Library

100/86

LL

Case No 381/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE COMMUNITY DEVELOPMENT BOARD Appellant

and

RABIA ESSA VALLI MAHOMED N O

MAHOMED SAYED MAHOMED N O

SHABIR AHMED MAHOMED N O

SHIRAZ ESSA VALLI MAHOMED N O Respondents

CORAM: TRENGOVE, HOEXTER, BOTHA, GROSSKOPF et SMALBERGER JJA

HEARD: 15 AUGUST 1986

DELIVERED: 18 SEPTEMBER 1986

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The issues in this appeal require the interpretation of certain provisions of the Expropriation Act 63 of 1975, relating to the liability of an expropriating authority to pay interest to the owner of expropriated property on the capital amount of compensation payable for such property. Regrettably, the provisions in question constitute yet another example of the Legislature's frequently encountered inability to express its intention with clarity and precision.

The appellant Board is endowed with powers of expropriation by sections 38 (1) (a) and 38 (1B) of the Community Development Act 3 of 1966, in terms of which the exercise of its powers is governed by sections 6 to 23 of the Expropriation Act, in such a way that references in the latter sections to "the Minister" are to be construed as references to the Board. To facilitate the discussion of the sections of the Expropriation Act relevant to this appeal, when

I come to deal with them later in this judgment, I shall myself refer to "the Minister" as connoting the appellant in the present case.

In 1979 the appellant expropriated a piece of immovable property in the town of Vereeniging, of which the owner was Essa Valli Mahomed. He was the plaintiff in an action which was subsequently instituted in the Transvaal Provincial Division against the appellant as the defendant. To some of the details of this action further reference will be made presently. Mr. Mahomed was originally the respondent in this appeal. He passed away during January of this year. At the outset of the hearing of the appeal an application was made to this Court for the substitution of the four executors appointed by the Master in the estate of the late Mahomed as the respondents in the appeal, in their capacities as such. The application, which was not opposed by the appellant, was granted, and in accordance with a tender made on behalf of the substituted respondents, they were ordered to pay the costs occasioned by the application. I shall refer to the late Mahomed as "the deceased".

The facts giving rise to the issues in this case are common cause. The appellant expropriated the deceased's property by virtue of a notice of expropriation issued on 28 November 1979 in accordance with the provisions of the Expropriation Act, to which I shall henceforth refer as "the Act". The date of expropriation, applying the definition in section 1 read with section 7 (2) (b) of the Act, was 28 November 1979. In the notice of expropriation the appellant did not offer the deceased an amount of compensation for the property, but requested the deceased to submit a claim for compensation in accordance with the provisions of section 7 (2) (c) of the Act. The period within which the deceased was required to submit his claim was thereafter extended by the appellant to 26 March 1980 in terms of the proviso to section 7 (2) (c) (see also the proviso to section 9 (1) of the Act). On 20 March 1980 the deceased submitted a written statement to the appellant, containing the information and particulars prescribed by section 9 (1) of the Act. In that statement the deceased claimed compensation of R320 000. The appellant did not accede to the claim.

On 1 December 1980 the appellant took possession of the property, pursuant to the provisions of section 8 (3) of the Act.

On 18 December 1980 the appellant, in terms of section 10 (4) of the Act, offered to pay the deceased compensation in an amount of R82 775, which was calculated as follows:

in terms of section 12 (1) (a) (i) of the Act	R75 250
in terms of section 12 (2) of the Act (being 10% of R75 250)	7 525
	R82 775

The deceased did not accept the appellant's offer.

/At ...

At the date of expropriation (28 November 1979, as stated above) the deceased's property was encumbered with a mortgage bond in favour of the S A Permanent Building Society. On 6 March 1981 the appellant wrote a letter to the deceased in connection with the bond. In it, the deceased's attention was invited to the provisions of section 19 (1) of the Act; he was required to agree to the payment by the appellant to the bondholder of the amount outstanding under the bond "as at the date the compensation money is paid out"; and he was advised that, unless this requirement were complied with, the appellant would be "prohibited" under section 19 (1) from paying out "any portion of the money" and that "in such circumstances the amount will in terms of section 21 of the Act, have to be paid to the Master of the Supreme Court for depositing in the Guardian's Fund after the provisions of section 10 (5) (a) and 10 (5) (b) of the Act have been complied with". The deceased

/did ...

did not reply to the letter.

The provisions of section 10 (5) of the Act did not come into operation, because the deceased instituted an action against the appellant within the period of 8 months mentioned in paragraph (a) of section 10 (5), and in fact the appellant did not pay any amount to the Master in respect of the deceased's property.

On 12 August 1981 the deceased issued a summons against the appellant in the Transvaal Provincial Division, in which he claimed payment of an amount of R330 992. From the particulars of claim it appears that the amount was made up as follows:

(a)	Compensation for the property in terms of section 12 (1) (a) (i)	R320 000
(b)	Financial loss in terms of section 12 (1) (a) (ii)	992
(c)	Amount to be added in terms of section 12 (2)	10 000
		R330 992

In its plea, the appellant maintained that the amount payable in respect of the expropriation of the property was R82 775, in accordance with its offer of 18 December 1980, as set out above. It did not, however, make payment of that amount or any part of it to the deceased.

The action was set down for hearing on 8 March 1985. At a pre-trial conference held on 21 February 1985 the possibility of settling the action was raised. This resulted in a settlement being reached on 1 March 1985 as to the capital sum to be paid by the appellant to the deceased and the costs of the action up to that stage, but not as to the appellant's liability (if any) to pay interest to the deceased up to that date, on which the parties were unable to reach agreement. In terms of the settlement it was agreed -

(a) that the appellant would pay the deceased an amount of R100 000 as compensation for the expropriated property in terms of section

12 (1) (a) (i) of the Act;

(b) that the appellant would pay the deceased a further amount of R10 000 in terms of section 12 (2) of the Act;

(c) that each party would pay his or its own costs of the action.

Pursuant to this agreement the appellant on 1 March 1985 paid to the deceased a total amount of R110 000.

On 4 March 1985 the deceased and the S A Permanent Building Society (the bondholder) notified the appellant in writing, in terms of section 19 (1) of the Act, that they had agreed that no portion of the agreed compensation was payable to the Building Society. (For the sake of clarity it may be mentioned that the appellant had, upon enquiry, already ascertained that nothing was due to the mortgagee, before it made its payment of R110 000 to the deceased on 1 March 1985.)

The question of the appellant's liability for interest still being in issue when the case came to trial, the trial Judge was requested to resolve the dispute between the parties on the basis of an agreed statement of facts, the relevant portions of which have been summarised above. The two issues the trial Judge was called upon to determine were: (a) whether the appellant was liable to pay interest to the deceased on the sum of R100 000 from 1 December 1980 to 1 March 1985; and (b), if the appellant was so liable, at what rate the interest was to be calculated. In broad terms, as to (a), the deceased contended for a positive answer and the appellant to the contrary (apart from the brief period from 1 to 18 December 1980 and 30 days thereafter up to 17 January 1981), both parties basing their contentions primarily on the provisions of section 12 (3) of the Act; and as to (b), the appellant contended for a fixed rate of interest applicable in respect of State loans and advances by virtue of the relevant notice under section 1 of Act

42 of 1917, to which reference was made in section 12 (3) of the Act prior to its amendment in 1982, while the deceased contended for a variable rate of interest determined from time to time in terms of section 26 (1) of Act 66 of 1975 in accordance with section 12 (3) of the Act after its amendment in 1982. The trial Judge found in favour of the deceased on both issues, and consequently made an order in the following terms:

> "1. Die verweerder word gelas om aan die eiser rente op die bedrag van R100 000 te betaal vanaf 1 Desember 1980 tot 1 Maart 1985 ooreenkomstig die koers van tyd tot tyd bepaal kragtens artikel 26 (1) van Wet 52 van 1966."
>
> > (The reference to "Wet 52 van 1966" was obviously a slip: what was intended was "Wet 66 van 1975".)
>
> "2. Die verweerder word gelas om eiser se koste sedert 1 Maart 1985 te betaal."

It is against that order that the appellant now appeals to this Court, leave to do so having been granted to it by the trial Judge.

With regard to the first issue, viz whether interest is payable at all over the relevant period, the amendment of section 12 (3) of the Act in 1982, to which I have referred, is of no consequence. In dealing with this issue I shall accordingly confine myself to a consideration of the subsection in its present form, and for ease of reference I quote it together with the preceding two subsections of section 12:

> "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 or inconvenience caused by the expropriation or the taking of the right.

(2) Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection 1 (a) (i) in respect of all land, including any portion of a piece of land, expropriated in terms of the notice of expropriation in question, an amount equal to ten per cent of such total amount, but not exceeding ten thousand rand.

(3) Interest at the standard interest rate determined in terms of section 26 (1) of the Exchequer and Audit Act, 1975 (Act No. 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 (a) (i): Provided that -

(a) 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 -

(i) the property was so taken

/possession ...

possession of, if prior to that date compensation for the property was offered or agreed upon; or

(ii) 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 notified the Minister in terms of the said section 21 (4) as to the payment of the compensation money; and

(b) from the date on which the Minister in terms of section 11 (1) pays or makes available an amount to the owner or any person referred to in section 21 (4),

the amount which is so payable shall for the purposes of the payment of interest not be deemed to be an outstanding amount."

(Subsection (4), referred to in the opening part of subsection (3), has no bearing on the issue and can be left out of consideration.)

It is to be observed that para (a) of section 12 (3) refers pertinently to section 21 (4), while para (b) refers pertinently to section 11 (1) of the Act. It will be convenient to quote sections 11 and 21 in full:

> "11. (1) If the Minister deems it expedient, he may, prior to the determination of the amount of compensation payable in terms of this Act for property or for use of property and on or at any time after the date of expropriation, but subject to the provisions of subsection (3), pay the amount offered the owner concerned as such compensation, or a portion of such amount, to the owner concerned or the person contemplated in section 19, or deposit it with the Master or utilize it in settlement of the tax or other moneys contemplated in section 20 under the same circumstances under which he should or could have so paid, deposited or utilized such compensation had it been determined on that date.
>
> (2) Any moneys received by the Master in terms of subsection (1) shall be paid into the Guardian's Fund mentioned in section 21 (2) (b), and bear interest at the rate referred to in the said section 21 (2) (b) until the compensation payable, in terms of this Act for the property in question or the use thereof has been determined, whereupon such moneys shall for the purposes of section 21, but subject to the provisions of subsection (3) of this section, be deemed to have been received by the Master in terms of subsection (1) of that section.
>
> (3) The payment, deposit or utilization of any amount under subsection (1) shall not preclude the determination by agreement or by a court contemplated in section 14 (1), of a different amount as compensation, but if the

amount so determined as compensation is less than the amount paid, deposited or utilized, the owner to whom or on whose behalf the last-mentioned amount was paid, or the Master with whom it was deposited, or the local authority concerned, as the case may be, shall refund the difference to the State together with, in the case of such owner or local authority, interest at the rate contemplated in section 12 (3) from the date on which the amount was so paid or utilized, and, in the case of the Master, the interest accrued thereon in terms of subsection (2)."

"21. (1) If property expropriated under this Act was burdened with a fideicommissum or if compensation is payable in terms of this Act to a person whose place of residence is not known, or if compensation is so payable and there is no person to whom it can be paid, the Minister may deposit the amount of the compensation payable in terms of this Act with the Master or if, in the opinion of the Minister, the property concerned is not so burdened and the compensation is so payable to a Black, with the South African Development Trust mentioned in section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), and after such deposit the Minister shall cease to be liable in respect of that amount.

(2) Any moneys received by the Master in terms of subsection (1) shall -

(a) if the property in question was burdened with a fideicommissum, mutatis mutandis be subject to all the terms and conditions contained in the will or other instrument by which such fideicommissum was constituted; and

(b) subject to the provisions of paragraph (a), be paid into the Guardian's Fund referred to in section 86 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), for the benefit of the persons who are or may become entitled thereto, and bear interest at a rate determined from time to time by the Minister of Finance.

(3) The provisions of subsections (1) and (2) shall not affect the jurisdiction of any court to make an order in respect of any moneys in question.

(4) In the event of a dispute or doubt as to the person who is to receive any compensation payable in terms of this Act, or in the event of the issue of an interdict in respect of the payment of any such compensation, or if the owner and any mortgagee or any buyer have not notified the Minister in terms of section 19 in regard to the payment of such compensation, the Minister shall pay the amount of such compensation to the Master."

In sections 11 (1) and 21 (4) there are references to section 19, of which subsection (1) is relevant in this case. It reads as follows:

> "19. (1) If any immovable property expropriated under this Act was immediately prior to the date of expropriation encumbered by a registered mortgage bond, or to the knowledge of the Minister the subject of an agreement contemplated in section 9 (1) (d) (ii), the Minister shall, subject to the provisions of sections 20 and 21, not pay out any portion of the compensation money in question, except to such person and on such terms as may have been agreed upon between the owner of such property and the mortgagee or buyer concerned, as the case may be, and as the Minister may have been notified of in writing by them."

On the facts of the present case, I have come to the conclusion that it is possible (and expedient) to resolve the issue under consideration on relatively narrow grounds, which relate to the interpretation of the words "compensation was offered" occurring in para (a) (ii) of section 12 (3). Before I proceed to state my views on that score, however, it is necessary, in order to avoid possible misunderstanding of the effect of this judgment, to deal briefly with some other aspects of the provisions quoted above, which were debated or

/touched ...

touched upon in the course of the arguments presented to this Court.

The main provision of section 12 (3), i e that which precedes the proviso, is the only part of it which appears to be free from difficulty. In many, if not most, cases the expropriating authority will have taken possession of the property expropriated before the amount of compensation payable in respect of it has been determined, in one of the three ways in which that can be done in terms of the Act (namely: 1. where an amount of compensation has been offered and the owner is deemed to have accepted it in accordance with the provisions of section 10 (5); or 2. where the amount of compensation is agreed upon between the parties; or 3. where the amount of compensation is determined by a court or by arbitration under section 14). To cater for cases in which the amount of compensation has not yet been determined, the expression ".... the amount of compensation

/payable ...

payable ...." must have been intended by the Legislature to refer to the amount as ultimately determined in one of the ways mentioned. Of that amount, "any outstanding portion" must mean any part of it not yet paid as at the date of taking possession of the property and for as long as it remains unpaid thereafter. If the whole of the amount in question is paid only after it has been determined, interest will be payable on it from the date of taking possession until the date of payment. All this is, however, subject to the qualification contained in the words ".... *in* accordance with subsection 1 (a) (i)". It is clear (although the reason for it is not) that the Legislature's intention was to exclude liability for interest in all cases of the taking of a right to use property, and also, in cases of the expropriation of property other than a right, interest on compensation for actual financial loss caused by it and on the added amount referred to in subsection (2).

/On ...

On the facts of the present case, therefore, the amount of R10 000 paid by the appellant to the deceased in respect of section 12 (2) could not have attracted interest. That is why the first issue, in accordance with what was said earlier, relates only to the sum of R100 000 which was agreed upon as being payable in terms of subsection (1) (a) (i).

It follows that in terms of the main provision of section 12 (3), considered apart from the proviso to it, the appellant was liable to pay interest to the deceased on R100 000 from 1 December 1980 to 1 March 1985.

So much, then, is clear. But when one moves on from the main provision to the proviso, all clarity ceases, and obscurity reigns supreme.

Para (a) of the proviso commences by expressing itself to be applicable "in a case contemplated in section 21 (4)". The latter subsection mentions a series of "cases", or factual situations, which may be referred to compendiously as cases of a dispute or doubt, or an interdict, or a failure to notify the Minister in terms of section 19. The last-mentioned case fits the facts of the present matter, as summarised earlier. In the cases mentioned, the Minister is directed to pay to the Master "the amount of such compensation", which refers back to the earlier expression in the subsection, "any compensation payable in terms of this Act". This expression is of wider ambit than that used in the main provision of section 12 (3), viz "the amount of compensation payable in accordance with subsection (1) (a) (i)", but as far as I can see nothing turns on the difference in this case. It was common cause between counsel, as I understood their arguments, that the injunction to the Minister to pay the amount in question to the Master was directory and not peremptory, and that after such payment to the Master the amount would not attract any interest. I shall simply assume (without deciding) that counsel were correct in both respects.

Counsel differed, however, in their arguments concerning the area of operation of section 21 (4). For the appellant it was argued that section 21 (4) was operative irrespective of whether the amount of compensation payable had been determined or not, while for the respondents it was contended that section 21 (4) was limited in its operation to the situation where the amount of compensation had already been determined. The wording of section 21 (4) itself favours the latter view, and so does the context in which subsection (4) appears as part of section 21 as a whole, for it seems to be clear from a consideration of the subject-matter dealt with in subsections (1), (2) and (3) that the Legislature was there concerned with the situation where the amount of compensation had already been determined. The view that section 21 (4) was intended to operate only in respect of an already determined amount of compensation is further

/fortified ...

fortified by contrasting it with section 11 (1), which deals in explicit terms with payments, inter alia to the Master, "prior to the determination of the amount of compensation payable in terms of this Act."

Counsel for the appellant argued, however, that section 11 (1) did not authorise a payment to the Master in the event of a failure by the owner and the mortgagee to notify the Minister in terms of section 19 (1), as in the present case. In my view it does, despite the presence in it of some curious features. It uses the expression "deposit it with the Master", without reference to a specific section of the Act. The expression "deposit .... with the Master" occurs in section 21 (1), but not in section 21 (4), which uses the expression "pay .... to the Master". Moreover, an amount deposited with the Master in terms of section 11 (1) will bear interest according to the provisions of section 11 (2), whereas an amount paid to the Master in terms of section 21 (4) will not attract interest, on the basis of the assumption made earlier. These features of section 11 seem to me to be effectively neutralised, however, by section 12 (3) (b), which speaks of "the date on which the Minister in terms of section 11 (1) pays or makes available an amount to the owner or any person referred to in section 21 (4)". The last-mentioned words must necessarily include the mortgagee in a case such as the present, while the words "makes available" can, I consider, bear no other connotation, in the context of section 11 (1), than a deposit with the Master. Section 11 (1) must be taken, therefore, to equate "deposit .... with the Master" with "pay .... to the Master", for it empowers the Minister, prior to the determination of the amount of compensation, to make such a deposit "under the same circumstances under which he should or could have so ..... deposited ..... such compensation had it been determined on that date", and these words, having regard to the wording of section 12 (3) (b) that I have quoted, must necessarily embrace a payment to the Master in terms of section 21 (4).

In passing, I should make it clear that, although I have used the wording of section 12 (3) (b) in aid of the interpretation of section 11 (1), with a view to counsel's argument concerning the latter, I express no view on the interpretation and manner of operation of para (b) as such in the context of the proviso to section 12 (3). It is fraught with profound problems, arising from the use of the indeterminate expression "an amount" in para (b), when that is read with the concluding words of section 12 (3), and in particular, the words "the amount which is so payable", which presumably refer back to the words "the amount of compensation payable in accordance with subsection (1) (a) (i)". Whatever solution may be found for those problems, it would not, as far as I can see, affect the decision of the

/issue ...

issue in the present case.

Counsel for the appellant argued further that, in the present case, the Minister was precluded from exercising his discretion to make a payment in terms of section 11 (1), by virtue of the provisions of section 19 (1), which had the effect of making it impossible for him to prevent the running of interest by making any payment. I do not agree. The prohibition of section 19 (1) against a payment except to a person designated by agreement between the owner and the mortgagee, of which the Minister is notified, is expressly stated to be subject to the provisions of, inter alia, section 21. The whole of the latter section is concerned with a payment to the Master. In my opinion it cannot be doubted that a payment to the Master, including a payment in terms of section 21 (4) specifically, falls outside the scope of the prohibition contained in section 19 (1). It follows, in the light of what has been said above, that the Minister was entitled at any time prior to 1 March 1985 to make a payment to the Master in terms of section 11 (1) of any amount that he wished to make available to the deceased and his mortgagee.

Reverting to the area of operation of section 21 (4), if it is accepted that it applies only when the amount of compensation payable has already been determined, it does not necessarily follow that para (a) of the proviso to section 12 (3) can have no application on the facts of the present case. It seems to me that the expression "in a case contemplated in section 21 (4)", viewed by itself, is ambiguous. It may connote no more than the existence of one or other of the series of factual situations mentioned in the section, viz a dispute or doubt, or an interdict, or a failure to notify the Minister; or it may have the additional connotation of the existence of one of those factual situations provided the amount of compensation has already been determined. The latter interpretation is suggested, rather strongly I consider, by the manner in which the proviso has been divided into two paragraphs, (a) and (b), and the subject-matter dealt with in each. Since para (b), by virtue of its reference to section 11 (1), deals exclusively with the situation where the amount of compensation has not yet been determined, one would expect para (a) to deal with the converse situation. Such a construction would fit in also with the apparent rationale of para (a), which seems to be that the Minister should not be held liable for interest where he is prevented from discharging his liability to pay compensation only by reason of circumstances beyond his control. On the other hand, if an amount paid to the Master in terms of section 21 (4) does not attract interest, as I have assumed, it is within the power of the Minister himself to avoid liability for interest in the circumstances dealt with in para (a) simply by making such a payment.

On that basis, indeed, I have difficulty in understanding why the elaborate and tortuous provisions of para (a) were considered to be necessary at all, instead of a mere explicit statement that interest would not be payable from the date on which the Minister made a payment to the Master in terms of section 21 (4), as was done in the case of para (b), with reference to section 11 (1).

The wording of subparas (i) and (ii) of para (a) serves only to obfuscate the intention of the Legislature. The reference to "compensation .... agreed upon" supports the notion that the Legislature contemplated the situation where the amount of compensation was determined, because the agreement itself fixes the amount. But the reference to "compensation .... offered" is utterly perplexing. If it is assumed, in the present case, that the amount of R100 000 in respect of section 12 (1) (a) (i), which was agreed upon on 1 March 1985, had already been offered by the appellant to the deceased on 18 December 1980 (instead of the lesser amount of R75 250), would the Minister not have been liable for interest thereon from the termination of a period of 30 days after the date of the offer? On the face of it, that seems to be the effect of the wording, but I must say that it appears to me to be improbable that the Legislature could have intended the mere making of an offer to have such a result. After all, the deceased's failure to notify the Minister in terms of section 19 (1) did not prevent the latter from discharging his obligation and thus avoiding liability for interest; he could have followed the simple expedient of paying the amount to the Master in terms of section 11 (1). The juxtaposition of the words "offered" and "agreed upon" as alternatives in such close proximity to each other suggests that the Legislature may have had in mind two concepts of equal operative force. But an offer does not ordinarily have the effect of determining the amount of compensation payable, like an agreement has. In the scheme of the Act an offer has such effect only in the context of the provisions of section 10 (5), where an owner fails to institute action within 8 months after the date of the offer and the Minister has given him the requisite notice in terms of the subsection. During the argument the question was raised whether the Legislature did not in fact intend the word "offered" to be understood in the limited sense of an offer having the effect of determining the amount of compensation in accordance with the provisions of section 10 (5). To give the word "offered" such a restricted meaning would certainly furnish the provisions of para (a) with a rational pattern which otherwise they appear to lack. Where an amount was offered which was less than the amount payable as ultimately determined by agreement or under section 14, para (a) of the proviso does not aim at preventing the running of interest on the lesser amount of the offer only, as opposed to the larger amount as

/determined ...

determined, because of the use of the words "the amount which is so payable" in the concluding portion of the proviso, which are incapable of being construed as referring to any "amount" contemplated in para (a) and must accordingly be taken to refer to "the amount of compensation payable" mentioned in the main provision of the subsection. This supports the notion that the amount offered may have been intended (as in the case of the amount agreed upon) to coincide automatically with the amount determined to be payable, which can only be the case in the event of section 10 (5) being applicable. Another pointer in the same direction is that no provision is made for the case where the amount offered exceeds the amount payable as ultimately determined. But there are obstacles in the way of adopting such an interpretation. Why did the Legislature not in terms restrict the word "offered" to a case contemplated in section 10 (5)? It may have thought that the intention was made clear enough by the use of the phrase "in a case contemplated in section 21 (4)", but it seems unlikely that it would have chosen to reveal its intention in so oblique a manner. Furthermore, if "offered" and "agreed upon" are equated as ways of determining the amount of compensation, the third way in which that can be done, viz by the procedure provided for in section 14, is left in the air. Possibly the Legislature considered that the practical implications of court or arbitration proceedings made it unnecessary to deal with that kind of situation, but that appears to be highly speculative.

For the purposes of the present case it is not necessary to resolve the problems adverted to above, and accordingly I shall refrain from attempting to do so. I shall simply assume (without deciding), in the appellant's favour, that the words "in a case contemplated in section 21 (4)" do not limit the operation of para (a) of the proviso to a situation in which the amount of compensation payable has already been determined, and that the word "offered" does not bear the restricted meaning referred to above. I am fully (and painfully) aware that I have indulged in a long discussion which poses questions instead of resolving them. I have done so lest incorrect inferences be drawn from the narrow basis upon which I shall decide the first issue in this case. In particular, I have sought to make it clear that the question whether the words "compensation .... was offered" in para (a) should be given a restricted meaning, in the sense indicated above, is left wide open for further consideration and decision if it becomes necessary in a future case. In my discussion I have also had a second object in mind. I have pointed to the major difficulties in discerning a rational and sensible pattern of regulating the non-payability of interest in the contents of the proviso (both paras (a) and (b)), in the fervent hope that the Legislature may be prompted to redraft the proviso in its entirety in order to remove the present obscurities and illogicalities in it.

I turn now to the grounds upon which the first issue can be decided. Counsel for the respondents argued that para (a) of the proviso did not come into operation on the facts of this case. The amount of R100 000 was agreed upon on 1 March 1985 and the Minister was notified in terms of section 19 (1) on 4 March 1985, within the period of 30 days contemplated in para (a), counsel said. The offer of R75 250 in respect of section 12 (1) (a) (i) which was made on 18 December 1980, counsel submitted, was irrelevant, since the amount offered was less than the amount which was ultimately determined to be payable. For this submission counsel relied on the words "such compensation was offered" in subpara (ii); he emphasized the word "such" and contended that by using that word the Legislature intended to refer to the expression "the amount of compensation payable ...." in the main provision, which in this case was ultimately fixed at R100 000. From a purely syntactical point of view counsel's contention is unacceptable. The words "such compensation" in subpara (ii) are immediately preceded by the indeterminate expression "compensation for the property" in subpara (i). As a matter of syntax the word "such" before "compensation" in subpara (ii) must be taken to refer to the immediately preceding expression "compensation for the property" in subpara (i), rather than to the much farther removed expression "the amount of compensation payable ...." in the main provision. The indeterminate sense of "compensation for the property" in subpara (i) must accordingly be regarded as having been carried over into the expression "such compensation" in subpara (ii). Whether, apart from the syntax, and as a matter purely of the Legislature's intention, the expression "compensation for the property" must be taken to refer to "the amount of compensation payable ...." in the main provision, is a different matter.

Counsel for the appellant argued that para (a) of the proviso came into operation by virtue of the appellant's offer of 18 December 1980 to pay to the deceased R75 250 in terms of section 12 (1) (a) (i). It is not the appellant's case that interest did not accrue on the sum of R75 250, being portion of the amount of R100 000 ultimately agreed upon. (That an argument on this basis was not put forward is understandable in view of the wording of the proviso, as discussed above.) Counsel's argument was that para (a) operated in such a way that no interest was payable on the sum of R100 000 (or any part of it) as from 17 January 1981 (being 30 days after the date of the offer). To couch it in general terms, the argument for the appellant comes to this, then: whenever the Minister has made an offer of compensation, and one of the factual situations postulated in section 21 (4) exists (such as a failure to notify the Minister in terms of section 19 (1), as in the present case), the effect of para (a) of the proviso is to suspend the accrual of interest on the amount of compensation as ultimately determined to be payable, even where the amount offered was less, by whatever margin, than the amount so determined.

In my opinion it is wholly inconceivable that the Legislature could have intended such a result. Counsel, with reference to the words "compensation was offered", invoked the rule of construction that the words of a statute must be given their ordinary and literal meaning. But that rule is subject to an important rider, which is always its concomitant: as was said in <u>Bhyat v Commissioner for Immigration</u> 1932 A D 125 at 129:

> ".... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity,

> inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended."

(See also Ebrahim v Minister of the Interior 1977 (1) S A 665 (A) at 677 D - 678 G and the cases cited there.) In my view it would be repugnant to obvious considerations of logic and equity to hold that the deceased forfeited all interest on the sum of R100 000 by reason of his failure to notify the Minister in terms of section 19 (1), merely because the Minister offered to pay him an amount of R75 250. I am accordingly satisfied that the interpretation contended for on behalf of the appellant would lead to an anomalous and, indeed, absurd result, which the Legislature could not have intended. The words "compensation was offered" are not to be read, therefore, as meaning "any compensation was offered", but should be given a restricted meaning so as to limit their scope to the case where the compensation offered was an amount not less than the amount of compensation

/as ...

as ultimately determined to be payable.

Counsel for the appellant pointed to the fact that under the common law no interest accrued on an as yet unliquidated amount of compensation (Union Government v Jackson and Others 1956 (2) S A 398 (A) at 410-6 and 437) and from that base argued that the liability to pay interest which is imposed on the Minister by section 12 (3) should not be extended beyond what was strictly necessary according to the language used. In my view there is no room for such an argument in the context of the issue to be decided in this case. By enacting the main provision of section 12 (3) the Legislature clearly intended to bring about a radical departure from the common law position, and it is clear that it did so because of considerations of equity (Die Suid-Afrikaanse Naturelletrust v Kitchener en Andere 1964 (3) S A 417 (A) at 423 E-F, and Klipriviersoog Properties (Edms) Bpk v Gemeenskapsontwikkelingsraad 1984 (3) S A 768 (T) at 772 F-G). That being so, there is no warrant for interpreting the proviso to the main provision in a manner that would produce what is in effect an arbitrary and inequitable limitation on the Minister's liability for interest.

In my judgment, therefore, the Court a quo was correct in deciding the first issue against the appellant, and the appeal on that score must fail.

I turn, then, to the second issue, which relates to the rate at which interest is to be calculated over the period from 1 December 1980 to 1 March 1985. As indicated earlier, this issue involves a consideration of the amendment of section 12 (3) in 1982. The amendment was brought about by section 4 (1) (a) of Act 21 of 1982, which came into operation on 12 March 1982. Before the amendment, the opening words of section 12 (3), preceding the word "shall", read as follows:

> "Interest at the rate applicable on the date of expropriation in respect of State loans and advances by virtue of a notice under section 1 of the Financial Adjustments Act, 1917 (Act No 42 of 1917) ...."

For ease of reference, I quote again the opening words of the section after the amendment:

> "Interest at the standard interest rate determined in terms of section 26 (1) of the Exchequer and Audit Act, 1975 (Act No 66 of 1975) ...."

Section 1 of Act 42 of 1917, in its main part (the proviso's to it are not relevant here), provided as follows:

> "Notwithstanding that the rate of interest payable in respect of any loan or advance made out of moneys appropriated by Parliament is specified by law or by notice under such law or by resolution of Parliament, the Minister of Finance may, by notice in the Gazette, fix the rate of interest at which any such loan or advance made after the first day of July, 1917, shall be issued ...."

This section was repealed by section 52 (1), read with the Schedule, of Act 66 of 1975. (It is of passing interest - but of no legal significance, I consider -

that Act 66 of 1975 was assented to on 20 June 1975, and that it, and hence the repeal of section 1 of Act 42 of 1917, came into operation on 1 April 1976, while the Expropriation Act, which was also assented to on 20 June 1975, came into operation only on 1 January 1977.) Section 26 (1) of Act 66 of 1975 provides as follows:

> "The Minister of Finance shall from time to time determine a standard interest rate which shall be applicable to loans granted by the State out of the State Revenue Fund, and, subject to any provision to the contrary in any law contained, interest shall be paid at that rate on loans so granted."

The argument for the appellant was that the rate of interest which was to be applied over the entire period from 1 December 1980 to 1 March 1985 was that rate which was applicable on the date of expropriation, i e 28 November 1979, as fixed in the last notice issued under section 1 of Act 42 of 1917, prior to its repeal. It was contended that that was the clear effect of section

12 (3) prior to its amendment, and that the amendment in 1982 could not have changed the position, because of the presumption against retrospectivity. For the respondents, on the other hand, it was argued that, by virtue of the provisions of section 12 (1) of the Interpretation Act 37 of 1957, the reference to section 1 of Act 42 of 1917 in section 12 (3) before its amendment was required to be read as a reference to section 26 (1) of Act 66 of 1975. It was contended that in terms of the latter section the varying standard rate of interest as determined from time to time was to be applied over the entire period from 1 December 1980 to 1 March 1985, and that the amendment of section 12 (3) in 1982 did not bring about any change in the pre-existing position.

Section 12 (1) of the Interpretation Act provides as follows:

"Where a law repeals and re-enacts with or

> without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted."

There can be no doubt that the Legislature intended, by enacting sections 52 (1) (read with the Schedule) and 26 (1) of Act 66 of 1975, to replace section 1 of the 1917 Act by section 26 (1) of the 1975 Act. The subject-matter dealt with in each section is the same, viz the fixing or determination of the rate of interest payable on State loans. The changes which were brought about, as revealed by a comparison of the provisions of sections 1 of the 1917 Act and 26 (1) of the 1975 Act, are not, in my view, of any great substance. Applying the test adopted in Berman Brothers (Pty) Ltd v Sodastream Ltd and Another 1986 (3) S A 209 (A) at 239 J - 240 D, the repeal of section 1 of the 1917 Act and the re-enactment with alterations of the earlier provisions in section 26 (1) of the 1975

Act did not change "the essential nature or character" of the repealed provisions. Accordingly the 1975 Act must be regarded as having repealed and re-enacted "with modifications" the provisions of section 1 of the 1917 Act, within the ambit of section 12 (1) of the Interpretation Act. In terms of the latter section, the reference to section 1 of the 1917 Act in section 12 (3) of the Expropriation Act, before its amendment in 1982, must be construed as a reference to section 26 (1) of the 1975 Act, "unless the contrary intention appears". I can find no such contrary intention, either in the provisions of the 1975 Act or in section 12 (3) of the Expropriation Act (cf the Berman Brothers case, supra, at 240 F-G). In particular, I do not consider that the use of the word "notice" in section 12 (3) precludes the reference to section 1 of the 1917 Act from being construed as a reference to section 26 (1) of the 1975 Act, and, consequently, as bearing on a determination under the latter section.

It follows that I reject the contention for the appellant that the rate of interest to be applied in the present case is to be found in the relevant notice issued under section 1 of the 1917 Act, and that I accept the submission for the respondents that the rate of interest applicable here must be ascertained with reference to the provisions of section 26 (1) of Act 66 of 1975. It does not follow, however, that it is necessarily the varying standard rate of interest as determined from time to time under section 26 (1) of the 1975 Act which is applicable over the entire period from 1 December 1980 to 1 March 1985. Whether or not that is so, depends upon matters still to be discussed. In this regard it will be convenient to divide the relevant period into two parts: the period prior to the amendment of section 12 (3) of the Act, that is, from 1 December 1980 to 12 March 1982, to which I shall refer as the first period, and the period thereafter, that is from 13 March 1982 to 1 March 1985, to which I shall refer as the second period.

To have an idea of what is involved, reference must be made to a schedule of the interest rates as determined under section 26 (1) of the 1975 Act from time to time, relevant to the period 28 November 1979 to 1 March 1985, which formed part of the stated case in the Court *a quo*. A brief synopsis of what is reflected in the schedule is as follows. On 28 November 1979, the date of expropriation, the rate was 9,5%. After two intervening increases, it was further increased to 11,25% on 1 December 1980, the date of the taking possession of the property. Thereafter a number of gradual increases followed, resulting in a rate of 13,5% being applicable on 12 March 1982, the date of the amendment of section 12 (3). In September 1982 the rate rose to 15%. Thereafter a number of gradual

/decreases ...

decreases followed, reaching a low of 10,75% in February 1983. The rate rose again over a period, reaching 15% in May 1984 and a high of 17,25% in October 1984. After two slight decreases, it stood again at 17,25% on 1 March 1975.

As to the first period, counsel for the appellant argued that, by virtue of the provisions of section 12 (3) of the Act prior to the amendment, it was only the rate of interest which was in force on the date of expropriation, i e 28 November 1979, that was relevant, that that rate applied throughout the first period, and that no account should be taken of any of the increases in the period. In my view, this argument is sound. The wording of the section is explicit and clear: what is expressed to be payable, is interest "at the rate applicable on the date of expropriation". These words leave no room for giving effect to increases in the prescribed rate of interest after the date mentioned.

/So ...

So, the increased rate which was applicable at the later date (1 December 1980) when the State took possession of the property - and from which interest commenced to run - is irrelevant. The application of section 12 (1) of the Interpretation Act to section 12 (3) in its original form, as discussed above, results in "the rate applicable" on 28 November being ascertained with reference to the determination under section 26 (1) of Act 66 of 1975 which was in force on that date, but it cannot have any effect on the impact of the words "on the date of expropriation", nor can it justify the taking into account of subsequent increases as determined pursuant to section 26 (1) of the 1975 Act. The idea of a variation of the rate from time to time, which is implicit in section 26 (1), was no less a feature of the repealed section 1 of the 1917 Act, but section 12 (3) of the Expropriation Act as originally framed did not allow subsequent variations to be taken into account.

In my view, therefore, the rate of interest which was payable during the first period remained constant at the rate which was applicable on 28 November 1979 by virtue of a determination under section 26 (1) of Act 66 of 1975. The amendment of section 12 (3) of the Act which came into force on 12 March 1982 could not affect the rate at which interest had accrued prior to that date without giving retrospective operation to the amendment. I agree with the submission of counsel for the appellant that there is nothing in the terms of the amendment to suggest that the Legislature intended it to be retroactive. The presumption against retroactivity accordingly leaves undisturbed the rate of interest which applied during the first period.

As to the second period, counsel for the appellant again relied on the presumption against retrospectivity, arguing that its application precluded the replacement of the then operative rate of interest by a different rate. With this argument I do not agree. The accrual of interest is a continuing process, and by allowing the new prescribed rate to supplant the previously existing one as from the date of the amendment, no more is being done than to give prospective effect to the amendment (cf Katzenellenbogen Ltd v Mullin 1977 (4) S A 855 (A) at 884 D-E). The mere fact that the accrual of interest in the future has its roots in the events of the past does not mean that retrospective operation is given to the amendment by substituting one rate of interest for another as from the date of its coming into force (cf Steyn, Uitleg van Wette, 5th ed, at 85, and Maxwell on Interpretation of Statutes, 12th ed, at 217). The principle at stake can, I think, be demonstrated as follows. The key words in the section remain the same: "Interest ..... shall ..... be payable ....." Let us suppose that in its original form the section had simply provided as follows: "Interest at the rate of 9% per annum shall ..... be

/payable ...

payable ....", and that the amendment had merely substituted the figure of "13%" for "9%". In this example it is clear, I consider, that interest would have commenced to run at the rate of 13% instead of 9% as from the date when the amendment came into force, notwithstanding that the interest was payable in respect of an expropriation and a taking possession of the property that had occurred prior to that date. That being so, it becomes apparent at once, in my opinion, that the legal position cannot be affected, either by the fact that the section lays down the rate of interest payable with reference to a determination made under another Act, or by the fact that the words "at the date of expropriation" have been omitted in the amendment, with the result of allowing a fluctuating rate of interest to apply for the future.

In my view, therefore, the rate of interest payable during the second period was the rate in force as

/determined ...

determined from time to time pursuant to section 26 (1) of Act 66 of 1975.

It follows that in my judgment the order made by the Court a quo in respect of the second issue was wrong in part (as to the first period) and correct in part (as to the second period).

It should be mentioned that counsel made available to this Court copies of two unreported judgments given in the Transvaal Provincial Division, in which apparently divergent conclusions were reached on matters similar to some of those discussed above, and in which views were expressed that in some respects apparently differ from those set out above. The judgments were given by LEVESON J in the case of Golfers Paradise (Pty) Ltd v Community Development Board, on 1 August 1985, and by O'DONOVAN AJ in the case of Davehill (Pty) Ltd and Others v Community Development Board, on 23 May 1986. In regard to the latter case we were informed by counsel that an appeal was pending, and it is possible that the same applies to the first-mentioned case. In the circumstances I have thought it better in my judgment in this case not to refer pertinently to the reasoning contained in those judgments. Suffice it to say that the views I have expressed in this judgment were arrived at after careful consideration of the judgments to which we were referred.

Finally, the costs of this appeal must be dealt with. The first issue, i e whether interest was payable at all by the appellant (save for the brief period from 1 December 1980 to 17 January 1981), was obviously the main issue in the case. On that issue the appellant has failed. In regard to the second, subsidiary, issue, relating to the rate of interest to be appied, the appellant has failed in respect of the second period, but has succeeded in respect of the first period, and to that limited extent has achieved success.

Counsel have not had an opportunity of addressing this Court on what order of costs would be appropriate in the circumstances I have mentioned. I propose to make a provisional order of costs, and to afford the parties an opportunity of submitting written argument on the matter, should they wish to do so. Since the order to be made is provisional only, I shall do no more than to state broadly the considerations that I have taken into account in deciding upon such order. The appellant, as I have said, has failed on the major issue and has achieved but limited success on the subsidiary issue. As to the latter, the period in respect of which an alteration is required to be made to the order of the Court _a quo_, is a relatively short one of slightly more than a year. The period in respect of which the order _a quo_ will remain undisturbed extends for just short of 3 years. The financial implications of the appellant's limited success, when seen in the context of the whole dispute between the parties, and having regard to the relevant interest rates at various times, as referred to earlier, appear to me, prima facie, to be rather insignificant. The appellant's success seems to be too insubstantial to carry the costs of the appeal, but on the other hand some recognition ought to be given to it by not awarding the respondents all their costs, so that this appears to be a case (for present purposes I put it no higher) in which it would be proper to order the appellant to pay a portion of the respondents' costs (cf Protea Assurance Co Ltd v Matinise 1978 (1) S A 963 (A) at 978). Provisionally, I assess that portion at one-half of the respondents' costs of the appeal.

The order of the Court is as follows:

1. The appeal succeeds to the limited extent reflected in para (a) of the amended order set

out in para 2 below, and fails in all other respects.

2. Para 1 of the order of the Court a quo is amended to read as follows:

"The defendant is ordered to pay interest to the plaintiff on the amount of R100 000 for the period from 1 December 1980 to 1 March 1985, such interest to be calculated as follows:

(a) from 1 December 1980 to 12 March 1982, at a constant rate, being the rate which was in force on 28 November 1979 by virtue of a determination made pursuant to section 26 (1) of Act 66 of 1975;

(b) from 13 March 1982 to 1 March

1985 at varying rates, being the rates which were in force from time to time by virtue of determinations made pursuant to the said section 26 (1) of Act 66 of 1975."

3. The appellant is ordered to pay one-half of the respondents' costs of the appeal.

4. The order in para 3 is provisional and subject to the following provisions:

(a) The appellant and the respondents may, within 3 weeks from the date of this judgment, serve and file with the Registrar written argument with a view to obtaining a variation of the order in para 3.

(b) In the event of either the appellant or the respondents serving and filing written argument in terms of para (a), the opposing party or parties may, within a further period of 2 weeks, serve and file with the Registrar written argument in reply.

(c) If written argument is served and filed in terms of the foregoing provisions, the Court will reconsider the order in para 3 and deliver judgment thereon.

(d) If no written argument is served and filed in terms of para (a), the order in para 3 will become final.

A.S. BOTHA JA

TRENGOVE JA
HOEXTER JA
GROSSKOPF JA
SMALBERGER JA

CONCUR