

Just and equitable compensation: the latest on the approach of the courts

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Background

The debate on expropriation and compensation remains a very hot and emotive debate, which reached a low point last year when there was an attempt to amend the property clause to expressly allow for expropriation without compensation and the state custodianship of land. Luckily the attempt to amend section 25 did not succeed, as that would have held disastrous consequences for the sector and broader economy.

The debate regarding compensation for land taken for land reform purposes, however, has been raging ever since the CODESA negotiations and the initial formulation of section 25 of the Constitution. Over the years there have been numerous attempts to give content to the provisions of section 25(3) which deal with just and equitable compensation, but without success. Interestingly enough, there have been few court judgements on the topic of just and equitable compensation.

Previous judgements of note

The 2005 Constitutional Court judgement in the case of *Du Toit v Minister of Transport*¹ laid down important guidelines regarding the interpretation of section 25(3) of the Constitution. Although this case dealt with the expropriation of gravel rather than land and the purpose of the expropriation was the construction of a road, rather than land reform, it can still be regarded as a very important milestone in the application of section 25(3) of the Constitution. The expropriation was done in terms of section 12 of the existing Expropriation Act of 1975, which makes provision for market-based compensation. Instead of deciding on the constitutionality of the old Act, the Court applied section 12 of the Expropriation Act taking into consideration the provisions of section 25 of the Constitution. The Court held, amongst other things, that: *"...the amount of compensation agreed or decided upon must adhere to the standards of justice and equity. It must also reflect an equitable balance between the interests of the public and of those affected by the expropriation. These standards, provided for in section 25(3) of the Constitution, are peremptory and every amount of compensation agreed to or decided upon by a court of law must comply with them. To determine that the amount is just and equitable, section 25(3) provides an open-ended list of relevant circumstances to be taken into account, including the market value of the property."* A two-stage approach was used, whereby market value was used as a point of departure. Hereafter the court considered the other factors listed in

¹<https://collections.concourt.org.za/bitstream/handle/20.500.12144/2231/Full%20judgment%20%282899%20Kb%29-4574.pdf?sequence=21&isAllowed=y>

section 25(3) to see whether any amounts needed to be subtracted from the market value. The Court considered each of the listed factors in section 25(3) in turn to assess whether they applied to the case before it. This approach, the court emphasised, must be applied with care to ensure that all the factors set out in s 25(3) are given equal weight. The factors set out in s 25(3) make justice and equity paramount in the calculation of compensation; market value on its own is but a component of the set.

In 2017 the Appeal Court delivered judgement in a labour tenant case, Uys and another v Msiza and others.² This case also centred around just and equitable compensation. In this case, the Land Claims Court allowed an arbitrary deduction of R300 000 from the market value of the property because the land was taken for reform purposes. The Appeal Court agreed with the approach taken in the Du Toit case and found that arbitrary subtractions from market value cannot be allowed. The Court found that: *“Section 25(3) sets out several factors to be considered. Because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then the other factors are considered to arrive at a final determination”*. The Court found that: *“There were thus no facts justifying the deduction of the amount of R300 000. The LCC arbitrarily decided on this amount with no rational foundation. The computation was accordingly unfounded and cannot stand.”* Importantly, the Appeal Court also found that the purpose of the expropriation was already factored into the market value of the property.

In 2019 the Land Claims Court handed down the judgement in the so-called Melmoth case.³ An agreement was reached in March 2018 between the valuers appointed by the state and the landowners respectively, that just and equitable compensation amounted to approximately R760 million. The valuer-general, however, determined the value of the land at about R420 million by applying a formula that attempts to place a value to the ‘current use’ of the property. This was not acceptable to the landowners. The minister was not prepared to offer more than the value determined by the valuer-general. The valuer-general was of the view that the determination made by his office was final and could not be challenged. The Land Claims Court however held that landowners are not bound by the determination of value by the valuer-general, but that they can approach the Land Claims Court to determine just and equitable compensation. The case took an unexpected turn when the minister lodged a notice at court a few days before the hearing to the effect that she would abide by the ruling of the court in the matter. One day before the hearing, the minister and the Restitution Commission made an offer to the landowners, which they were prepared to accept. In terms of the relevant rules of court, the dispute between the state and the landowners was then settled based on the offer made by the state and agreed to by the landowners.

² <https://lrc.org.za/wp-content/uploads/pdf/Supreme-Court-of-Appeal-Judgment.pdf>

The Moloto judgement

On 11 February 2022, the Land Claims Court handed down judgement in the case of the Moloto community v the Minister of Agriculture, Land Reform and Rural Development and others.⁴ This judgement is an important landmark regarding the court's interpretation of section 25(3) of the Constitution and the calculation of just and equitable compensation. The valuer-general had a particular interpretation of just and equitable compensation based on a formula incorporated into the regulations of the Property Valuation Act of 2014. This formula, which has been widely applied (also retrospectively as in this case) makes use of the so-called "current use value". The result of the application of this formula is generally that landowners get a lot less than market value. In this specific case, the landowners were on average offered 33,7% less than market value.

The formula

In essence, the formula states that a value should be placed both on what the property would command in the marketplace and its current use. The current use value represents the value attached to the beneficial use that the owner derives from the property. In terms of the formula, these two values are then added together, and divided by two. Thereafter adjustments can be made in terms of any acquisition benefits or other factors.

Various expert witnesses testified before the court, amongst them, Dr Saul du Toit, a very experienced agricultural valuer and Dr Kobus Laubscher, a well-known agricultural economist. Dr Laubscher testified, amongst other things, to the systemic economic impact of an approach of deviating from market value in circumstances where banks secure their loans on the strength of mortgage bonds based on market valuations. However, the court found that no evidence was presented that any of the subject properties were subject to a mortgage.

Can a current use value be quantified?

The court dealt specifically with the questions as to whether a numerical value could be attached to the current use of the property? On the question as to, whether a numerical value can be attached to current use, the court responded in the affirmative. Previous case law seemed to accept valuations that make use of the income approach where comparable sales were not available. The current use value, also known as the income-based approach is not suitable to determine the value of farms and smallholdings. In this regard, the judge quoted from Judge Antonie Gildenhuys' book entitled "Onteieningsreg":

⁴ LCC 204/2010

[71] In *Ontheieningsreg*,⁷⁷ Gildenhuis deals with the income approach, explaining that the valuation method proceeds from the premise that a purchaser will not pay more for a property with a certain income level than an amount the investor can obtain a similar income level elsewhere for the same risk.⁷⁸ This method of valuation is suitable for investment properties including housing, office blocks, petrol stations and some industrial buildings but is ordinarily not suitable for a home, a business or a farm, although the author notes that it had been used in some Australian courts to value grazing land. Gildenhuis emphasizes that a distinction must be drawn between income resulting from the specific attributes of a property which is relevant to its value and income that derives from the owners' personal business on the property which may not be.⁷⁹

Referring to this text the judge concluded that the authorities appear to hold, at least generally, that the income method will not be used when valuing residential or agricultural property.

Importantly, this approach was used to calculate the market value and not applied separately to market value when interpreting section 25 of the Constitution. However, the court once again confirmed that the interpretation of section 25 cannot be equated to valuation. Whilst valuation practice can and should help to inform a court's determination of compensation, section 25 of the Constitution is based on a contextual analysis of the facts and a court is best placed to do so.

How does a current use value affect compensation?

In its rationale, the court noted that a contextual approach to section 25(3)s was followed in the *Du Toit* case and was indeed the correct way in which to approach the calculate just and equitable compensation. The judge found that context always matters and that a consideration of the circumstances in which the expropriated land is used, can facilitate an understanding of the balance of public and private interests. It is not impermissible to attach a financial value to current use but it must be relevant to the facts at hand. The judge found that the court was unable to rely on the valuations made available to them to determine a current use value in any event. Based on the facts in this case, the court then relied on the agreed market value of the properties and found that that constituted just and equitable compensation. The judge emphasised that market value should not be given a central role in determining just and equitable compensation, but also made it clear that if any other factors are to be considered those need to be submitted to the court so that the

court can have adequate information on all relevant factors. The judge also made a cost order in favour of the landowners, which included wasted costs of many postponements caused by the state in this matter.

For this reason the court indicated that a formulistic approach was not helpful if it quantified and applied current use across the board. The court distinguished between expropriations taking place in terms of the 1975 Expropriation Act, where in terms of the Du Toit judgement above, a two-stage approach starting with market value, was mandatory and cases that fell outside the Expropriation Act.

Onus of proof

On the subject of who bears the onus of proof, the court found that where a party raises a particular contention, such as that the income derived from the property should be calculated and considered on par with the market value, that party bears the onus of proof in respect of such contention raised.

Key takeaways

The following key points can be taken from this judgment:

- The two-stage approach remains the method used to calculate compensation, especially where this is done in terms of the Expropriation Act;
- Where comparable sales are not available, the income approach to valuation (based on the income generated by the property) can be used to value the property but this approach may not be appropriate for agricultural properties;
- The “current use value” can be independently quantified from market value but this will only affect the compensation if relevant to the facts of the case. Stated differently, where the property is not used optimally it may affect the compensation payable to the owners;
- Where properties are used for their best purpose, there should be little to no difference between current use and market value;
- Although this case did not deal with the formula published under the Property Valuation Act, it seems very unlikely that a court will deem a robotic application of this formula as just and equitable because the current use value will not always be relevant; and
- Finally, where a property is subject to a mortgage bond it may be a relevant factor in calculating compensation, but to date there have been no cases where this was relevant.

Conclusion

This judgement is important because it deals with the interpretation of section 25(3) and the factors listed therein – something that very few judgements have done thus far. The

judgement brings some clarity regarding things like who bears the onus in disputes regarding compensation, the general approach regarding the interpretation of section 25(3) and the controversial “current use value” concept. It clearly points out the limitations and shortcomings of the income method of determining compensation. It confirms the approach developed in the Du Toit case at least as far as expropriations in terms of the current Expropriation Act are concerned.

Ultimately this case has once again demonstrated that each and every case can only really be analysed and decided on its own particular facts. It also points to the importance of expert witness testimony in such cases. Hopefully, this judgement will bring an end to the practice by the valuer-general to try and apply a formula of which current use value is an element to farming properties as a general rule.