330, D – E.

prevented development of the property into a Community shopping centre? These factors were never clarified satisfactorily in evidence.

[104] In establishing a value for the Expropriated portion, the opinions of Winkler should also be considered in detail.

[105] It is apposite at this stage to deal with the submission of Mr Venter, that NAD does not agree that Winkler Jnr[40] was sufficiently qualified and has sufficient experience to be regarded as an expert. It is therefore apposite to deal with this aspect at this stage.

[106] Winkler testified that he had been a professional valuer since 2010, that is 13 years. He testified that he was attached to the firm of Winkler Snr. He testified that he obtained an honours degree in Quantity Surveying at the University of Pretoria. He practised for two years as a quantity surveyor. He obtained a Master's degree in real estate at the University of Pretoria and registered as a professional valuer.

---

[40] Mr J W Winkler filed the expert report as well as addendum report behalf of Sanral. On the day of testimony, however his son Mr Christiaan Winkler took the stand and he explained that he is a professional valuer, that Winkler Snr was unable to testify due to medical reasons, and that he would testify on the basis of reports filed by Winkler Snr. NAD did not object to the fact that Winkler Jnr was taking the stand.

[107] He testified that he had experience in valuing shopping centres up to 40,000 square metres, and he had experience in the valuation of undeveloped land.

[108] He also testified that they have done valuations for Eskom for a long period, strip valuations for powerlines as well as for SANRAL for land acquisitions mostly based on the Expropriation Act.

[109] In cross-examination, he concedes that he only had done valuations of approximately five shopping centres, whereas Mr Parfitt had been involved in the valuation of hundreds of shopping centres

[110] It seems that despite 13 years of practising as a professional valuer, his exposure to shopping centre valuations paled into insignificance compared to Parfitt, who had been involved in a few hundred shopping centre valuations. For that reason, so the argument went, Winkler can not be regarded as an expert.

[111] I do not agree. In my view, it is wrong to devise some quantitative measure that aggregates into a quantitative minimum beyond which a person can be regarded as an expert witness. In my view, it is also wrong to count the number of instances in which a person was involved

in the valuation of a property type and compare that with the number of instances in which the expert for the opposite party had been involved in similar valuations, and from that conclude that the one is an expert and the other is not, or that the one is a greater expert than the other. To take such an approach is to make a basic error of counting evidence instead of weighing evidence, which a court should do.

[112] The focus of evaluating expert evidence falls on the assessment of prima facie proved facts on which the expert bases its conclusion and the rationality of the reasoning behind the conclusion.[41]

[113] I am satisfied that Winkler Jnr is suitably qualified and has suitable experience to express an opinion concerning the matters which are the subject matter of this opinion.

[114] The basic methodology Winkler employed was the following: the business economic potential of the Property, should be assessed using the economic demand factors specifically operative within the Hoedspruit area since the general market for these types of properties in smaller towns is not very attractive.

---

[41] *Imperial Marine*, supra.

[115] Apart from this, according to him the Property, is suitable for small retail development, both Portions "A" and "B" in Figure 2 can still be developed optimally and the specific area of the Expropriated portion did not adversely affect the development potential, and therefore values of the Property.

[116] Winkler opines that the 2015 purchase of the Property, is a very good indication of the market value of the property at that stage since he regarded that purchase as a *bona fide* transaction.

[117] Relying on a well-known author, Gildenhuys, he states that one is seldom in the lucky position to have a transaction on your subject property. This is the case in this instance.

[118] He echoed a sentiment expressed by Parfitt, that the comparative sale evaluation becomes less and less comparable the more adjustments have to be made. If you have transactions of the subject property (in this instance the Property) the only adjustment that needs to be made, is an adjustment for the time value of money. That is the only adjustment would be an increase or decrease, depending on the situation, in the light of a certain rate, and in this instance, the experts agree that the appropriate rate is 5% per annum.

[119] What Winkler did, was to take the price paid for the property in 2015, as the market value of the property, to be an amount of R 14 500 000-00, even though the purchase price paid by NAD was only R 7 750 000 – 00. The market value is thus an adjusted value of the purchase price. I will return

[120] Winkler Snr, in his report, took the market value of the property after the expropriation to be the purchase price of the Property, in 2015, per square meter, that is R 14 500 000-00 divided by the area, *viz*, 44 331 resulting in a purchase price per square meters of R 327 – 00. Winkler thereafter opined that after expropriation, the value of the property can be determined by multiplying the area of Portion A in Figure 2, *viz* 33373 square metres multiplied by R 327-00 that is R 10 912 971,00. To this he adds a value for Portion B in Figure 2, that is the area of Portion B viz 5857 square metres multiplied by R 327-00, that is R 1 9115 239.00. The value of the two portions taken together is thus R 12 828 210.00. If this amount is subtracted from the value of the entire property before expropriation, that is R 14 500 000-00, it leaves an amount of R 1 671 790 - 00. According to Winkler Snr in his report, this is the market value of the Expropriated portion, that should be awarded to NAD. This,

according to him in his report, represents a result of a before and after the valuation of the Property.

[121] In my view remarks are necessary concerning the testimony and reports of the Winklers. In the Deed of Sale between Overine and NAD, it is clear that NAD had only one obligation and that is to pay a purchase price of R 7 750 000-00, and nothing more. This figure is also the figure reflected in the Deed of Transfer. If this is so then how did they arrive at a purchase price of R 14 500 000-00?

[122] The explanation is to be found on P. 11 of the addendum report of Winkler Snr. In paragraph 9.1.1, he states the following:

"*The subject property was purchased with a school on it. The purchaser demolished the school. According to information obtained from the valuation report compiled by Mr Peter Parfitt(o.b.o NAD Prop Income fund), the school was relocated at a cost of R 6 750,000,00. Taking this relocation cost into consideration, the total purchase price is as follows*:"

[123] Parfitt testified explicitly that the transaction had a

*"slightly chequered history as who is meant to do what with it, not who it belonged to, but who was meant to do in certain obligations to anybody that was going to invest into the property.*"

[124] This statement is in itself vague, and it was never clarified. It was argued before this court on many occasions that NAD incurred these relocation costs. There is however no evidence to this effect.

[125] Furthermore, Winkler Snr's report presented its calculations in a "before and after" manner. This calculation is not a before and after calculation within the context of *Ingersoll-Rand*, that is, to keep proper account of the integration potential of land that has been compromised by the expropriation. It is of course not wrong to use the before and after method in the instance of land with no integration potential, as Hartzenberg J remarked in *Ingersoll-Rand*"[42]. All that will happen is that the calculation will show that there was no integration potential to begin with. This is what Winkler Jnr testified. Winkler Snr's formulation of his valuation was an unnecessarily convoluted way of doing a very simple calculation, and that is to divide the purchase price paid by the purchaser, by the area of the land before expropriation, and to regard that result as the square metres value of the land expropriated.

[126] In my view, therefore, given the fact that this court found that NAD did prove the reasonable possibility of the potential use of the Property as

---

[42] P. 329 F – G.

being that of a community shopping centre and that there is no evidence to include the relocation costs of the school as part of the purchase price of the Property, the correct way to approach the value of the Property before expropriation, is to regard the 2015 transaction between Overine and NAD, as a *bona fide* transaction, and as representing the value of the Property. Such was also the approach followed by a court in *Jacobs v Minister of Agriculture*.[43]

[127] The purchase price of R 7 750 000 – 00, should be adjusted for a single year[44] to reflect the changes in the value of money over time. The experts are *ad idem* that the rate applicable should be 5% per annum. To adjust the purchase price is simple: R 7 750 000-00 multiplied by 1,05, leading to a result of, that is R 8 137 500 – 00. Thus for purposes of this judgment show take a market value of the Property, on the date of expropriation to be R 8 137 500 – 00.

[128] Parfitt testified that the expropriated portion has no market value. This testimony was never challenged and it is almost self-evident that no

---

[43] 1972 (4) SA 608 W.
[44] NAD took transfer of the property, and consequently paid the purchase price, on 13 March 2015 and expropriation took place on 25 July 2060, that his one-year and 4 months later.

purchaser will be interested in buying the Expropriated portion on the open market.

[129] That being the case, the proviso in Section 12(1) of the Expropriation Act comes into play, and that is where the property expropriated has no market value, then the expropriated property shall be valued based on either the replacement cost of the improvements on the property or "*in any other suitable manner*". In my view, this is an instance where the value which is to be attached to the expropriated portion should be evaluated "*in any other suitable manner*".

[130] I will return to the value of the Expropriated portion after having considered the factors mentioned in section 25(a), (b),(d) and (e) of the Constitution. In the end, this court has to arrive at a value which is just and equitable reflecting an equitable balance between the public interest and the interests of those affected.

SECTION 25(3)(a),(b),(d),(e) OF THE CONSTITUTION

[131] Section 25(3)(a): The current use of the property, is as was the case on the date of Expropriation, an open space. The zoning is Business 1, previously having been educational. The rezoning application was done

simultaneously with the acquisition of the property and the previous owners applied for the rezoning of the property. The fact that the previous owners were indicated to be the applicants for the rezoning, does of course not mean that NAD did not undertake the rezoning, since NAD could have undertaken all rezoning steps, and incurred all the costs, with the assistance of Overine. The problem is just that there is no evidence to this effect and it is unclear which of the parties did what in terms of rezoning.

[132] Section 25(3)(b): The Property initially had a small school built on it. The property was initially donated to the local authority, gearing township establishment Hoedspruit x 6, to develop a school. Since the school was not developed within five years, it was transferred back to the developer, and Overine eventually acquired the Property to develop a school on the Property. NAD approached Overine (and perhaps other parties) with a proposal that included the relocation of the school to adjacent properties, which would allow the Property to obtain a Business 1 zoning. Once again, the exact nature of the eventual agreement between all the relevant parties was never properly explored in the evidence.

[133] Section 25(3)(d): There was no direct state investment and subsidy in the acquisition and beneficial capital improvement of the Property.

[134] Section 25(3)(e): The purpose of the acquisition of the Expropriated portion, is to enable both SANRAL and the Municipality to devise a solution to alleviate the traffic problems in the area of Hoedspruit Extension 6. That this was necessary and that the expropriation was in the end necessary, was not disputed by any of the parties.[45] The provision of road infrastructure, in my view, is an instance of regulatory expropriation falling within what is called, the "police power" of the state which arises from the obligation of the state to take measures about the environment, health, morals, culture or economy of the country.[46]

[135] When it comes to assessing compensation, the public, from whom the money comes, has an interest that the award would not put an undue financial strain on the public purse. The interest of the expropriated property owner is to receive full compensation.[47] The question that should be asked is that the sacrifice made by the expropriatee must be such that it can be expected from other persons as well, otherwise, it

---

[45] NAD never attempted to review and set aside the expropriation on the basis that the requirements of section 41 of the Sanral Act, were not met.
[46] Gildenhus and Grobler, *op cit* Par 153.
[47] Gildenhuys and Grobler, *Op cit* Par 128.

could offend the equality clause contained in section 9 of the Constitution.

DETERMINATION OF COMPENSATION WHICH IS JUST AND EQUITABLE

[136] This court must award compensation which is just and equitable reflecting an equitable balance between the public interest and the interests of those affected.[48]

[137] The market value of the property date of expropriation was R 8 137 500 – 00.

[138] Parfitt calculated the present value of the purchase price of the transaction between NAD and Hebidres Investments, on the date of expropriation, to be R 11 487 966.00.

[139] If these two values are kept in mind, then the strange result is that the Property is worth more after expropriation than before expropriation.

[140] Some may argue that in such a situation, no compensation should be payable. In fact, Parfitt testified that he was involved in arbitration proceedings in which the arbitration tribunal determined that no

---

[48] Section 25 (3).

compensation should be paid to a certain landowner, for the expropriation of a small portion of its land, during the Gautrain development.

[141] In my view, expropriation without compensation can only be justified in specific circumstances, for instance, where the situation as described in section 25(3)(d) or for instance where the portion of land expropriated would be so insignificant that it would be the case of *de minimis*. Many other scenarios may also exist.

[142] In general, as was stated by the Supreme Court of Appeal in *Haakdoornbult* and articulated by Kleyn[49], the purpose of compensation for expropriation is to recompense the expropriatee, that is to provide a sum of money to the expropriated to replace what he has lost. This should be done based on what is just and equitable reflecting an equitable balance between the public interest in the interest of the property owner.

[143] In my view, as was stated above, NAD expended an amount of R 7 750 000 – 00, under circumstances that they knew, or any reasonable person would have known precisely what portion SANRAL intended to

---

[49] Supra.

acquire, and they knew or should have known, since it was stated in the Deed of Sale, that SANRAL's acquisition of the Expropriated portion was imminent, either by way of agreement or expropriation if necessary.

[144] In my view, it is just and equitable that under such circumstances NAD should be compensated by awarding to them the pro rata amount of the purchase price paid by them for the Property to compensate them for the value of the asset, at the date of the transaction, taken from them.

[145] In SANRAL's letter of 13 August 2023 already, SANRAL expressed an interest in acquiring a portion of the Property and even the whole property by buying it, to solve the traffic problem of Hoedspruit Extension 6. Schmidt testified that while SANRAL was still negotiating with the representatives of Overine, Overine sold the property to NAD, unbeknown to SANRAL. While there is of course no legal obligation on either Overine or NAD to communicate the upcoming sale with SANRAL, the transfer of the property confronted SANRAL with a new owner, which had a completely new attitude to the expropriation.

[146] In my view, it is just, fair and equitable to place SANRAL in a position that it had been in, should it have finalised the acquisition from Overine. SANRAL could then lock its position in by expropriating the Property,

had they realised that a sale of the property was imminent, in the absence of an agreement with Overine[50]. Overine was willing to sell for R 7 750 000-00, that is R 7 750 000-00 divided by 4 4331 square metres resulting in a value of R 174,82 per square meter.

[147] The area of the Expropriated Portion is 5101 square meters, resulting in a total amount of R 891 756,82, for the Expropriated portion.

REASONS FOR JUDGMENT IN SANRAL'S APPLICATION TO AMEND

[148] This case was adjourned on 2 December 2022 and at that stage, NAD indicated that they contemplated closing their case but they would have made a final decision on that when the trial was received on 27 March 2023.

[149] When the trial resumed on 27 March 2023, Mr Shokoane SC on behalf of SANRAL, proceeded with two interlocutory applications. The first was an application to amend SANRAL's pleadings and the second was an application in terms of rule 30 A.

[150] NAD opposed the application.

---

[50] See *Mooikloof* supra.

[151] The application[51] was argued the entire 27 March 2023. I indicated that that I would give judgment on the 28th of March 2023. On that date, I dismissed the application and indicated that my reasons would follow with the final judgment together with an order for costs.

[152] From the outset, part of SANRAL's version was that the rezoning of the Property from Educational to Business1 was unlawful.

[153] Now, to be clear, there were indeed strange aspects surrounding the rezoning. This rezoning was achieved in what van Nieuwenhuizen called, world-record time, the time between the lodging of the rezoning application and the eventual approval thereof did not allow for meaningful public participation and comments from government agencies that may have an interest in the rezoning. The rezoning was finalised without, with what would normally be expected, thorough expert reports, to support the requirement of the need and the desirability for the rezoning.

[154] At the same time though, it is, in my view clear that irrespective of the formal zoning of the Property, the only sensible land use is some or another kind of business land use, simply because of the locality and

[51] At some stage Sanral withdrew the Rule 30A application.

adjacent property developments. The potential use of the property is not constrained by the existing land zoning.[52]

[155] The amendment aimed to achieve two results: Firstly to amplify the allegations in support of the illegality of the zoning of the Property, and secondly to insert a prayer that the zoning of the Property be reviewed and set aside.

[156] It is just inexplicable why SANRAL brought the application: it was not necessary, and strictly spoken not even admissible, to try to amplify the allegations of unlawfulness in the plea with further allegations, some of which were nothing more than evidence. It was also inconceivable that, at that stage of the trial, that a prayer could be added for a type of counterclaim in which the zoning of the Property, would be set aside. At that stage, the Property had a new owner, a person who would certainly have had a direct and substantial interest in the outcome of any proceedings to set the zoning of the property aside. When confronted with this fact, Mr Shokoane simply responded by saying that the court could ignore that portion of the intended amendment, and grant the rest of the amendment. That was a surprising response.

---

[52] See Boshoff *supra*.

[157] In summary, the attempted amendment was unnecessary, would have impacted adversely on the rights of persons not parties to the proceedings, and would certainly have necessitated a postponement, if granted, to enable NAD to consider its position.

[158] The application for amendment was in my view frivolous and unjustified in its entirety.

[159] In my view, the only just cost order would be to order that SANRAL shall NAD's costs occasioned by the application to amend, and that on a scale as between attorney and client. The waste of court time for a full day was without any justification.

GENERAL REMARK

[160] The court proceedings were postponed on 31 March 2023 to 5 June 2023.

[161] When proceedings resumed on 5 June 2023, the court was told that Mr Shokoane's brief was terminated and that Mr de Villiers would appear thenceforth on behalf of SANRAL.

Mrde Villiers thereafter proceeded with the case of the First Defendant. At some stage, he tried to lead opinion evidence, that was not contained in the initial reports of the expert of the First Defendant, nor that the opinions put to the experts of Nad. The consequence of that would have been that the experts of SANRAL would not have had the opportunity to respond thereto.

[162] Mr Venter objected. He argued that the experts of Nad were bound by their initial opinions, and if they were allowed to venture outside the initial opinions, then NAD would be prejudiced, and he would at least be entitled to recall some of his expert witnesses. I agreed with Mr Venter and upheld his objection. I indicated that I would give my reasons for this in the final judgment.

[163] Gildenhuys and Grobler[53] states that the prolixity of expropriation cases has become notorious. The authors state that evidence should be limited to what is necessary and relevant. By the time that Mr de Villiers wished to introduce opinion evidence not previously canvassed, a trial that would, with proper planning and cooperation by the parties, not have lasted beyond five days, already lasted nine days, with no

[53] *Op cit* Par 139.

indication at that stage as to when the end would be in sight. If Mr Venter had recalled witnesses, as he would no doubt be entitled to have done, the trial would have become even more protracted. At that stage, evidence and opinions had already been presented to the court, covering the question of the valuation of the Property from all possible angles. I was satisfied that it was not in the interest of justice, nor fair towards either NAD or the court to allow Mr de Villiers to present evidence on an opinion not canvassed in the expert opinions at that stage, nor was it put to the experts of Nad[54].

SOLATIUM AND INTEREST

[164] NAD is entitled to interest as stipulated in section 12(3) of the Expropriation Act.

[165] NAD is also entitled to a solatium amount be added to the amount of compensation, calculated as follows: 10% on R 100 000 – 00, that is R 10 000 – 00 plus 5% on R 400 000, that is R 20 000 – 00 plus 3% on R 391 756 – 82 totalling a solatium amount of R 41 752-00. Nad is accordingly entitled to a total compensation of R 933 509-52.

---

[54] See, for similar remarks the judgment in AM and Another v MEC For Health, Western Cape 2021 (3) Sa 337 (SCA), Par. 22 – 26.

COSTS

[166] This brings me to the issue of costs.

[167] Section 15 (2) of the Expropriation Act states that if the compensation awarded by the court is equal to or exceeds the amount last claimed by the owner one month prior to the date for which the proceedings were for the first placed on the roll, costs shall be awarded against the Minister. If the amount is equal to or less than the amount last offered by the Minister one month prior to the date for which the proceedings were for the first time placed on the roll, costs should be awarded against the owner. If however lastly[55] the amount awarded exceeds the amount last offered by the Minister but is less than the amount claimed by the owner, so much of the cost of the owner shall be awarded against the Minister as bears to such costs the same proportion as the difference between the compensation so awarded the amount so offered, bears to the difference between the amount of compensation so awarded and the amount so claimed.

[168] Section 15 (3)(d) stipulates however that a court shall in its discretion deviate from the prescriptions of Section 15(2) if the conduct of any

---

[55] Section 15 (2)(c).

party during or before the proceedings justifies a deviation from subsection 2.

[169] The effect of section 15(2) which is badly worded, is the following: The formula intends the award of a fraction of costs following the specific formula: the difference between the award and the offer forms the numerator of the fraction whereas the difference between the award and the claim forms the denominator of the fraction.

[170] If this formula is applied in this instance, Nad will receive less than 5% of its costs.

[171] This court is alive to the criticism against the formula prescribed by the Act, as well as the possibility that the judgement in *Biowatch Trust v Registrar, Genetic Resources*[56] may necessitate a different approach to costs in expropriation claims.

[172] In my view, NAD will be greatly prejudiced if the formula in section 15(2) is applied.

---

[56] 2009 (6) SA 232 CC and she also Gildenhuys and Grobler, *op cit* Par 150.

[173] This trial became protracted mainly as a result of the conduct of SANRAL's first counsel, Mr Shokoane, during the trial. Mr Shokoane indulged in protracted cross-examination, for the most part aimless, irrelevant and frivolous.

[174] Apart from this, when Mr Venter tried to object, or the court tried to give direction to the proceedings, such attempts would lead to drawn-out arguments some of which could at best be typified as low-level quarrelling.

[175] At some stage, the court requested Mr Venter to refrain from noting objections, even though such objections may have had merit, but to leave the issues to be dealt with during argument, just to avoid unnecessary further delays in the court.

[176] Apart from this, Mr Shokoane consumed valuable court time by reading slowly through pleadings and expert reports, while contemplating what next question to put to witnesses. During this time the court had to wait patiently for him to proceed. All of this led to an enormous waste of time.

[177] When Mr de Villiers came on record after Mr Shokoane's mandate was terminated, he summarily abandoned the reliance on the version that the rezoning of the Property was unlawful. Two days later, after having presented the case for SANRAL, Mr de Villiers closed SANRAL's case.

[178] Mr Venter argued at some stage that this case should not have lasted more than five days. I agree. Instead, it lasted 11 days.

[179] In my view, the conduct of SANRAL justifies a deviation from the formula prescribed in section 15 (2), and a just order would be that SANRAL shall pay the costs of NAD and that the costs for the following trial days shall be paid on a scale as between attorney and client: 28 – 2 December 2022. These days represent 50% of the total time used by NAD to present its case.

I make the following order:

1. The First Defendant shall pay NAD an amount compensation of R 933 509-52 ;

2. The First Defendant shall pay NAD interest calculated as from 25 July 2016 up until the date of payment at the interest rate prescribed in terms of Section 80 of the Public Finance Management Act, 1999 (Act 1 of 1999).

3. The First Defendant is to pay NAD's costs in respect of the First Respondent's application for leave to amend its pleadings, brought on 27 December 2023, on a scale as between attorney and client.

4. The First Respondent shall pay the costs of suit of the and the costs of the trial dates 28 November 2022 – 2 December 2022 shall be paid on a scale as between attorney and client.

G. J. DIAMOND

ACTING JUDGE OF THE HIGH COURT

LIMPOPO PROVINCIAL DIVISION

**APPEARANCES:**

| | | |
|---|---|---|
| **HEARD ON** | : | **25 July 2023** |
| **JUDGMENT DELIVERED ON** | : | **19 JANUARY 2024**. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **19 JANUARY 2024** at **11:00** |
| **FOR THE APPLICANT** | : | Adv. A Venter |
| **INSTRUCTED BY** | : | Ivan Pauw & Partners Attorneys<br>c/o Mmakola Matsimela Inc |
| **FOR THE RESPONDENT** | : | Adv. Shockwane [25July 2022]<br>Adv. De Villiers [5-7 June 2023] |
| **INSTRUCTED BY** | : | Mokgadi Attorneys<br>c/o LL Senyatsi Inc |


Annexure "A"
718
216
215
198
HOEDSPRUIT EXT 6
387