IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

WILLIAM GEORGE DAVIS.......... first appellant

ROBERT EDWARD ALEXANDER..... second appellant

and

THE MAYOR AND CITY COUNCILLORS
OF THE CITY OF PIETERMARITZBURG...... respondent

CORAM: CORBETT CJ, HEFER, VIVIER, STEYN JJA, et F H GROSSKOPF, AJA.

DATE OF HEARING: 23 February 1989

DATE OF JUDGMENT: 9 May 1989

JUDGMENT

CORBETT CJ:

In October 1984 the two appellants purchased a fixed property in Terry Street, Pietermaritzburg and on 2 February 1985 they took transfer thereof. Upon the erf stood a block of 10 flats known as "Fortuna Court". (I shall refer to the land, as improved, as "the property".) By a registered letter dated 6 December 1985 appellants were given notice by the City Council of Pietermaritzburg (the respondent) of the expropriation of the property in terms of the Expropriation Act 63 of 1975 ("the Act"). The parties were unable to agree as to the amount of compensation payable in respect of the property expropriated and in due course the appellants instituted action against the respondent in the Natal Provincial Division claiming an order determining the amount of compensation to which they were entitled in the sum of R310 000, together with ancillary relief. After pleadings had been closed the parties filed a "Statement of Agreed Facts" (I shall call this "the stated case") for decision by the Court. The matter came before Howard J (as he then was), who found generally in favour of the respondent and made the following order:-

"(a) The amount of compensation payable to the plaintiffs is determined at R218 828;

(b) The defendant is ordered to pay interest on the said amount in terms of sec 12(3) of Act No 63 of 1975;

(c) Costs are awarded in accordance with the provisions of sec 15(1) and (2) of the said Act."

In coming to this decision the learned Judge rejected a claim by the appellants to be paid, in addition to the amount of R218 828, a further sum of R64 877 said to be compensation for "actual financial loss" caused to appellants by the expropriation, in terms of sec 12(1)(a)(ii) of the Act. (The judgment of Howard J has been reported, see Davis and Another v Pietermaritzburg City Council 1988 (3) SA 537 (N). I shall refer to this as "the reported judgment".) With the leave of the Court *a quo* appellants appeal against that part of the judgment which rejected the aforesaid claim of R64 877.

According to the stated case, the appellants, acting through a firm of land surveyors, made a "preliminary" application to the respondent (the "local authority") on 7 November 1985, in terms of the Sectional Titles Act 66 of 1971, for a development scheme whereby the property was to be divided into a number of sections, each flat representing a separate section. On 21 November 1985 a meeting of the tenants of the flats was held for the purpose of providing them with particulars concerning the sectional title development scheme. And on 5 December 1985 final sectional title plans were submitted by the land surveyors to the respondent.

The stated case further records that the paties were agreed that the correct valuation of the property for the purposes of sec 12(1)(a)(i) of the Act was the sum of R208 828. The detailed calculations made in order to arrive at this figure are set forth in an annexure ("I") to the stated case, and it is further stated that the "facts assumed and contingencies applied in annexure 'I' are agreed by the parties as being correct". The final three paragraphs of the stated case read as follows (appellants being referred to as "plaintiffs") :

"33.

The parties agree that Plaintiffs would probably have obtained permission to sectionalise Fortuna Court and in that event the sectional title register and plan would have been opened, registered and that Plaintiff would have been in a position to commence selling units in February 1986.

34.

The parties agree that First and Second Plaintiffs as developers would probably have sold all the sectionalised units by October 1986.

35.

The parties agree that the sale of the sectionalised units would have resulted in a Developers' Profit for First and Second Plaintiffs in the sum of R64 877,00 which sum has been deducted in terms of the valuation formula adopted in Annexure I."

In explanation of the latter portion of para 35, I would point out that annexure "I", which is headed - "Feasibility calculations for Sectional Title Conversion as at 6th December 1985" - consists of certain calculations in terms of which the following figures are arrived at on the basis that the sectional units comprising the development scheme would have been sold at certain prices and at a certain rate over the agreed period of disposal, viz February 1986 to October 1986 (see paras 33 and 34 above):

Present value (as at 6 December 1985) of total sales income	R320 093
Present value of cost of sales	49 773
Net present value	R270 320
Deduct - developer's profit for risk return @ 24%......... NOTE: Sectional Title Act/Rent Act problems	64 877
	R205 443
Add back - rentals for 6 months from 5 flats...........	3 385
Open market value at 6/12/85..	R208 828

(Here I would just add that in arriving at the amount of his award the trial Judge added to this figure of

In explanation of the latter portion of para 35, I would point out that annexure "I", which is headed - "Feasibility calculations for Sectional Title Conversion as at 6th December 1985" - consists of certain calculations in terms of which the following figures are arrived at on the basis that the sectional units comprising the development scheme would have been sold at certain prices and at a certain rate over the agreed period of disposal, viz February 1986 to October 1986 (see paras 33 and 34 above):

Present value (as at 6 December 1985) of total sales income	R320 093
Present value of cost of sales	49 773
Net present value	R270 320
Deduct - developer's profit for risk return @ 24%......... NOTE: Sectional Title Act/Rent Act problems	64 877
	R205 443
Add back - rentals for 6 months from 5 flats...........	3 385
Open market value at 6/12/85..	R208 828

(Here I would just add that in arriving at the amount of his award the trial Judge added to this figure of

R208 828 the statutory amount of R10 000 provided for by sec 12(2) of the Act, about which the parties were agreed.)

Section 12 of the Act prescribes how the compensation payable in respect of property expropriated is to be determined. The relevant portion of the section reads:

> "(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 realised 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;........."

This portion of subsec (1) is identical to the corresponding portion of sec 8(1) of the previous Expropriation Act 55 of 1965 ("the 1965 Act"), save in certain minor respects which are not relevant for present purposes.

It is clear from authority that where the property expropriated consists of land then, in the assessment of "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", account must be taken not only of the use to which the property is being put at the time of expropriation, but also to the property's potential for future development and other possible uses (Thanam N O v Minister of Lands 1970 (4) SA 85 (D), at p 88 D - E, Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk 1973 (3) SA 376 (A), at p 395 H, Bonnet v Department of Agricultural Credit and Land Tenure 1974 (3) SA 737 (T) - all cases decided in relation to sec 8(1) of the 1965 Act; Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council 1979 (1) SA 949 (W), at pp 952-4 - decided in relation to sec 12(1) of the Act; and see generally 10 LAWSA par 74). But it is the property as it is on the date of notice, with its potentialities, that must be valued; the property must not be valued as though the potentiality had been realized and the development taken place (see Southern Transvaal Buildings case, *supra*; cf Lochner v Afdelingsraad, Stellenbosch 1976 (4) SA 737 (C), at p 744 B - F). In the Southern Transvaal Buildings case, *supra*, which also related to the expropriation of a block of flats which had the potential for redevelopment as a sectional title property, King AJ concluded that (at p 955 D - E) -

> ".... one must approach this matter on
> the basis of a sale to a single willing
> buyer of the property with the potential

> for sectional title. If a sectional title register had been opened at the date of expropriation this would have involved the sale of each unit and consideration would then have to be given to the fictitious willing purchaser of each unit. It is, therefore, in my view, erroneous to attempt to value the property on the basis of a sale of individual units to separate purchasers."

In that case the Court had before it the evidence of various valuers. The Court relied on evidence which indicated (a) the total price which a developer could expect to receive for the flats sold as separate units, (b) the costs of development and (c) an amount, representing the profit/risk factor, which a developer would require to be taken into account were he the willing purchaser of the property; and arrived at its determination by deducting from (a) the sum of (b) and (c) and rounding off the resultant figure.

It seems to me, with respect, that the general approach adopted by the Court in the <u>Southern</u>

<u>Transvaal Buildings</u> case, <u>supra</u>, is a correct application of sec 12(1)(a)(i) of the Act to the facts of such a case; and that the method of calculation used in that case, though not necessarily the only appropriate one, is a reasonable and practical one. (See also the remarks of Howard J in the reported judgment at p 540 A - B.) And it seems likely that the parties in the present case had this general approach and method of calculation in mind in compiling the stated case and in arriving at the figure of R208 828 as being the amount to which the appellants were entitled in terms of sec 12(1)(a)(i) in respect of the property expropriated.

Appellants, however, contend that in terms of sec 12(1)(a)(ii) they are entitled to be awarded in addition the amount of R64 877 representing developer's profit. Their argument is that had the expropriation not taken place they would, according to the stated case, probably have obtained permission to "sectionalize" the property, after which a sectional plan would have been registered and a sectional title register opened in respect of the property, with the result that in February 1986 they would have been in a position to commence selling sectional title units; that as developers they would probably have sold all the units by October 1986; that this would have resulted in the accrual to them of a developer's profit of R64 877; and that, therefore, having been deprived by the expropriation of the opportunity to earn this profit of R64 877, they had suffered an actual financial loss in this sum "caused by the expropriation".

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

But appellant's case founders also, in my opinion, on the reef of causation. It has been held by this Court, in relation to sec 8(1)(a)(ii), read with sec 8(4)(e), of the 1965 Act, that it is not sufficient that the expropriation is a causa sine qua non of the alleged financial loss: it must be clear that there is a direct causal connection between the expropriation and the alleged financial loss (see Pienaar v Minister van Landbou 1972 (1) SA 14 (A), at p 25 A-B; also Estate Marks v Pretoria City Council 1969 (3) SA 227 (A), at p 245 A - G). This finding is equally applicable to sec 12(1)(a)(ii), read with sec 12(5)(e) of the Act.

In *Pienaar*'s case, *supra*, the appellant had, prior to expropriation, owned, *inter alia*, two portions of agricultural land, referred to as "Gedeelte 291" and "Gedeelte 292". He had used water from a borehole situated on Gedeelte 292 to irrigate land on Gedeelte 291. Gedeelte 292 was not fully developed and there was not sufficient water from the borehole to irrigate the agricultural land on both portions. The State expropriated Gedeelte 291 only. At the time of the expropriation the appellant had intended constructing a dam which would have irrigated both portions. He had proposed to finance the dam by selling gravel excavated from the basin of the dam. Apart from the construction of the dam itself, this scheme would have entailed the subdivision of another piece of land and the consolidation of the appellant's share thereof with Gedeelte 292. For purposes of assessing compensation Gedeelte 291 was valued on the basis that it constituted dry land ("droë grond"). Appellant disputed this basis of valuation and, in the alternative, claimed that he had suffered actual financial loss in terms of sec 8(1)(a)(ii) of the 1965 Act, represented by the difference between the value of Gedeelte 291 as irrigated land and its value as dry land. This claim was based upon the contention that but for the expropriation he would have carried out his dam-building scheme, which would have provided irrigation water for both Gedeelte 291 and Gedeelte 292. The contention was rejected by this Court. The Court accepted the practical feasibility of the scheme and that it would have been carried out in the foreseeable future. The Court held however as follows (per Botha JA at p 25 E - G):

> "Die feit dat die *nodige* onderverdeling en konsolidasie waarskynlik sonder enige moeilikheid in die nabye toe-

koms goedgekeur en deurgevoer sal word, is relevant by oorweging van die vraag of appellant se skema prakties uitvoerbaar is. Dit is egter geen bewys van oorsaaklikheid tussen die onteiening van Gedeelte 291 en die beweerde geldelike verlies nie. Dit toon inteendeel duidelik dat, voordat die appellant se beweerde geldelike verlies kan intree, daar 'n onafhanklike wilsuitoefening en optrede deur homself en ander persone moet wees. Sonder daardie wilsuitoefening en optrede kan appellant se beweerde geldelike verlies nie intree nie. Net so ook hang die voltooiing van die dam, ofskoon dit 'n prakties uitvoerbare skema is en waarskynlik binne afsienbare tyd voltooi sal wees, hoofsaaklik van die inisiatief en volharding van die appellant en die aanvraag na gruis af. Dit ook is 'n nodige skakel in die veroorsaking van appellant se beweerde uiteindelike geldelike verlies wat van die onteiening van Gedeelte 291 geheel en al onafhanklik is."

The Court consequently held that though the expropriation could be regarded as a causa sine qua non of the alleged financial loss, it could not be said that there was between them a direct causal connection.

It seems to me that, as held by Howard J (see reported judgment at p 540 G - I) the application of the principles enunciated in Pienaar's case, supra, to the facts of the present case leads to a similar conclusion. Before a developer's profit could have been realized by the appellants their application for approval of the development scheme would have had to have been granted by the local authority in terms of Act 66 of 1971; they would have had to apply to the Registrar of Deeds for the opening of a sectional title register, such application to include the sectional plan relating to the scheme; the Registrar would have had to register the sectional plan and open a sectional title register; the renovations and repairs to the flats, apparently contemplated according to Annexure "I", would have had to have been carried out; and the units would have had to be marketed and sold, this entailing considerable time and effort on the part of the appellants and/or their estate agents. This all, as Howard J rightly remarked (at p 540 I), would have entailed "independent volition and action" on the part of appellants and others and thus the alleged loss could not be said to have been caused by the expropriation itself.

The appeal is dismissed with costs.

M M CORBETT

HEFER	JA)	
VIVIER	JA)	CONCUR
STEYN	JA)	
F H GROSSKOPF	AJA)	