38/98

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 626/95

In the matter of:

KANGRA HOLDINGS (PTY) LTD Appellant

and

THE MINISTER OF WATER AFFAIRS Respondent

CORAM: MAHOMED CJ, VAN HEERDEN DCJ, EKSTEEN, HOWIE *et* STREICHER JJA

DATE OF HEARING: 7 May 1998

DATE OF DELIVERY 22 May 1998

J U D G M E N T

/HOWIE JA:. . .

HOWIE JA:

Appellant company, whose claim for expropriation compensation was the subject of a successful exception in the Transvaal Provincial Division, appeals with the leave of that court.

The only portion of the claim pertinent to the appeal was based on the provisions of s 12(1)(b) of the Expropriation Act, 63 of 1975.

Appellant was the owner of certain registered coal rights pertaining to portions of a farm near Piet Retief on which there were substantial underground coal reserves. In advance of inundation of the relevant areas by the waters of a major dam then under construction, the rights were expropriated by respondent in terms of the Water Act, 54 of 1956 with effect from 5 September 1990. As at that date the material provisions of s 12 of the Expropriation Act ("the Act") read as follows:

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

(a) in the case of any property other than a right, 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, an amount to make good any actual financial loss caused by the expropriation or the taking of the right;

. . .

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

. . .

(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 therefore;"

In claiming under subsec (1), appellant founded its prayers for compensation upon the following allegations:

"6 In terms of Section 12(1)(b) of the Expropriation Act, No 63 of 1975 ('the Act') prior to its amendment by Section 11(a) of Act No. 45 of 1992, the plaintiff is entitled to be paid compensation by the defendant for the actual financial loss caused by the expropriation of the coal rights.

7 The expropriation of the coal rights caused plaintiff actual financial loss:

7.1 In the event of this Honourable Court finding that income tax ought not to be taken into account in calculating actual financial loss, in the sum of:

7.1.1. R110 000 000 calculated on the basis that the plaintiff would have mined and sold the coal to which the coal rights related;

alternatively to paragraph 7.1.1.

7.1.2 R70 662 175 calculated on the basis that the plaintiff would have entered into a mineral lease or similar agreement with a third party for the exploitation of the coal rights.

The calculation of the amount in paragraph 7.1.1. is set out in a report by P White and A Sealey dated 30 June 1995 ('the White/Sealy Report'). The White/Sealey report will be provided to the defendant simultaneously with the service hereof. The calculation of the amount in paragraph 7.1.2 is set out in annexure 'A'.

7.2 In the event of this Honourable Court finding that income tax ought to be taken into account in calculating actual financial loss in the sum of:

7.2.1 R49 300 000 calculated on the basis that the plaintiff would have mined and sold the coal to which the coal rights related:

Alternatively to paragraph 7.2.1

7.2.2 R35 331 088 calculated on the basis that the plaintiff would have entered into a mineral lease or similar agreement with a third party for the exploitation of the coal rights.

The calculation of the amount in paragraph 7.2.1 is set out in the White/Sealey report. The calculation of the amount in paragraph 7.2.2 is set out in annexure 'A' ".

At the time of expropriation appellant had not yet exploited the coal rights, whether by establishing a coal mining operation or in any

other manner. The White/Sealey report incorporated by reference in the particulars of claim sets out in comprehensive detail the steps which appellant would have had to take had it ever proceeded to mine coal in the exercise of its rights. The report furnishes details of the expenses that would have had to be incurred and the profits that were allegedly attainable. It concludes with an exercise discounting such prospective profits to current value.

The document referred to in the claim as annexure "A" presents a calculation, on stated assumptions, of the current value of the royalties appellant could allegedly have earned had it entered into a mineral lease and had the lessee mined the coal.

Excepting to the claim on the basis that the quoted allegations disclosed no cause of action, respondent contended that on neither alternative basis was the claim one for actual financial loss within the meaning of the relevant subsections of the Act. More particularly,

respondent maintained:

"1.4.1. The alternative claims as specified and particularised do not reflect and quantify actual financial loss caused by the expropriation of the mineral rights;

1.4.2. The actual financial loss specified and quantified as aforesaid constitutes indirect loss for which, in terms of Section 12(5)(e) of the said Act, no allowance shall be made in determining the amount of compensation."

At the outset it is appropriate, in view of various points regarding the subject of current or market value that were canvassed during argument, to emphasize what the questions are that the claim and the exception in effect raise. In that section of the White/Sealey report dealing with the net present value of the loss of prospective profits it is alleged that, because no regular market values for mineral rights are normally available, such net present value is the measure widely employed when value has to be determined for purposes of the transfer of mineral rights between mining companies, mining lease transactions or transfer

duty assessments. The report goes on to state that in arriving at a reasonable value for the rights which were expropriated in this case such value —

> ". . . should reflect the level of the financial loss to (appellant) as a result of the expropriation . . . (T)here is no readily acceptable market value for such rights as held by a reputable company intent on their exploitation, and the only feasible approach is to follow the net present value technique . . .".

In the context of contractual damages the terms "market" and "market value" do not connote an organised market like a stock exchange or municipal produce market; if a commodity, offered for sale, is likely to attract potential purchasers who would be prepared to buy if the price were agreed, that commodity is marketable in a commercial sense and capable of having a market value: Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A) at 878 E - 879 B. No consideration of principle seems to me to render the position any different where one is dealing with the

value of an expropriated asset, even one, I would venture to add, for which there would only have been a single potential buyer.

No doubt it was the consideration that rights, in the main, do not have a market value that led the legislature to provide expressly for the market value measure of compensation in para (a) of s 12(1) but not in para (b). It is nevertheless plain that loss of an asset through expropriation constitutes actual loss of its market value. Such loss therefore necessarily falls within the ambit of (b). In other words, where that which is expropriated is a right having a market value, there is no difference between the measure of compensation respectively afforded by paras (a) and (b). Consequently, (b) entitles the owner of an expropriated right with market value to compensation not only in respect of such value but to additional actual loss provided, of course, that the latter is "caused by the expropriation" and, provided further that, apart from causation, it is a loss for which the Act permits compensation.

Significantly, the sum in which appellant seeks compensation is simply claimed as being actual financial loss caused by the expropriation. However, counsel for appellant said that if the coal rights had had a market value at the date of expropriation (the existence of which value seems to me to be shown by a number of facts stated in the White/Sealey report) he disavowed any intention, as evinced by the present particulars of claim, to claim the compensation in issue *qua* market value. His contention was that appellant was not confined to market value but entitled to compensation on the basis of the present value of the fully realised commercial potential inherent in the rights. In the circumstances, the challenge raised by the exception is whether the sum representing the latter value constitutes actual financial loss caused by the expropriation, and, in any event, whether the loss claimed is compensable under the Act at all.

In the view I take of the matter it is unnecessary to decide

whether the loss claimed constitutes "actual financial loss". I shall merely assume, in appellant's favour, that it does. The question then is whether it was, or would have been, caused by the expropriation within the meaning of the Act.

Pienaar v Minister van Landbou 1972 (1) SA 14 (A) involved consideration of the forerunners to the two subsections now relevant. The wording of the earlier provisions was the same as that of the current subsections save that the counterpart of s 12(5)(e) included "loss of profits" among the factors for which no allowance could be made. Nothing presently turns on the omission of these words from s 12(5)(e) but I shall revert to it in relation to another point.

Pienaar's case concerned two pieces of agricultural land. Portion 291 was irrigated with borehole water emanating from Portion 292. The former was expropriated, the latter not. 292 was not fully developed and because the borehole provided insufficient water to irrigate

both portions the owner's intention had been to construct a dam on 292 for supplying both Portions. The scheme would have involved subdivision of another piece of land and consolidation of the owner's share of it with 292. 291 had been valued as non-irrigated land and the owner claimed compensation on the basis that Portion 291 had to be valued as irrigated land or, alternatively, compensation for the actual financial loss involved in its being valued as non-irrigated. In relation to the alternative, the Court interpreted the words "deur die onteiening veroorsaak" (in the counterpart of s 12(1)(a)(ii))in conjunction with the requirement (in the counterpart of s 12(5)(e)) that "indirekte skade" had to be left out of account, and concluded (at 25A - C) that it followed from the latter requirement that only actual financial loss directly caused by the expropriation was compensable. It was not enough that the expropriation was a *causa sine qua non* of the alleged loss; it had to be clear that there was a direct causal connection between the two. Accordingly, so it was

held, the need for subdivision and consolidation before the development of 292 and, consequently 291, could occur, demonstrated that before the alleged actual loss could have been sustained there would, in various respects, have had to be decision making, initiative and action by the owner and others. All of these were necessary links in the causation of the alleged loss and showed that such loss was independent of the expropriation. It followed that the required direct causal connection was absent and the claim failed. (At 25 E - H).

That interpretation of the earlier relevant statutory provisions was affirmed in Davis v Pietermaritzburg City Council 1989 (3) SA 765 (A) at 771 D-E (where it was held to be equally applicable to s 12(l)(a)(ii) read with s 12(5)(e)) and Benede Sand Boerdery (Edms) Bpk v Virginia Munisipaliteit 1992 (4) SA 176 (A) at 182 E-H (where, as here, s 12(1)(b) was involved).

Counsel for appellant argued that these cases were wrongly

decided. The basis of that submission was that it had been erroneously assumed throughout, without interpretative analysis, that the word "damage" in s 12(5)(e) was synonymous with "loss" (and "skade" with "verlies"). According to the argument, the word "damage" in the subsection connoted physical, not patrimonial, harm and indirect loss, as opposed to indirect damage, was therefore compensable.

This submission cannot succeed. The words "loss" and "damage" are not defined in the Act and must therefore be given, subject to their context, their ordinary meaning. There being no contextual support for the argument to be derived from the wording or setting of the provisions in question, the ordinary meaning prevails. "Damage" is a word of wide and general import and ordinarily embraces physical damage and pecuniary loss (Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd 1988 (3) SA 122 (A) at 130 I - 131 B, a case involving provincial legislation conferring a power akin to expropriation)

and "loss" is a synonym for "damage" (at 131 G-H). Moreover, the Pienaar decision preceded the Act and the legislature must be taken to have been aware of the interpretation laid down in that case, based, as it was, on the synonymity of "damage" and "loss". Finally, being a purely statutory mechanism for taking property from its owner and vesting it in the expropriator, expropriation *per se* has no physical impact. It therefore cannot by itself cause physical damage whether direct or indirect. If, however, indirect physical damage were to ensue following upon expropriation, say, to the unexpropriated part of the owner's land where the expropriated part is taken for a road or railway, and the damage is due to the use of the property for the purpose for which it was taken, such damage would be so obviously not "caused by the expropriation" that there would have been no need to provide in s 12(5)(e) for its exclusion. Alternatively, assuming such damage were indeed to be interpreted as having been "caused by the expropriation", there appears

to be no reason in principle or logic why it should be excluded but not also the indirect loss of profits which would have been earned in future by exploiting the expropriated part.

For these reasons I think that there is no warrant for inferring a legislative intention to confine "indirect damage" to physical damage. It follows that indirect financial loss is also excluded by s 12(5)(e) and is therefore not compensable.

The loss for which appellant claims was not caused directly by the expropriation. It was not caused by the loss of the coal rights. It was caused by non-exploitation of those rights. As in the cases of Pienaar and Davis, before the profits in question could have been earned appellant would have had to take a series of steps to establish its income producing structure. Those steps were all links in the chain of causation of the loss and they had nothing to do with the expropriation. One may test it this way. Had expropriation not occurred and had appellant

retained the rights for another say ten or fifteen years before disposing of them without having done any more about coal mining than it had by the time of expropriation, its loss, or, more accurately, the financial expression of its non-realisation of profits, would have been exactly the same as the loss it now claims. The loss claimed was at best only an indirect result of the expropriation and, on the statutory interpretation stated above, not compensable.

Appellant's counsel sought to derive support for his case from the fact that the words "loss of profits" were included in the precursor to s 12(5)(e) but then deliberately removed when the present provision was enacted. This, it was argued, showed that loss of profits was now compensable even if indirect. I do not think that this submission is acceptable. While loss of profits directly caused by the expropriation would clearly fall within the ambit of s 12(1), there is no reason to think that the legislature intended indirect loss of profits to be

included in s 12(1)(a)(ii) or s 12(1)(b) but all other forms of indirect loss to be excluded by s 12(5)(e). The statutory interpretation necessarily inherent in counsel's submission would be extraordinary and involve violence to the language used. On the contrary, the reason for the omission of "loss of profits" seems to be this. In Jacobs v Minister of Agriculture 1972 (4) SA 608 (W), when those words were still part of the exclusionary counterpart to s 12(5)(e), and followed upon the words "any indirect damage or" it was argued that all loss of profits was excluded from compensation. However, it was held (at 621 G - 622 A) that the word "indirect" also qualified "loss of profits" and, accordingly, that while indirect loss of profits had to be excluded, a direct loss of profits had to be compensated. In the light of that decision, and the contention of which it disposed, it is understandable that the legislature wished to make it clear that loss of profits was not *per se* a category of loss to be left uncompensated. On the interpretation laid down in Pienaar, of which

the legislature by 1975 also knew, such loss was to be compensated if direct but excluded from the reckoning if indirect.

It was further argued on appellant's behalf that a distinction should be observed between consequential loss and indirect loss. Even if the latter were to be excluded, said counsel, the former, which included the loss now claimed, was compensable. In this regard reliance was placed on the decision in A and B Taxis Ltd v Secretary of State for Air [1922] 2 KB 328 (CA). There, in terms of statutory war-time powers, the government temporarily took the premises of a taxi business. The company operating the business sought compensation from a War Compensation Court under an indemnity statute, claiming the cost of buying substitute premises and reinstating its business there, less the amount realised on the sale of those premises once it was permitted to return to its own. The statute permitted recovery of direct loss or damage but not indirect loss. The compensation tribunal allowed certain items of

loss but not the expenditure on the substitute premises, holding that the latter was consequential and not direct loss. The Court of Appeal differed, holding that direct loss or damage could include consequential damage and that the item in issue could not entirely be excluded as indirect loss; what was recoverable depended on what it had been reasonable to incur in the prevailing circumstances. In my view appellant's argument derives no assistance from that case. The distinction there, as here, was direct as opposed to indirect loss. Once it was plain, as it was, that it was reasonable to continue the business elsewhere and not to shut up shop, clearly some of the loss incurred involved expenditure aimed at maintaining the existing income-producing structure and, in that regard, the taking of steps that would never have been necessary had it not been for the temporary unavailability of the company's premises. A direct link therefore existed in respect of some of the loss claimed. The present case is plainly distinguishable.

It was then argued for appellant that in so far as in the Pienaar and Davis judgments the indirectness of loss was demonstrated by the fact that the respective owners would have had to take a variety of steps before the loss claimed could ever have been suffered, which steps involved what the cases call "independent volition and action" on the owners' part, such volition and action was also involved in cases where claims for loss of profits had in fact succeeded e g in Natal Estates Ltd v Community Development Board 1985 (3) SA 378 (D). In addition, so it was urged, the criterion of independent volition and action could not apply where what was expropriated was a right to minerals (as opposed to land) because such volition and action formed an essential and integral part of enjoyment of the right.

I agree that independent volition and action is not *per se* an acid test and that, for example, it would appear to have involved independent action on the owner's part to cut and process the sugar cane

in respect of which two years' worth of actual direct loss was compensated in the Natal Estates case. The point to emphasise, however, is the self-evident one that the facts of each individual case must determine whether actual financial loss has been sustained and, if so, whether such loss has been directly or only indirectly caused by expropriation. And there is in this regard no difference in principle, in my view, between the case of land and the case of mineral rights. One can own land but do nothing on it or one can develop it. One can own mineral rights but do nothing to exercise them or one can exploit them. Prior to the expropriation in the present case appellant merely intended to exploit its rights. They were not actually exploited. When expropriation removed the rights there was a direct loss of their value. But there was no direct loss of the alleged profits because numerous steps had yet to be taken before they could be realised. Accordingly, if the rights had a market value as at the date of expropriation then that market value would

have constituted a direct loss. If they then had no market value the measure of direct loss might conceivably be determined with reference to potential future profits but the profits alleged in this case, being indirect loss, could not *per se* provide that measure.

Then, appellant's counsel placed special reliance on certain aspects of a case which is the subject of two reported decisions: Minister van Waterwese v Mostert 1964 (2) SA 656 (A) and Minister of Water Affairs v Mostert 1966 (4) SA 660 (A). That litigation involved an expropriation of three farms in terms of the Water Act. Two were the subject of registered long leases. The lessees claimed i a loss of prospective profits. Their claims were excepted to on the basis that their rights as lessees did not entitle them to compensation at all under the statute. In addition, application was made for the striking out of the claims for loss of profits. The Water Court's dismissal of the exceptions and application was upheld on appeal to this Court. However, all that is

said in the earlier report (at 669 E-F) in relation to the claim for loss of profits is that it is conceivable that there could be cases in which compensation claimable under the Water Act could include loss of future income. The matter then went to trial. The lessees were awarded compensation not in respect of loss of profits but on the basis of a finding that the leases had had a sale value. On appeal, in the later case, this Court (at 734 G - 735 A) considered that there had been no such value and that what the lessees would be entitled to was loss of anticipated profits if causally related to the expropriation. The Court did not determine the causation aspect, merely concluding that any loss in that regard was not claimable because, on the facts, it had been reasonably avoidable (at 735 H). The crucial point about Mostert's case is that although actual loss was compensable if likely to be caused by the expropriation the Water Act then contained no equivalent of s 12(5)(e) which excluded compensation for indirect damage. The case therefore

affords appellant's argument no support.

For the reasons advanced so far the claimed loss was not "caused by the expropriation" and the exception, on that ground alone, was well taken.

There is an additional ground, however, on which the claim was destined to fail. That ground, and the reasons underlying it, emerge from the respective judgments in the Davis matter on trial (1988 (3) SA 537 (N)) and on appeal (*supra*). Consequent upon expropriation of their block of flats, the owners claimed compensation in respect of market value and i a in respect of actual loss under s 12(1)(a)(ii). That loss represented the present value of the sum the owners alleged they would have earned as developer's profit had they, but for expropriation, obtained the opening of a sectional title register and then sold the flats on sectional title. At first instance it was agreed by the parties that compensation was payable, in an agreed amount, for the market value of the property with

its potential for sectional title development. An award was made accordingly. The claim for loss of future profit was contested and refused. In the trial judgment (at 540 D-F) the reasons for refusing that claim were stated as follows:

> "What the plaintiffs had as at 6 December 1985, and what they lost by reason of the expropriation, was the property with its potential for sectional title development, and it is agreed that the amount of R208 828 is appropriate compensation for that loss. It follows that a payment of R208 828 will put the plaintiffs in the same financial position they were in immediately before the expropriation. To uphold the additional claim of R64 877 would have the effect of compensating the plaintiffs twice for the same loss, allowing them, as it were, to have their cake and eat it. The aggregate amount thus awarded would exceed their total loss, and I do not think that s 12 of the Act can be construed as authorising compensation on that basis."

In this Court the reasons were stated thus (at 770 I -771 C):

> "It is to be observed that if this argument is correct it would mean in effect that in such a case the owner of the

property expropriated would be compensated not for the market value of the property on the date of the notice of expropriation with its then-existing potentiality for development, but for the present value of what would have accrued to him had the potential been realised and the development carried out. This seems to me to be contrary to principle and likely to lead to anomalies which could not have been intended by the Legislature. Take, for example, the expropriation of land which has potential for development as a residential township, but where the establishment and development of the township and the disposal of the plots therein would in all likelihood be spread over a period of, say, 20 years. On appellant's argument the township owner would be entitled, as compensation, not only to an amount representing the market value of the land (with its township potentiality) at the time of expropriation from which compensation he could immediately start earning investment income— but also an amount representing the present value of the developer's profit derived from implementing the township scheme, and thus exploiting the property, over the following 20 years. It was, no doubt, considerations such as these that led Howard J to suggest that the appellants wanted to 'have their cake and eat it' (see reported judgment at 540F)."

If the trial court in the Davis case meant to imply that the sum in contention was not a loss, I would rather say, as this Court emphasised, that the award of the additional amount claimed would, in effect, have afforded the owners the benefits they would have enjoyed had the property, as at date of expropriation, been finally developed. What the owners were entitled to, therefore, was the market value of the property as it was at date of expropriation, not to the benefits flowing from what it would have become later. The principle referred to by this Court at 770J must necessarily be that stated in Estate Marks v Pretoria City Council 1969 (3) SA 227 (A) at 242 G - 243 A, namely that the Act aims, principally, to provide the equivalent in value of the property lost. Accordingly, the duplication which the trial Court in Davis must have had in mind was that the owners would have been compensated twice in respect of potential: once for potential as unrealised and the second time for potential as realised. One might add this. Just as the owners could

not have claimed the sum by which the market value of the property would have increased had development taken place, so must it be equally plain that they could not get the profits it was alleged they would have earned had development taken place.

Counsel for appellant submitted that the position was essentially different here where mineral rights were concerned. Property could be developed in a variety of ways and could have potential in a number of respects. Mineral rights, on the other hand, could only be exercised by extracting the minerals and disposing of them for value. The case of land and the case of rights, said counsel, were therefore entirely distinguishable.

I do not think that that submission can be sustained. Factual differences between land and rights there certainly are but I fail to see any difference in principle where the rights in question have market value. Of course land can be developed whereas rights cannot, but development in

the case of land is really the exploitation of it, as rights, too, can be exploited. When rights have market value then, for reasons already stated, that is a feature to be taken into account in determining whether compensation is payable under s 12(1)(b) in respect of actual financial loss. And if, as was held in the Davis case, the principle of compensation which the Act embodies permits cognisance of unrealised exploitation potential but not realised potential, then there is no reason why that limitation should apply only to s 12(1)(a) and not also to s 12(1)(b). It follows, in my opinion, that the claim in question seeks compensation for a type of loss for which the Act makes no provision and therefore does not permit.

The exception was therefore rightly upheld and the appeal must fail.

The order *a quo* permitted leave to amend within twenty days. That time having passed, it is necessary to effect a substitute provision.

As to costs, respondent employed three counsel but

sought the costs of only two.

The following order is made:

1. The appeal is dismissed with costs, such costs to include the costs of two counsel.
2. Appellant is granted leave to amend its particulars of claim within 20 days of the date of this order.

C T Howie

Mahomed CJ
Eksteen JA **CONCUR**
Streicher JA

38A/98

REPUBLIC OF SOUTH AFRICA

Case No 626/95

bw/

IN THE SUPREME COURT OF APPEAL
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In the matter of

KANGRA HOLDINGS (PTY) LTD **Appellant**

and

THE MINISTER OF WATER AFFAIRS **Respondent**

Coram: **Mahomed CJ, Van Heerden DCJ, Eksteen, Howie and Streicher JJA**

Date of Hearing: **7 May 1998**

Date of Delivery: **22 May 1998**

JUDGMENT

Van Heerden DCJ

Van Heerden DCJ

I agree that the appeal should be dismissed but disagree with part of the reasoning of my colleague, Howie.

My colleague finds that if the mineral rights in question did not have a market value as at the date of expropriation "the measure of direct loss might conceivably be determined with reference to potential future profits, but the profits in this case, being indirect loss, could not per se provide that measure."

I fail to see why, assuming that the rights do not have a market value, loss of profits can not be claimed, or why such loss should be regarded as an indirect one.

Assume that in the original grant of the mineral rights it was stipulated that they would not be transferrable by the appellant. In such a case the

rights would have no market value (cf the second Mostert case at 734G - 735A). Also assume that the appellant was on the point of commencing the exploitation of the rights at the time of expropriation. I cannot perceive of any reason why the appellant in the postulated case cannot claim the value of the rights in its hands, to be calculated with reference to its net loss of profits. Yet, according to my colleague's judgment, the appellant will at most be entitled to claim some nebulous direct loss.

The test, which can conveniently be called the volition test, which has been applied in a number of decisions of this court, may easily be misconstrued. It must be kept in mind that in all those cases the expropriatee had suffered a primary loss. The question then arose whether he was entitled to the secondary loss claimed by him and it was in this context that the volition test was applied.

The concept "any indirect damage" which finds expression in s 12(5)(e) of the Act presupposes that the expropriatee has suffered a primary or direct loss. Hence, if a net loss of profits is claimed as damage, and it is a competent measure of damages, the volition test is wholly inappropriate.

In casu the appellant has preferred only one claim, albeit in alternative formulations. The question whether he has suffered indirect loss therefore simply does not arise.

I turn to the reasons why, in my view, the appeal must nevertheless fail. In terms of s 12(1)(a) of the Act the expropriatee may claim the market value of the expropriated property. Section 12(1)(b), however, does not in terms confer such a claim upon the holder of a right which has been expropriated. The compensation to be paid to him is an amount to make good any actual financial loss caused by the expropriation or the taking of the

right. The reason for the change in terminology is obvious. With a few exceptions a right does not have a market value. This may be illustrated by considering the example of A who has a right to draw water (for use on his farm) from a dam on the farm of his neighbour. That right cannot be sold and hence does not have a market value. If A's right is expropriated his loss is consequently the value of his farm with the servitude minus such value without the servitude (cf. JM de Kock en Seun (Edms) Bpk v Elektrisiteitsvoorsiengskommissie 1983 (3) SA 160 (A) 168 E-F). It follows, and this is important, that A cannot claim the profits he would have made by virtue of the supply of water had the expropriation not taken place.

Some rights have, however, a market value. I have in mind mineral rights and the rights of lessees; there may be others. It seems to me that the legislature must have contemplated that in the case of an expropriation of

such a right the ordinary common law measure of damages should apply; in other words that the expropriatee should be entitled, and confined to the market value of the right concerned unless he can show that because of special circumstances that measure is not an appropriate one (cf. Katzenellenbogen's case at 880B). It follows that in general the expropriatee cannot claim loss of profits in lieu of the value of the expropriated rights.

In our case the appellant did not aver that the mineral rights do not have a market value. Nor did it rely on special circumstances in the above sense. Indeed, one of its claims, albeit an alternative one, was for payment of some R77 million asserted to be the value of the expropriated rights. There are furthermore indications in the White/Sealey report that the rights in question do have a market value, not the least of which is that subsequent to the expropriation the appellant sold his remaining mineral rights in respect

of the farm to Trans-Natal Collieries Ltd.

For these reasons I concur with the order proposed by my colleague, Howie.

HJO Van Heerden
Deputy Chief Justice