



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT DURBAN**

(1)	REPORTABLE: YES / MSC
(2)	OF INTEREST TO OTHER JUDGES: YES / MSC
(3)	REVISED.
06-03-2019 <i>[Signature]</i>	

BEFORE: CANCA AJ & ASSESSOR SIBEKO

CASE NO.: LCC 03/2009

In the matter between:

EMAKHASANENI COMMUNITY

Claimant/Plaintiff

and

**THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

1st Defendant

**REGIONAL LAND CLAIMS COMMISSIONER,
KWAZULU-NATAL**

2nd Defendant

VRIENDSCHAP BOERDERY

3rd Defendant

SPEB BONA TIMBER ESTATE (PTY) LTD

4th Defendant

CENTRAL TIMBER CO-OPERATIVE LTD

5th Defendant

WESSEL HENDRIK ELS

6th Defendant

MAPHOLOBA FARMING CC

7th Defendant

MANZINI ESTATE (PTY) LTD	8 th Defendant
WILLEM VERMAAK	9 th Defendant
WANSBECK FARMS CC	10 th Defendant
NICHOLAS PAUL ISABELLE	11 th Defendant
WANSBECK FARMS (PTY) LTD	12 th Defendant
MERKOR FARM TRUST	13 th Defendant
MAHAMBBA HLALA AGRI CC	14 th Defendant
ED MARITZ MERINO TRUST	15 th Defendant
HAYDAN PERCIVAL FAMILY TRUST	16 th Defendant
KERRIE INV (PTY) LTD	17 th Defendant
SWAAR BEGIN LANDGOED CC	18 th Defendant
RUDI STEPHANUS SCHNETLER	19 th Defendant
CA LEITCH & SONS (PTY) LTD	20 th Defendant
SCHNETLER TRUST	21 st Defendant
LEON JOHANNES BEUKES	22 nd Defendant
ANDREW JAMES STUART MCLLRATH	23 rd Defendant
MONDI LTD	24 th Defendant
PHINDITHEMBA MPUMELELO MANQELE & AGNESS SAMKELISWE MANQELE	25 th Defendant
MTHONJANENI MUNICIPALITY	26 th Defendant
ROMAN CATHOLIC CHURCH, DIOCESE OF ESHOWE	27 th Defendant
PEACH FARM (PTY) LTD	28 th Defendant
PETER JAMES RIDDEN	29 th Defendant
PROVINCIAL DIRECTOR, DEPARTMENT OF LAND REFORM OFFICE	30 th Defendant

REGISTRAR OF DEEDS

31st Defendant

CASE NO.: LCC 230/2009

In the matter between:

ENTEMBENI COMMUNITY

Claimant/Plaintiff

and

THE MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM

1st Defendant

REGIONAL LAND CLAIMS COMMISSIONER,

KWAZULU-NATAL

2nd Defendant

KBG ESTATE (PTY) LTD

3rd Defendant

VLAKPOORT ESTATE (PTY) LTD

4th Defendant

CENTRAL TIMBER CO-OPERATIVE LTD

5th Defendant

PETER JAMES WALKER

6th Defendant

SUNSET TRUST

7th Defendant

CASE NO. : LCC 201/2013

In the matter between:

MTHONJANENI COMMUNITY

Claimant/Plaintiff

and

THE MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM

1st Defendant

REGIONAL LAND CLAIMS COMMISSIONER,

KWAZULU-NATAL

2nd Defendant

DEFACTO INV 199 (PTY) LTD

3rd Defendant

VLAKPOORT ESTATE (PTY) LTD

4th Defendant

IAN TARVIS MCMURRAY	5 th Defendant
MCMURRAY TRUST-TRUSTEES	6 th Defendant
NICO WILLEM HARRIS	7 th Defendant
ESKOM HOLDINGS SOC LIMITED	8 th Defendant
SWEET HOME TRUST-TRUSTEES	9 th Defendant
NICO HARRIS FAMILY TRUST-TRUSTEES	10 th Defendant
GEORGE ALBRECHT ALEXANDER ALBERS	11 th Defendant
RICHARD WALTER HORSLEY	12 th Defendant
HLEZANE SIBIYA	13 th Defendant
AMAFI AKWAZULU-NATALI	14 th Defendant
DEPARTMENT OF REGIONAL AND LAND AFFAIRS	15 th Defendant
APOSTOLIC VICARATE-ESHOWE	16 th Defendant
LANCASTER QUARRIES FINANCE (PTY) LTD	17 th Defendant
INGONYAMA TRUST-TRUSTEES	18 th Defendant
BURLINGTON GRANGE INV (PTY) LTD	19 th Defendant
SAPPI MANUFACTURING	20 th Defendant
CENTRAL TIMBER COOP LTD	21 st Defendant
BROMAC PROP INV (PTY) LTD	22 nd Defendant

Judgment: 06 March 2019.

JUDGMENT

CANCA AJ

Introduction.

[1] This is a matter for the determination of just and equitable compensation the Minister of Rural Development and Land Reform (“the Minister”) would be obliged to pay certain landowner defendants in respect of the properties the Minister had agreed to acquire from them. The determination of the aforesaid compensation, which was set down for adjudication on the 3rd to the 5th December 2018, did not proceed as anticipated on those days. The reason for this follows below.

Brief background.

[2] On the 28 November 2018, this Court handed down a judgment in terms of which it, *inter alia*, dismissed an interlocutory application brought by the Ingonyama Trust (“the Trust”).

[3] In that application, the Trust sought an order, in terms of which land, to be awarded to the claimant communities in this matter, be transferred into its name, to be held by the Trust for the benefit of those communities.

[4] The award of that land was as a result of a settlement reached by the Minister, the Regional Land Claims Commissioner, KwaZulu-Natal (“the Commission”), (together, hereinafter, referred to as the “State”), the landowner defendants referred to in paragraph [1] above and the claimant communities. The settlement

agreement was made an order of Court in the judgment alluded in paragraph [2] above.

[5] The aforesaid agreement, *inter alia*, provides for the payment of just and equitable compensation to the landowner defendants whose properties were to be acquired by the State. The said compensation would, in terms of that agreement, either be agreed to by the parties themselves, or, in the case of disagreement, be determined by this Court.

[6] The State and the landowner defendants failed to reach agreement. And, in accordance with the provisions of the settlement agreement, the amount of the just and equitable compensation then fell to be determined by the Court.

[7] Notwithstanding that the State was a party to the settlement agreement, the State has adopted a new stance. It now attempts to acquire the properties from the landowner defendants at values determined by the Office of the Valuer-General (“OVG”) and not at the compensation determined by the Court.

[8] The State’s new stance, which is contained in a document titled “Notice”, was communicated to the landowner defendants on 29 November 2018, approximately two days before the commencement of the hearing of this matter.

[9] The Notice, in relevant parts, reads as follows:

“BE PLEASED TO TAKE NOTICE that the first respondent will acquire the properties mentioned below and pay the owners thereof just and equitable compensation set out in the column marked **“VALUE OVG”**.

PLEASE TAKE NOTICE FURTHER that the amounts mentioned below are based on the valuation determination report issued by the Valuer General in terms of Section 12 of the Property Valuation Act, 2014 (Act No. 17 of 2014).

PLEASE TAKE NOTICE FURTHER that the first respondent is bound by the valuation determination report issued by the Valuer General in terms of Section 12 of the Property Valuation Act, 2014.

PLEASE TAKE NOTICE FURTHER that if you are not satisfied with the decision of the first respondent you are entitled to instituted [sic] application proceedings to set aside his decision and the valuation determination report on which the decision is based.

S/No	Project / Farm/Erf	Owner	OVG Value (R)	Comments
1.	<p>Portion 1 of the Farm Zietover No. 6138, GU</p> <p>Portion 2 of the Farm Zietover No. 6138, GU</p> <p>Remainder of Portion 5 of the Farm Zietover No. 6138, GU</p> <p>Portion 9 of the Farm Zietover No. 6138, GU</p>	Vriendschap Boerdery cc	R91 087 037	<p><u>Valuation analysis</u></p> <p>All value forming factors in terms of the Property Valuation Act 17 of 2014 were taken into account in arriving at the above recommended value. Therefore the overall value for land and buildings has been adjusted accordingly.</p> <p><u>The current use value</u></p>

	<p>Portion 5 of the Farm Verzethoek No. 6151, GU</p> <p>Remainder of Portion 6 of the Farm Verzethoek No. 6151, GU</p> <p>Remainder of the Farm Verzethoek No. 6151, GU</p> <p>Remainder of Portion 3 of the Farm Zietover No. 6138, GU</p>			<p>The farms are currently used for Agricultural, residential with farm improvements.</p> <p>The current use value is determined on the basis of current land use. The farms are currently used pre-dominantly timber farms. These farms have Avocados, pine, wattle and gum plantations of various ages. Other extents are utilized for veld grazing, roads and farm land. Access to the farms is gravel. The average rainfall is 754mm- 927mm with temperatures between 11.4°C to 128.2°C. The farms are exposed to heavy frost during May and August. The grazing capacity is 2.2-3.5ha/LSU and differs according to the Bio Resource Group. With this grazing capacity, the farms are suitable for grazing and timber farming.</p> <p>Audited financial statements were not submitted to help OVG verify information.</p> <p><u>History of acquisition</u></p> <p>These farms belong to various owners and were purchased in various years from the 1800's.</p>
2.	<p>Portion 51 of the Farm Saxony No. 6149, GU</p> <p>Portion 52 of the Farm Saxony No. 6149, GU</p>	Vriendschap Boerdery cc	R16 806 548	
3.	<p>Portion 1 of the Farm Keurplaats No. 218, GU</p> <p>Portion 7 of the Farm Vriendschap No. 492, GU</p> <p>Portion 8 of the Farm Vriendschap No. 492, GU</p> <p>The Farm Katazo No. 749, GU</p>	Vriendschap Boerdery (Pty) Ltd	R3 469 337	
4.	Portion 6 of the Farm Zietover No. 6138, GU	Swaar Begin Landgoed cc	R20 129 393	
5.	Portion 12 of the Farm Merino No. 6150, GU	Mahamba Hlala Agri cc	R9 602 918	

				<i>different times by different owners.</i>
6.	<i>Remainder of Portion 1 of the Farm Merino No. 6150, GU</i>	<i>Isabelle NP & Wansbeck Farms cc</i>	<i>R 4 845 988</i>	<i>The OVG assumes this information to be true. OVG also reserves the right to amend any of the values should new information reveal otherwise at a later stage.</i>
7.	<i>Portion 8 of the Farm Wandsbeck No. 6157, GU</i> <i>Portion 3 of the Farm Wandsbeck No. 6157, GU</i>	<i>Isabelle Nicholas Paul</i>	<i>R 51 357 334</i>	<u>Market Value</u> <i>Different valuation methodologies were used at arriving at Market Values. Market values are in line with the sales in the vicinity. All factors have been considered by the OVG in arriving to this conclusion.</i>
8.	<i>Remainder of the Farm Merino No. 6150, GU</i>	<i>Vermaak Willem</i>	<i>R 6 155 126</i>	
9.	<i>Remainder of Portion 3 of the Farm Merino No. 6150, GU</i> <i>Portion 4 of the Farm Merino No. 6150, GU</i> <i>Portion 11 of the Farm Merino No. 6150, GU</i>	<i>Vlakpoort Trust-Trustees</i>	<i>R 17 345 464</i>	<u>Investments/subsidy by state</u> <i>The owners have informed OVG that they did not enjoy any investment or subsidies by the State.</i> <i>The OVG assumes this information to be true. OVG also reserves the right to amend any of the values should new information reveal otherwise at a later stage.</i>
10.	<i>Portion 6 of the Farm Merino No. 6150, GU</i> <i>Portion 7 of the Farm Merino No. 6150, GU</i> <i>Portion 8 of the Farm Merino No. 6150, GU</i>	<i>JJS Maritz Merino Trust-Trustees</i>	<i>R 31 602 513</i>	<u>Purpose of acquisition</u> <i>These properties are being claimed. The acquisition is for land reform purposes, which is public interest.</i>
11.			<i>R 6 094 963</i>	

	<i>Portion 9 of the Farm Merino No. 6150, GU</i>	<i>ED Maritz Merino Trust-Trustees</i>	
12.	<i>Remainder of the Farm Rustverwacht No 6159, GU</i> <i>Portion 2 of the Farm Rustverwacht No 6159, GU</i> <i>Portion 303 of the Farm Protest No 6135, GU</i> <i>Portion 306 of the Farm Protest No 6135, GU</i> <i>Portion 307 of the Farm Protest No. 6135, GU</i>	<i>Sunset Trust - Trustees</i>	<i>R 57 653 274</i>
13.	<i>Portion 4 of the Farm Rustverwacht No. 6159, GU</i>	<i>West Dulcie</i>	<i>R 4 649 029</i>
14.	<i>Remainder of Erf 418 MelmothWeiht bridge)</i>	<i>Swaar Begin Landgoed (Pty) Ltd</i>	<i>R 4 996 509</i>
15.	<i>Portion 5 of the Farm Eikendal No. 6134, GU</i> <i>Portion 300 of the Farm Protest No. 6135, GU</i>	<i>Defacto Inv 199 (Pty) Ltd</i>	<i>R 16 417 563</i>
16.	<i>Portion 1 of the Farm Wintershoek No. 400 GU</i>	<i>Defacto Inv 199 (Pty) Ltd</i>	<i>R 4 023 801</i>

17.	<p>Portion 5 of the Farm Entonjaneni No. 13356, GU</p> <p>Portion 6 of the Farm Entonjaneni No. 13356, GU</p>	<p>Nico Harris Family Trust - Trustees</p>	<p>R 1 969 580</p>	
18.	<p>The Farm Dorsfontein No. 18296, GU</p>	<p>Johan Harris Family Trust- Trustees</p>	<p>R 2 918 639</p>	
19.	<p>Remainder of Portion 1 of the Farm Entonjaneni No. 13356, GU</p> <p>Portion 2 of the Farm Entonjaneni No. 13356, GU</p>	<p>Nico Willem Harris</p>	<p>R 19 617 185</p>	
20.	<p>Portion 2 of the Farm Coolidge No. 13386, GU</p>	<p>Richard Walter Horsley</p>	<p>R 661 971</p>	
21.	<p>Remainder of the Farm Mislukt No. 380, GU</p>	<p>Mr RJ McMurray</p>	<p>R 944 280</p>	
22.	<p>Portion 1 of the Farm Vlakpoort No. 32, GU</p>	<p>Ian Tarvis McMurray</p>	<p>R 73 803</p>	
23.	<p>Remainder of the Farm Entonjaneni No. 13356, GU</p>	<p>McMurray Trust - Trustees</p>	<p>R 11 525 628</p>	
24.	<p>Remainder of the Farm Vlakpoort No. 32, GU</p> <p>Remainder of the Farm Diepkloof No 6118, GU</p>	<p>Vlakpoort Estates (Pty) Ltd</p>	<p>R 15 459 862</p>	

25.	<i>Remainder of the Farm Coolidge No. 17225, GU</i>	<i>Albers George Albrecht Alexander</i>	<i>R 15 101 339</i>
26.	<i>Portion 1 of the Farm Deane No. 6140, GU</i>	<i>Els Wessel Hendrik</i>	<i>R 5 417 111</i>
27.	<i>Portion 2 of the Farm Vergelegen No. 6139, GU</i>	<i>Els Lily louise</i>	<i>R 73 805</i>

The State's rationale for its new stance.

[10] Mr. Notshe, with Mr. Nqala, for the State, advanced several contentions for the State's new stance.

[11] First, Mr. Notshe contends that the Minister is bound by the determination of the compensation arrived at by the OVG. Mr. Notshe relied on the provisions of Section 12(1)(a), of the Property Valuations Act No 17 of 2014 ("the PV Act"), including the Act's definition of value¹ for this contention.

¹ According to section 1 of the PV Act, value, for the purposes of section 12(1)(a) means:

" the value of the property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interest of those affected by the acquisition, having regard to all relevant circumstances, including the-

- (a) Current use of the property;
- (b) History of the acquisition and the use of the property;
- (c) Market value of the property;
- (d) Extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) Purpose of the acquisition."

[12] Sub-section 12(1)(a) of the PV Act provides that:

“Whenever a property has been identified for-

(a) Purposes of land reform, that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria, procedures and guidelines.”

[13] According to Mr. Notshe, the Minister has no basis for compensating the landowner defendants other than with the values determined by the OVG. Failure to comply with that determination and, compensating the landowner defendants with values other than those determined by the OVG, would result in that compensation being unlawful, so the contention continued.

[14] Mr. Notshe further contended that, if the landowner defendants were unhappy with the Minister’s decision, they should have launched proceedings to set aside that decision. And, should they have been so inclined, they were, and still are, at liberty to initiate proceedings to nullify the valuation determination report upon which the Minister has based her decision, so the contention continued.

[15] Mr. Roberts, with Ms. Roberts, for the landowner defendants, opposed the Minister’s new stance and the contentions advanced on her behalf. This opposition was supported by several submissions, some of which I list below.

[16] Firstly, Mr. Roberts submitted that the Notice has no legal effect given that it is neither a valuation report nor a tender and the Notice was not properly before

Court. Secondly, Mr. Roberts contended that even if the PV Act was applicable, its effect was not retrospective. Mr. Roberts supported this submission with the fact that the PV Act only came into operation on 1 August 2015, 9 years after the matters in LCC 03/2009 and 230/2009 were referred to this Court and 5 years after the referral of the LCC 201/2013.² He also submitted that the Minister has waived her right to rely on the provisions of the PV Act, assuming that the Act constrained her as was contended on her behalf, by agreeing to the settlement referred to earlier.

Discussion

[17] Mr. Roberts' attack that the Notice is neither a tender nor a valuation report is based on the provisions of Rule 31 of the Rules of this Court and those of section 15 (2) of the PV Act respectively.³

[18] The Notice, as I understand the State's case, is not meant to be a valuation report. Rather, it is merely a document evidencing the compensation determined by the OVG for which compensation, the Minister alleges she is bound to purchase the affected properties.

² LCC 03/2009; LCC 230/2009; LCC 201/2013 in respect of the Emakhasaneni, Entembeni and the Mthonjaneni Communities respectively as well as the Isizwe Sakwa Dladla and the Entembeni Royal House, who were joined to these proceedings, were consolidated by Judge Bertelsmann who was previously seized with this matter.

³ Rule 31 sets out when an offer is to be made to the opposing party; and

Section 15(2) provides that:

"A valuation report must reflect such opinions, statements and information as may be required or prescribed and must reflect an opinion or conclusion on the valuation of the property which is the subject of the valuation and must include all relevant information including, where applicable, the current use of the property, the history of acquisition and the use of the property, the market value of the property, an explanation on how a value was determined and the methodology utilized in determining the value."

[19] The values of the respective properties set out in the Notice, are also not offers or tenders in the classical sense, if I understood Mr. Notshe's submissions correctly. An offer or tender, in my view, implies that same can be negotiated or refused by the party to whom it is directed.

[20] The State's case is that landowner defendants are obliged to relinquish their properties to the State at the amounts set out in the Notice without the ability to negotiate the price with the Minister. The landowner defendants' only remedy, according to Mr. Notshe, is for them to approach the Court to review the Minister's decision and refer the matter back to her for re-determination should the review succeed.

[21] Mr. Roberts contends that the Notice had no substance (or legal effect) as the landowner defendants could not use same, for example, to review the Minister's decision. This was, *inter alia*, because the Notice, which purports to reflect the Minister's decision on the matter, does not constitute an administrative decision in terms of the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA").

[22] A plain reading of the Notice supports Mr. Roberts' contention. The Notice sets out neither a decision by the Minister nor one by the OVG. The wording of section 12(1)(a) of the PV Act merely states that the OVG must value the land "*for the purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines;*" It does not say that the OVG makes the decision as to the compensation to be paid or that the Minister is bound by that decision.

[23] At best, the determination of the OVG could, in my view, be used as a guideline by the Minister when negotiating the purchase price of any property she intends acquiring in terms of a 42D from a landowner. That landowner should then be able to approach this Court for a determination of the just and equitable compensation, should she or he be unhappy with the value arrived at by the OVG and which the Minister undertakes to acquire the property. To find otherwise would result in an iniquity. Our current Constitutional regime, affords every individual the right to approach the Courts for protection of a right which such an individual perceives to have been infringed or is about to be infringed. To contend that such an individual, pitted against the might and resources of the State, should approach the Courts to set aside the OVG's valuation and refer the matter back to the Minister for re-determination, would be unfair as most landowners, if not all, in cases of this nature, fund the litigation from their own funds.

[24] In a joint minute prepared by the valuers of the State and the landowner defendants on 14 March 2018, the total amount of just and equitable compensation for the properties to be acquired by the Minister amounted to R760 999 890.00. The total amount set out in the Notice amounts to R420 000 000.00, approximately half of the amount agreed to in the joint minute of March 2018. The landowner defendants would, should the Minister's new stance prevail, potentially suffer prejudice to the sum of R340 999 890.00, Mr. Roberts submitted. I agree.

[25] Also, even if the wording of the Notice is interpreted to constitute a decision by the Minister, no internal appeal procedure is provided for in the Notice,

rendering its contents unfair as, the option granted to the landowner defendants to approach the Court places an undue financial burden on them.

[26] It was also contended on behalf of the landowner defendants that the Minister's action was procedurally unfair as they were, *inter alia*, not afforded an opportunity to exercise their rights as set out in section 3 of PAJA.⁴

[27] There is merit in this contention given that the landowner defendants only became aware of the Minister's new stance approximately 2 days before the hearing and after she had taken the decision. That decision clearly adversely affects the landowner defendants' rights as there are marked differences in the values determined by their experts and the Minister's valuer, compared to those of the OVG.

[28] In the light of all of the above, I agree that the Notice has no legal effect. In any event, even if I am wrong and this document has legal effect, it is not properly before Court. The State, as a party to the settlement which was made an Order of Court, should, as Mr. Roberts contended, either have brought an application setting aside that Order or have brought an application wherein it sought to have the Notice placed before Court. This it failed to do.

Does the PV Act constrain the Minister as was contended for on her behalf?

⁴ Section 3 requires administrative action to be procedurally fair and, in sub-section (2) sets out the steps which an Administrator must follow where his or her action may materially and adversely affect a person's rights.

[29] The PV Act was enacted:

“To provide for the establishment, functions and powers of the Office of the Valuer-General; to provide for the appointment and responsibilities of the Valuer-General; to provide for the regulation of the valuation of property that has been identified for the acquisition by a department; and to provide for matters connected therewith.”

and its objects are to:

- “2 (a) give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of property;*
- (b) provide for the establishment of the Office of the Valuer-General;*
- (c) provide for the valuation of property that has been identified for the purpose of land reform;*
- (d) provide a voluntary valuation service to departments; and*
- (e) provide for the setting of criteria and procedures and the monitoring of valuations.”*

[30] The status and functions of the OVG are set out in sections 5 and 6 of the Act.

These read as follows:

“5. Status. – The Office of the Valuer-General –

(a) is a juristic person with full legal capacity and is subject to this Act;

(b) must be impartial and must exercise the powers and perform the functions of office without fear, favour or prejudice; and

(c) is accountable to the Minister.

6. Functions – The Office of the Valuer-General –

- (a) must value any property contemplated in section 12 (1) (a);*
- (b) may, at the request of a department, value property contemplated in section 12 (1) (b)⁵;*
- (c) must make recommendations to the Minister regarding the-

 - (i) criteria for the determination of the value of [the] property contemplated in section 12(1)(a);*
 - (ii) procedures and guidelines, excluding the method of valuation for the valuation of properties, the manner in which a valuation must be performed and any other relevant factors; and*
 - (iii) systems to monitor compliance with the criteria and procedures contemplated in sub-paragraphs (i) and (ii); and**
- (d) must determine the matters that must be reflected in a valuation report contemplated in section 15.”*

[31] The PV Act commenced on 1 August 2015, when this matter was already before Court and it is silent as to whether its provisions apply prior to or after its commencement. Whether a statute has a retrospective effect or not depends on the intention of the Legislature as gleaned from the language and purpose of the legislation. See *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 709I – 710E.

⁵ Section 12(1)(b) provides that whenever a property has been identified for “*acquisition or disposal by a department, for any reason other than that mentioned in paragraph (a), the market value of such property may, at the request of a department, be determined by the Office of the Valuer-General.*”

[32] The general rule is that legislation is to be construed as regulating future matters only. See *Kaknis v Absa Bank Ltd, Kaknis v MAN Financial Services SA (Pty) Ltd* [2017] 2 All SA 1 (SCA) at para [10].

[33] Mr. Notshe, whilst acknowledging the aforesaid general rule, submitted that, insofar as the compensation payable for property identified for land reform is concerned, the PV Act introduced a change in procedure and, given that the landowner defendants' rights would not be adversely affected as they would still receive just and equitable compensation, the Act was applicable in this matter. Reliance for this submission was placed on the dictum of Kentridge AJ, in *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para [66], where the learned Judge, after setting out the general rule referred to above, states:

“There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried ‘no matter when such case began or when the cause of action arose’ – Curtis v Johannesburg Municipality 1906 TS 308 at 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorizing new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively. See Yew Bon Tew v Kenderaan Bas Mara (supra at 563 (AC); Industrial Council for Furniture Manufacturing Industry, Natal v Minister of Manpower and Another (supra at 242).”

I find no merit in this submission.

[34] The Act may very well set out the procedure whereby the amount for which the Minister may purchase property for land reform purposes but that does not

exclude this Court's jurisdiction to determine the just and equitable compensation. Particularly, where the parties have referred the matter to it for such determination. It seems to me that the position argued for on behalf of the Minister by Mr. Notshe, as alluded to earlier, might apply where the parties are at a section 42D negotiation stage and not where the matter is already before Court. Also, as the learned Judge in *Mhlungu* stated, the test to be applied is whether the new legislation affects vested rights. As set out in paragraph [24] above, the landowner defendants will suffer substantial financial loss if the OVG's valuation is upheld, this, notwithstanding the fact that the Minister's own valuer, as set out in the aforementioned paragraph [24] determined a much higher valuation for the properties.

[35] I do not find anything in the PV Act which prevents the Minister from paying "compensation" that exceeds the "value" determined by the OVG, nor to agree to the determination of "compensation" by the Court, well-knowing that the Court's determination could be higher than the "value" determination by the OVG. The valuation guidelines prescribed by the Valuation Regulations (particularly paragraph 6 of the Regulations) could, in my view, result in valuations which are much lower than just and equitable compensation determined in terms of section 25(3) of the Constitution, and will also be in conflict with the definition of "value" contained in section 1 of the PV Act.

[36] If the properties had been expropriated, compensation would have to be determined by a Court, untrammelled by the "value" determined by the OVG. In terms of section 25(2)(b) of the Constitution, compensation for expropriation

“must either have been agreed by those affected or decided or approved by a court.” The Court cannot be bound to accept a value determined by the OVG as the amount of compensation for an expropriation. Section 26(2) of the Constitution provides that no law may limit any right entrenched in the Bill of Rights. Section 22(1)(b) of the Restitution Act empowers the Court to determine compensation for the expropriation or acquisition of land. I cannot imagine that compensation for “acquisition” would have to be determined on a different basis than compensation for “expropriation”.

[37] In the light of all of the above, I find that the Minister is not constrained by the PV Act in the manner contended for by Mr. Notshe.

[38] In a final attack, Mr. Roberts argued that the Minister, having agreed that the Court should determine the question of just and equitable compensation, had waived reliance on the PV Act, alternatively, elected not to rely on it and in the further alternative, was estopped from relying on this Act. Reliance for this submission was placed on *SA Eagle Insurance Co v Bavuma* 1985 (3) SA 42 (A) at 49 G-H, where the Court held that:

“It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms”.

[39] At no point, prior to the presentation of the Notice, did the Minister, or her legal representatives, indicate that they intended to rely on the PV Act. This Court and the landowner defendants, who, in anticipation of the hearing of expert evidence in respect of the determination of just and equitable compensation, had filed expert notices and summaries dealing with the issue of that compensation, all assumed that the matter would proceed as set down for the hearing of expert evidence on 3-5 December 2018.

Costs.

[40] The landowner defendants ask for a punitive costs order against the State. Although this Court, as a general rule, only awards costs where special circumstances exist, I am of the view that such circumstances are present in this matter.

[41] The stance adopted by the Minister, two days before the hearing of the matter, given that the provisions of the PV Act commenced approximately 3 years prior to the hearing of the matter is worthy of sanction and therefore constitutes a special circumstance.

[42] At the end of argument, I directed the parties to ensure that their expert witnesses were at Court the following day in order to testify regardless of my finding on the Minister's new stance. The State failed to abide with that direction. Mr. Notshe informed the Court that it could not instruct him or the State about which witnesses to call and that the Notice which sets out the Minister's stance

was sufficient. Whilst Mr. Notshe might be correct in contending that the Court cannot direct him as to which witnesses to call, both the Court, the State and the landowner defendants had, prior to the Minister's new stance, agreed that the hearing which was to commence on 3 December 2018 would entail the leading of the respective parties' expert witnesses. For the State, essentially at the commencement of the hearing to produce a document which ostensibly represented the Minister's evidence, without a witness to verify its contents, was irregular and discourteous to the Court and the parties.

[43] As a show of the Court's displeasure of the State and, in particular the actions of Mr. Notshe, a senior counsel and an officer of the Court, I directed that he and his junior, not be permitted to charge a fee for two of the three days this matter was due to run. This is incorporated in the Order below.

[44] In the result, I order as follows:

1. The Court Order dated 28 November 2018 remains binding on the first defendant and has not been negated by the contents of the Notice.
2. The first defendant is ordered to pay the taxed attorney and client costs of the second, fifth, sixth, ninth, tenth, twelfth, fifteen, sixteenth and seventeenth defendants ("the landowner defendants"). Such costs are to include the costs of two counsel and those of the landowners' attorney, including traveling time and traveling and accommodation costs, and the

reservation and the attendance fee and accommodation costs of the landowners' expert witness.

3. The counsel for the first defendant are not permitted to charge a fee for the 4th and 5th of December 2018.



M P Canca

Acting Judge, Land Claims Court

I agree





EJ Sibeko

Assessor

Appearances:

For the Minister of Rural Development: Adv. VS Notshe SC
and Land Reform Adv. C Nqala

Instructed by: State Attorney, Durban

For the Landowner Defendants: Adv. MG Roberts SC
Adv. E Roberts

Instructed by: Cox & Partners Attorneys, Vryheid