

29/96

Case No. 366/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE TOWN BOARD OF THE TOWNSHIP
OF PORT EDWARD

APPELLANT

and

HOBART ANTHONY KAY

RESPONDENT

CORAM: VAN HEERDEN, VIVIER, NIENABER, MARAIS JJA
et PLEWMAN AJA

HEARD: 16 FEBRUARY 1996

DELIVERED: 27 MARCH 1996

J U D G M E N T

NIENABER JA *et*
PLEWMAN AJA

NIENABER JA *et* PLEWMAN AJA:

Introduction

The appellant (the defendant in the court below) is the Town Board of the township of Port Edward, Natal. The respondent (the plaintiff in the court below) was the owner of a property described as "remainder of lot 1015", some 105 hectares in extent, situated within the township of Port Edward. For the sake of convenience we refer to the subject property as "the property" and to the parties as in the court below. Prior to 6 March 1984 the property, then still part of lot 1015, had been zoned "undetermined" in terms of the defendant's town planning scheme. Together with an adjoining lot, lot 1016, lot 1015 was the last extensive coastal holding in the area upon which development had not yet taken place. On 6 March 1984 the defendant resolved as an "interim measure" to amend the zoning of lots 1015 and 1016 to "conservation reserve". It was this change in zoning which, in the result, led to the defendant becoming

obliged in terms of s 67 *sept* of the Local Authorities Ordinance 25 of 1974 (Natal) ("the Ordinance") to acquire the property because the parties had not been able within 5 years to agree on a value as they were required by the Ordinance to attempt to do. The defendant was reluctant to carry out its obligations in this regard and the plaintiff accordingly applied to the Durban and Coast Local Division for relief directing it to do so. On 12 November 1991 Van der Reyden J granted an order which compelled the defendant to expropriate the property. On 10 February 1992 a notice of expropriation was thereupon served on the plaintiff. This expropriation culminated in the present litigation which is an action for an order determining the value of the property in terms of s 12 of the Expropriation Act 63 of 1975 ("the Act"). Thirion J sitting in the Durban and Coast Local Division fixed the value at R3 640 000 and granted judgment in favour of the plaintiff in that amount, together with a *solatium* of R10 000 (in terms of

s 12(2)(a) of the Act), interest and costs. The amount of the award satisfied neither party. Both sought and received leave from the court *a quo* to appeal to this court. Hence the appeal and the cross-appeal.

The Property

The property initially designated as lot 1015, was sub-divided in 1989 into sub 1 (6,18 hectare in extent), sub 2 (22,7 hectare in extent) and the remaining extent of Lot 1015, which is the subject property (105,8 hectare in extent). Sub 1 was retained by the original owners of lot 1015 and sub 2 and the subject property were transferred to the plaintiff. To the north of these properties lies lot 1016 - a triangular piece of land. All these properties are part of the town of Port Edward. The property is separated from portions 1 and 2 by the main South Coast road (the R61) and lies on the inland side of this road. Portions 1 and 2 are to the seaward side of the road and therefore are beach front properties.

The town of Port Edward has been built up as far as the northern boundary of the adjoining lot 1016. Lot 1016 is only partly developed. The property itself is vacant land.

There has been some development on portions 1 and 2 and on ground lying further inland on the western boundary of the property. It must be noted further that the southern boundary of the property and of portion 2 is the Umtamvuna River which is the boundary between Natal and the Transkei. The river in that part which borders the property runs in a cliff lined gorge.

To the west (that is the inland side of the property) is found what is called the Old Pont area - so named because prior to the construction of a bridge this is where the road to the Transkei crossed the river. Upstream from the Old Pont area lies the Umtamvuna Nature Reserve.

Certain developments had at the expropriation date taken place on sub 2, in the Old Pont road area and across the river in

the Transkei. On sub 2 which had been sold off by the plaintiff to a developer, a cluster home development known as Caribbean Estates had been erected. In the Old Pont road area there is a mixed area of industrial land and small holdings where two residential developments known as Eden Wild and Eden Crest have been built. And on the Transkeian bank there is, on the sea front, the Wild Coast Sun - a hotel and casino complex which includes various recreational facilities and a golf course said to have been built to international standards. Further inland there is, on the Transkeian side, an area of informal structures sometimes referred to as a squatter settlement.

The property is described in the judgment of the court *a quo* in the following terms:

"The subject property is about 3.5 km from the central business area of Port Edward. It is on the southern boundary of Port Edward and at the southernmost end of the Natal Lower South Coast. Its southern boundary is the Umtamvuna

river which in that area also forms the boundary between Natal and Transkei.

Alongside the subject property the Umtamvuna river runs approximately south east but for the sake of easy reference I shall take it as running due east and I shall fix all other directions accordingly.

The subject property is bounded on its eastern side by the main south coast road (national road) which is carried over the Umtamvuna by a bridge at the south-eastern corner of the property. Across the national road from the subject property and between the national road and the sea lie sub 1 and sub 2 of Lot 1015. On sub 2 has been established Caribbean Estates, a chalet development, a photograph of which forms part of exh MM.

The subject property's frontage onto the Umtamvuna river is just short of a kilometre in length. Cliffs covered with riverine forest rise steeply from the river bank (as can be observed on a photograph, part of exh MM) to a height of about 75 feet. From above the cliffs the terrain rises gently in the direction of the apex in the north western corner of the property. The greater part of the property is gently undulating.

The western part of the subject property is at an elevated level and the land slopes gradually from there in the direction of the national road and also southwards towards the river and northwards towards Lot 1016, so that there is a ridge

down about the central part of the property. Most parts of the property enjoy good sea views even though some are distant views. The portion next to the national road does not have a sea view. The more southerly portions have views over the Transkei across the Umtamvuna.

Access to the Umtamvuna lagoon down the cliffs can be had at one point only - just west of the bridge - down a steep path.

The subject property is undeveloped land and appears never to have been farmed - except that it might have been used for grazing. The vegetation on the property is of a rich and diverse nature. The central high lying area is covered with watsonia/protea/grassland which appears to be in its pristine state. This area has a high conservation value - so has the riverine forest along the cliffs above the Umtamvuna river.

Immediately to the west of the national road is an area of disturbed red desert which is infested with casuarina trees. This area which covers roughly one fifth of the property appears white on the aerial photograph in exh Q. The area has no conservation value. It was referred to in the evidence as the southern red desert.

Near the western boundary of the subject property is an oval shaped disturbed area as can be observed on the aerial photograph, part of exh Q. This area has been referred to in the evidence as the western (sometimes northern) red desert. It appears to have been used as a borrowpit and is largely

denuded of vegetation. It has no conservation value.

Two wetlands have been identified on the property. One is north of the western red desert. It drains into a tributary of the Zolwani river which runs across Lot 1016 and into the Zolwani lagoon at the northern boundary of sub 1 of Lot 1015. Conservationists regard it as important to the successful management of the lagoon that the catchment area of the Zolwani - and thus also the wetland - should not be disturbed. Any development of the subject property would have to take account of the need to preserve and properly manage the wetland.

The other wetland is on the subject property's boundary with Lot 1016 and is next to the eastern (or southern) red desert. This wetland is an eroded area which is in need of rehabilitation.

Adjoining the subject property on its western side and close to the river is a cluster housing development, Eden Crest. This development is on the edge of the escarpment overlooking the Pont area. Beyond the Pont area to the west, the Umtamvuna State Forest commences. Further north of Eden Crest and on the western boundary of the subject property are a number of smallholdings. On its northern boundary the subject property adjoins Rem of Lot 1016 which is unimproved land with some old banana fields in evidence. Like the subject property, Rem of Lot 1016 is reserved for conservation."

Port Edward itself is what is described as a resort industry service orientated town. What this seems to mean is that it is a small seaside town with no significant industrial or business centre beyond that which is required to service the various seaside resorts in the area. It has a distinct retirement component. There were growing pressures to allow further resort and residential development although there were still many undeveloped stands in the town. The demand for expansion created its own pressures. So, for instance, the defendant was at the relevant time involved in litigation relating to the need for a refuse site. There was also a demand that the town expand its sewerage system. Not all the developments in its area were wholly desirable or appealing or even lucrative. On sub 2 of lot 1015 there was the development known as Caribbean Estates about the appearance of which the witnesses and Thirion J (who saw it during an inspection *in loco*) were less than complimentary. Eden Crest and Eden Wild were likewise

enjoying but limited success and across the river the Wild Coast Sun was experiencing a falling demand for accommodation and the golf course a reduced demand for its use.

The Zoning of the property

In evidence the history of the plaintiff's town planning scheme and in particular the zoning of the subject property was investigated in some detail. It is unnecessary in this judgment to do more than summarize the more significant events.

As has been stated earlier the property was not originally subject to a particular zoning but became zoned for conservation in terms of the defendant's town planning scheme. This was because the provincial authorities had long been concerned to plan and control development on the lower south coast. From time to time general plans were prepared to regulate this development - the first being the "Draft Regional Plan for the South Coast" of 1974 published by the Town and Regional Planning Commission, Natal,

which recommended that development along the coast "should not be continuous but ... interspersed with open spaces".

This policy was in place in 1983 when one Holmes, the acting chairman of the defendant (then known as the Port Edward Health Committee) approached the plaintiff with the suggestion that he purchase lot 1015 and develop it along the lines of the San Lameer development. (The San Lameer complex, situated to the south of Marina Beach, had been developed in phases since the 1970s. It consisted of a number of preconstructed chalets purchased as such by owners, a hotel, restaurants, sporting and recreational facilities and a golf course, originally 9 holes, later expanded to 18 holes with a separate club house. Apart from the golf course San Lameer's main attractions were a lagoon and access to the beach.) The plaintiff saw the potential of the property as a holiday resort and discussed his ideas with the Health Committee which wrote to him, on 29 July 1983,

"Your letter dated 19 July 1983 was tabled at a Meeting of the Committee on 26 July 1983 and it was unanimously agreed to support your application for the proposed development of flats, hotels, etc. on Lot 1015 Port Edward."

On 23 July 1983 the plaintiff and two associates thereupon reached agreement with the owner of lot 1015 to purchase it for R2 million. (The actual deed of sale in terms of which the plaintiff eventually took transfer of sub 2 and the remainder of lot 1015 was only signed some time thereafter.) Unbeknown to the plaintiff the defendant, at the urging of the Town and Regional Planning Commission, had already resolved on 13 July 1983 to amend the defendant's town planning scheme to rezone lots 1015 and 1016 as conservation areas. This was effected on 6 March 1984 when these two properties were zoned as "conservation reserve". One consequence of this zoning was that the plaintiff was compelled, in order to obtain the requisite consent to develop a private township on lot 1015, to make application to the provincial authorities for a

so called need and desirability certificate in terms of s 11 *bis* of the Natal Town Planning Ordinance, 27 of 1949 (N). Thus commenced a sorry tale of obstruction and frustration, culminating in the expropriation of the property in February 1992, the plaintiff intent on developing the property or parts thereof as a holiday resort and the authorities intent on preserving its natural resources and sensitive ecosystems for posterity. It is not necessary for present purposes to attempt to follow the tortuous course the exchanges and negotiations took over the next few years. All that needs to be mentioned is, firstly, that the conservation policy of the provincial planning authority was further articulated in 1985 in a policy document entitled "Provincial 'Green Wedge' Policy" with specific reference, *inter alia*, to lot 1015 and that this policy was vigorously pursued. Secondly, that the plaintiff, in the face of considerable opposition, also from the defendant, nevertheless succeeded in obtaining consent in 1986, amplified in 1988, to develop that

portion of lot 1015 which eventually became sub 2. Thereafter in 1986 the plaintiff, as stated earlier, sold off the proposed sub 2 of lot 1015 for R3,6 million. It was on that property that the development known as Caribbean Estates took place.

The dispute about the appropriate zoning of the remainder of lot 1015 continued however. It was the defendant's efforts to impose a split zoning of "part private conservation and part agricultural" on the property, once again inspired by the Green Wedge policy, which precipitated the application for a *rule nisi* which Van der Reyden J eventually confirmed.

The role that the Green Wedge Policy plays in this appeal is that it gives formal recognition to a development policy which would, so it was argued, have had an important effect in the eyes of the notional willing buyer whose attitude has to be considered in the valuing process of s 12 of the Act. Much argument was directed to this issue which we will discuss later in this judgment.

Problematical aspects

The plaintiff appreciated that there were special problems attendant upon the determination of the value of the property at the expropriation date. The nature, size and location of the site, its ecologically sensitive areas, its history and its treatment by the provincial authorities, made it, in particular, difficult to trace truly comparable transactions. All concerned were moreover agreed that it was not suitable for farming purposes and that farming it, say, as a banana plantation would negate if not destroy its best features, namely its setting and surrounds.

As was stated in *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 516:

"It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind

of a purchaser, the present cost of erecting the property, the uses to which it is capable of being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way he would to the best of his ability be fixing the exchange value of the property."

The plaintiff presented his case as he was entitled to do in the form of a draft scheme of development, more particularly a golf course estate, in order to demonstrate the development and profit potential of the site. It was contended on behalf of the plaintiff that the "willing buyer" and the "willing seller" postulated by s 12 of the Act would have approached the notional sale of the property on no other footing. This necessitated, firstly, a comparison with other golf course estates in Natal such as San Lameer near Marina Beach, Selborne Park Estate near Pennington, Mount Edgecombe Country

Club Estate near Durban and Prince's Grant near Stanger, to illustrate the demand for and the economic viability of such a project; secondly, an analysis of more or less concurrent sales of large scale properties in the area with resort potential to indicate the approximate order of prices paid for such properties in the area; and thirdly an elaborate exercise to arrive at what is known as the residual land value of the property. For present purposes this can be described as a calculation and capitalization of the profits expected to be generated by the scheme and the deduction therefrom of the total cost (cf *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A) at 723F-G; *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A) at 895E). It is a method which was readily conceded by the plaintiff not to be a valuation method as such. It was employed by the plaintiff simply in support of the value his valuer placed on the property, based on other transactions to which major adjustments had to be made in order to render them

more or less comparable.

Two approaches to the problem

Notwithstanding certain common ground between the parties their different starting points translated into a significant difference in the value each placed on the property.

The plaintiff's case, in brief, was that the subject property had the potential of being developed as a golf course estate along the lines of the golf course estates in Natal mentioned earlier and elsewhere in South Africa. To establish that potential the plaintiff employed a team of experts who produced what was described in the trial as Leggo plan No. 7. This consisted of a sophisticated and elaborate conceptual layout of an 18 hole golf course with a club house, sporting facilities and 427 sites destined for chalets and cluster housing. It was designed to preserve and protect the ecologically sensitive areas in an attempt to allay the concerns of the planning authorities in that regard. According to this plan 70

out of the 105 hectares would become available for marketing to members of the public, assumed to be largely from the Transvaal, with a sufficient income to enable each of them to afford a holiday home at the coast. On the basis of certain transactions said to be comparable which the plaintiff's expert valuer Labuschagne identified and analysed a hectare value of R120 000 for the 70 marketable hectares was derived, totalling R8 400 000. (The remaining 35 hectares, consisting of the ecologically sensitive cliffs, riverine forests and wetlands were not accorded a separate value but were regarded as attractions contributing to the overall value of the 70 marketable hectares.) Labuschagne made an allowance for the period he estimated it would take to obtain the consent of the various authorities, by way of a need and desirability certificate, to proceed with the development of the property. He estimated this period to be from nine months to one year, during which the project would remain on hold. He calculated that this would lead to a

reduction in the value of R120 000 to R100 000 per hectare.

Labuschagne's ultimate valuation figure was therefore R7 million at

which, he believed, a sale of the property would have been

concluded on 10 February 1992, the date of the notice of

expropriation. This estimate, the plaintiff contended, was supported

by what is called an Internal Rate of Return calculation prepared by

the witness, Hyatt, showing that on an investment of R7 million for

the purchase of the property a rate of return of 45% could be

expected. Finally, and for purposes of his cross-appeal, the plaintiff

was prepared to allow a further discount of 15% for the risk of not

being able to obtain full development rights. It is formulated thus

in the heads of argument:

"The value of the 70 hectares usable land is, therefore, depending on precisely what period is taken for the realisation of the rights to develop the property, between, say, R6 million and R7 million. If the amount so arrived at has to be further reduced for the discount factor referred to in the previous sub-paragraph, by, say, 15%, a value of between

R5 million and R6 million is indicated. The plaintiff therefore fixes the amount claimed for purposes of his cross-appeal at R5 million."

The defendant had a different point of departure. Based on the evidence of its expert valuer, Fitchett, it was submitted that the notional informed buyer may have recognised some potential for low impact, low density development and exploitation of the property in the long term, by virtue of its unique setting and particular recreational and natural attributes, but that that potential was so vague and so far removed in the future that no potential buyer would have been prepared to invest more in the property than "rock bottom prices" to which, at best, something had to be added for its potential for future development. Although Fitchett readily conceded that the property was not suitable for agricultural purposes - indeed that farming activities on it would destroy the very potential it may have for future development - he valued it on the

basis of agricultural land, applying values he extracted from comparable transactions of farm land in the vicinity during the relevant period. He allowed an arbitrary 20% for the potential of future development. On the assumption that the necessary consents for future development would be obtained somewhere in the distant future his maximum figure was R1 260 000. This was the figure which the defendant agreed, on the occasion when leave to appeal was granted, had in the meantime to be paid to the plaintiff.

The proof of potential

The plaintiff claimed and the defendant conceded that the property had a potential for future exploitation which had to be taken into account in valuing it. The dispute is as to what that potential is, when it would have been realisable, to what extent the negotiating parties would have had regard to it and how it is to be translated into a figure.

A party who asserts that a property has a particular potential

must prove it (*Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens* 1976 (4) SA 589 (T) at 608G-615F). By potential is meant a use, additional to its current use, for which the property is suited and reasonably capable of being put in the future (cf *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer Vizagapatam* [1939] 2 All ER 317 (PC) at 321H-322B; *South African Railways v New Silverton Estate Ltd* 1946 AD 830 at 838; *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) at 88D-E). Such proof has three components: (a) that the potential exists; (b) that a willing buyer and seller would have taken it into account in fixing the price (*Thanam NO v Minister of Lands, supra*, at 88F; *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) at 744G-745G) and (c) the quantum. Component (a) must be shown as a reasonable possibility (*Minister of Water Affairs v Mostert & Others, supra*, at 723C; *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 627G-629C;

Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk 1973 (3) SA 376 (A) at 384H).

Component (b) must be proved on a balance of probabilities (*Jacobs v Minister of Agriculture, supra*, at 627G-629C; *Thanam NO v Minister of Lands, supra*; *Bonnet v Department of Agricultural Credit and Land Tenure, supra*; *Van Zyl v Stadsraad v Ermelo* 1979 (3) SA 549 (A) at 573D-H). Once (a) and (b) have been conceded or established there is no *onus* in the narrow sense in respect of component (c) (*Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens, supra*, at 610F-611B; 612G-613B). Where there are several possibilities, all reasonable, for which the property is suited, the party relying on the potential is entitled to select from amongst them the one which is most advantageous to him as being the "highest and best use" to which the property can be put, provided of course that such use would have occurred to both the notional parties and would have been accommodated by them in their

negotiations about the price. But such potentiality must not be inflated: it remains a mere potentiality, not a reality (cf *Davis and Another v Pietermaritzburg City Council* 1989 (3) SA 765 (A) at 769H-770B), and as such it is at best a bargaining chip in the notional negotiations.

In the instant case both parties accepted that the notional parties to the notional sale would have recognised and therefore would have made some allowance for the development potentialities of the property, having regard to its location, size and special attributes. The dispute, as stated earlier, was therefore not so much about the existence of any potentiality but as to its nature and the extent it would have influenced the parties in their negotiations. According to the plaintiff they would have regarded it as a potential golf course estate along the lines of the Leggo scheme; according to the defendant nothing so specific would have occurred to them and if it did it would have been discounted because the concept was

physically, economically and legally flawed.

When the plaintiff purchased lot 1015 he clearly had not contemplated a marketing exercise on the scale of the Leggo plan. His prime concern was to develop what eventually became sub 2 of lot 1015; and in order to obtain the rights to do so he was at one stage prepared to trade off to the provincial authorities or the Natal Parks Board the entire area to the west of the main road (which is essentially the subject property). It was only after the forced acquisition of the subject property by the defendant that it became necessary for the plaintiff in order to claim compensation to investigate its potentiality. And it was for that purpose that he engaged Leggo and his team of experts to advise him.

According to Leggo the only potential purchaser, given the size of the site, would have been an institutional buyer. That opinion was not seriously challenged on behalf of the defendant.

One must therefore postulate two fully informed parties, one

of them an institutional buyer with the know-how and means to embark on a large scale development, negotiating in good faith, both of them familiar with the history of the property and briefed with all the various ecological and feasibility studies that were placed before the court *a quo*. In those circumstances it is inconceivable that the possibility of developing the resort potential of the property would not have occurred to them. A San Lameer type of development was, after all , mooted even before the plaintiff bought the property. And if it occurred to them it would have been discussed and that discussion, in our view, would inevitably have led to a debate about the merits and demerits of a golf course estate.

Once it is accepted that the debate about the price would have been conducted between the owner and an institutional buyer at the level of a possible golf course estate, in other words, that the property, to the knowledge of the seller, was purchased as being capable of a large scale marketing operation by an investor with the

means at its disposal to undertake it, it refutes Fitchett's (and hence the defendant's) approach that the seller would have been prepared to accept "rock bottom prices" with a token premium for the distant prospect of a development or project of some unidentified kind.

Counsel for the defendant laid great stress on a passage in the evidence of the plaintiff's valuer, Labuschagne, where he stated:

"Mr Southwood: Now, if you had a cash sale without rights, what allowance would the potential purchaser have made for the fact that the number of rights and the time in which they would be granted would be uncertain? ---

That's speculation, M'Lord. It was the same - the same answer to the question on Friday with regard to the purchase of sub 2 of 1016. I just don't know and I think it defies - it would defy any valuer. It would - it would - it's just not capable of quantification. You just don't know. Primarily because these things don't happen in the market place. That is - that is a hypothetical situation. Buyers don't buy blind unless they're buying at absolute rock bottom prices and that's not the way I've approached this valuation. I don't think one has to approach it that way.

Now, when you say they don't buy blind unless they buy at absolute rock bottom prices, what you're saying is that

because of that substantial risk, there's a very substantial discount in the price over and above what you might get with rights? -- There would be, M'Lord, undoubtedly. Nobody in his right mind would go and buy something like this, spending this - anticipating spending this kind of money, both buying the land and investing in it and pay a price which doesn't reflect the risk if the property had no rights. He would buy it at the next best level of potential which, in this case, may well have been agriculture. But he would do that to safeguard himself. He wouldn't do it because he believed that was the price. It's the fall back situation."

We do not think that the passage bears out the meaning which the defendant's counsel sought to attribute to it, that is to say, as a concession that in the circumstances of this case the notional seller would have been compelled to settle for rock bottom prices. Labuschagne was dealing with a hypothetical situation, namely that there were no rights and indeed no prospects of any rights being granted to the property for future development. A concession in the terms framed by counsel would have been contrary to the entire tenor of Labuschagne's evidence, indeed, it would be contrary to

Fitchett's own concession that the parties would have made some allowance for future potential.

The court *a quo* said of Fitchett's approach:

"The approach adopted by Fitchett was to value the property as agricultural land which may be subdivided into 2 ha small holdings and then to adjust the value upward by 20% to cater for its long term potential for development as a golf course estate. I find no virtue in this approach. It is unrealistic to value the subject property as agricultural land. It has never been used for farming. The Administrator would not have granted permission for its subdivision into small holdings. To have done that would assuredly have led to the destruction of the indigenous vegetation."

We agree. In our view both parties in negotiating a price would therefore as a matter of probability have been alive to the possibility that the subject property had a resort potential and was in principle capable of development as a golf course estate and both parties would have had regard to the necessity of protecting the ecologically sensitive areas, not only because this would have been

insisted on by the authorities but also because it would be in the developer's own interest to maintain, nurture and promote the natural attractiveness of the property as a potential selling point for its own project.

The next question is how the notional negotiating parties would probably have treated the Leggo plan. According to counsel for the defendant the plan would have been ignored because (a) of its physical constraints (b) it was not economically viable and (c) of certain legal restrictions which would have hampered or curtailed its implementation.

It is necessary to examine each of these objections.

(a) Physical constraints

The Leggo plan No. 7 is, as stated earlier, an elaborate and detailed design of a golf course estate, said to be a low key development with a minimal adverse impact on the ecologically sensitive environment. It was produced as a result of a joint effort

by a town planner, a property consultant, a valuer, a consulting engineer, a consulting geologist and soils engineer, a specialist golf course designer and a firm of quantity surveyors. A draft was submitted to an environmental development consultant, Nicolson, who made certain suggestions to accommodate the ecologically sensitive areas such as the riverine forest and the wetlands. Nicolson in turn submitted the concept to Dr Cooper of the Wild Life Society who expressed his support for it. There was some cross-examination directed to show that the concept could not have been a practical one because of a lack of an adequate water supply for the golf course and because of anticipated difficulties with the disposal of effluent but these criticisms were, in our view, countered by the plaintiff in a manner that would have satisfied a potential purchaser that from a purely physical point of view the vision was viable.

(b) Economic viability

The next question is whether the parties would have regarded the scheme as economically viable. Hyatt did the exercise on behalf of the plaintiff on the basis of the Leggo layout, his own projection of achievable sale prices, the quantity surveyor's estimates of costs and Labuschagne's valuation of the land at R7 million. He assumed a six year development period and a four year selling period, with a 50% sales rate in the third year, a 30% sales rate in the fourth year and the remaining 20% over the last two years of development. He also assumed that the need and desirability application would be successfully processed during the course of the first year of development. A further assumption was a sales commission for marketing agents at 3% of selling prices. On the basis of these and other assumptions, estimates and projections he concluded that the scheme would generate a minimum yield of 45%. Hyatt's calculations were not seriously challenged but his assumptions were.

Some of these will be discussed later in the judgment. For the present it suffices to say that the notional purchaser, primed by the seller with a study such as that of Hyatt, would have insisted, and the seller would have been compelled to concede, that it remains in essence a paper exercise and that considerable allowances would have to be made for uncertainties and contingencies.

(c) Legal Restraints

Counsel on both sides were agreed that anyone wishing to embark on a scheme as ambitious as that envisaged in the Leggo plan, involving the establishment of a private township, would have been required to apply for a "need and desirability" approval. Such an application might, as happened in this case in the past, have involved a public hearing. Both the necessity for development purposes and the desirability in the public interest (see s 11 *bis* of the Natal Town Planning Ordinance, 1947) of permitting the establishment of a township on the property in accordance with the

proposed scheme would have been in issue. The application would have been considered by the Townships Board which would have made a recommendation to the Administrator-in-Executive Committee, with whom the final decision lay. One of the matters receiving attention would have been the zoning of the property. Clearly it would have required a change of zoning from "conservation reserve" to one accommodating the establishment of a township in accordance with the conditions laid down by the provincial authorities.

It was argued on behalf of the defendant that the notional negotiating parties would not have given serious consideration to the Leggo scheme since both of them would have been aware that the Natal Provincial Administration would either not have agreed to its implementation or, if it did so agree, would have imposed conditions which would have rendered it no longer economically viable.

The plaintiff, in turn, sought to counter this argument by invoking s 12(5)(f) of the Act. It reads:

"Any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account."

The rationale for the section is plain: any appreciation or depreciation in the value of the property which, broadly speaking, is a by-product or spin-off of the expropriation, is to be ignored (cf generally, Gildenhuis *Onteieningsreg* 155-160; Jacobs *The Law of Expropriation in South Africa* 161-168; 10 *Lawsa* par. 73). According to the plaintiff any depreciation in the value of the property (and hence in the notional price) which was due to either the current zoning as "conservation reserve" or the Green Wedge

policy, was to be ignored. The argument seems to be this: because both the Green Wedge policy and the current zoning aimed at nature conservation, and this was also the reason for the expropriation of the property, any depreciation in the value of the property as a result of the Green Wedge policy or the zoning was "due to the purpose ... in connection with which the property is being expropriated" and as such must be ignored. To the extent that either the policy or the zoning would (i) create a risk that the need and desirability certificate might not be granted or (ii) lead to restrictions in the conditions imposed when the need and desirability certificate was granted or (iii) cause an additional delay in obtaining such a certificate, and having a negative impact on the negotiated price, such depreciation or diminution, so it was argued, had therefore to be disregarded.

There is a difference, in our view, between the effect of the Green Wedge policy, on the one hand, and the zoning, on the other.

The Green Wedge policy was formally adopted in 1985 which was after the respondent's acquisition of the property. But it was no more than a concrete formulation of what had been the consistent policy considerations of the provincial authorities since at latest 1974. With or without the Green Wedge Policy, as adopted in a formal document, the notional buyer and seller would at the expropriation date have had to bear in mind the authorities' long standing opposition to both continuous ribbon-like development and its opposition to permitting development on a "leapfrogging" basis, where this would lead to or further ribbon-like development. Another significant feature of the Green Wedge Policy is that it was a policy of general application and even though the property is identified in the formal document, not a policy, unlike the zoning, related to the development of the specific property.

Counsel for the plaintiff strongly relied on *Myers v Milton Keynes Development Corporation* [1974] 2 All ER 1096 (CA). In

that case the authorities, acting pursuant to the New Towns Act 1965, in 1966 published a master plan containing certain proposals for the establishment of a new town on a 22 000 acre rural site. The site included the whole of the plaintiff's Walton Manor estate. Amongst the published proposals was the compulsory acquisition of that estate. In terms of the master plan it would remain untouched for the first ten years whereafter it would become a residential area. In 1970, four years after the publication of the master plan, the property was, to use our terminology, in effect expropriated. The ten year period thereupon commenced. The Court of Appeal was primarily concerned with the methodology of the valuation in that case. Planning permission to realise the potential of the land, it was held, should be assumed because of a statutory presumption (s 15 of the applicable statute). In addition the so-called *Pointe Gourde* principle had to be applied.

The *Pointe Gourde* principle derives from the case in which

it was formulated, *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (PC). It was founded upon Section 11(2) of the then applicable Land Acquisition Act which provided that "the special suitability ... of the land taken be not taken into account (in awarding compensation) if that purpose is a purpose to which it could be applied only in pursuance of statutory powers". What was then in question was an enhancement of value as a result of the very scheme for which the acquisition had taken place. (A case of a depreciation in value obviously would follow the same principle.) It was held that the increase was entirely due to the scheme. (See the opinion of Lord MacDermott at 572.)

In the *Milton Keynes* case, *supra*, at 1100g Lord Denning MR referred to the principle as follows:

" '[That] principle', said Lord Cross of Chelsea, '... does not affect the interest to be valued, but only its value when

ascertained.' (See *Rugby Joint Water Board v Footitt* [1972] 1 All ER 1057 at 1095). It applies so as to ensure that any increase in value due to the scheme is to be left out of account".

It is that principle which underlies s (12)(5)(f) of our Act. At 1102f-g the application of the principle is discussed in these terms:

"It is apparent, therefore, that the valuation has to be done in an imaginary state of affairs in which there is no scheme. The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing - a country planning authority which will grant planning permission of various kinds at such times and in such parcels as it thinks best, but with an assurance that in March 1980 planning permission would be available for the residential development of the Walton Manor estate."

The support which counsel for the plaintiff sought to extract

in the plaintiff's favour from the *Milton Keynes* judgment is this: the policy or "scheme" in pursuance of which the property in the *Milton Keynes* case was expropriated was formulated long before the expropriation took place. The value of the land was accordingly depreciated "from the moment the scheme was hatched" (to quote from his heads of argument). Any such depreciation must therefore be disregarded, which in effect means (and we again quote from the heads of argument) that

"the purpose of the NPA and the defendant to preserve or acquire the property for conservation purposes in terms of the 'Green Wedge' policy and every step taken in pursuance of that policy must be disregarded in their entirety, particularly when the granting of the required consents and an N & D certificate is concerned."

In our view the judgment in the *Milton Keynes* case does not support that submission. We say so for these reasons:

i) the appreciation in value in the *Milton Keynes* case was

entirely attributable to the scheme as such; think away the new town scheme and there would be no enhancement in the value of the property. In the instant case any depreciation in value would not be exclusively attributable to the formalisation of the Green Wedge policy as such; think away the formulation of that policy in 1974, reiterated in 1985, and the authorities would still have been concerned for the public good to preserve the unique environment of the property. That is because the urge to conserve is not the result of the Green Wedge policy; the Green Wedge policy is the result of the urge to conserve.

ii) In the *Milton Keynes* case the policy (the scheme) was formulated by the expropriating authorities and the eventual expropriation was an inevitable step in the implementation of that scheme. In the instant case the Green Wedge policy was not formulated by the defendant but by the Natal Provincial Administration which was not the expropriating authority; nor was

the eventual expropriation by the defendant a necessary step in the implementation of the Green Wedge policy. In fact the defendant was a decidedly reluctant expropriator which strenuously resisted acquiring the property until it was compelled by a court order to do so pursuant to s 67 *sept* of the Ordinance.

iii) There is this further consideration: in the *Milton Keynes* case the plaintiff was already the owner of the property when the scheme was conceived; in the instant case the underlying policy as later formally enunciated predated the plaintiff's ownership. Even if the mere announcement of that policy by the provincial authorities had the effect of depressing the price, such devaluation must have been reflected in the price which the plaintiff thereafter paid for it. The plaintiff in his capacity as purchaser therefore had the benefit of that depreciation; to disregard the depreciation in his capacity as seller would be to benefit him in a manner clearly not intended by the section.

For these reasons s 12(5)(f) cannot, in our view, be invoked in relation to the general policy of the authorities to be protective of the environment.

The approach is different, however, in respect of the zoning of the property as "conservation reserve". That zoning was by the defendant itself in pursuance of its own policy of nature conservation in respect of the particular property. That, in a broad sense, was also why the property was eventually expropriated. Zoning (unlike the policy statement known as the Green Wedge policy) was a legally enforceable encumbrance relating to the property. Its effect would be to inhibit the marketing of that property, whether by way of implementation of the Leggo scheme or otherwise. This is a restriction that the owner (the plaintiff) would have had to overcome. As such the zoning does result in a depreciation in the value of the property. The necessary link between the zoning, the depreciation and the expropriation is

therefore clear: the common denominator, the "purpose", was nature conservation. Any devaluation or diminution due to the zoning or to the necessity of its removal or amendment, would therefore in principle have to be disregarded.

The establishment of a township on the property in accordance with the Leggo scheme would have required a change of zoning from "conservation reserve" to something else. In *Minister of Agriculture v Estate Randeree and Others* 1979 (1) SA 145 (A), a case involving the expropriation of vacant land previously zoned "special residential", later zoned "educational I", it was stated at 153F-154B:

"It will be apparent that the approach adopted by the trial Judge differs somewhat from that which I have held to be the correct one. In essence, SHEARER J decided to ignore the zoning for E 1 and to make his determination on the basis of what would otherwise, in the view of the notional buyer and seller, have been the probable zoning of the two properties under the scheme. In terms of this judgment the actual zoning cannot be ignored but the need in this case to

postulate an open market and a plurality of buyers demands that in determining compensation regard must be had, *inter alia*, to what potential buyers would consider to be the prospects of obtaining a special consent or a rezoning."

The notional parties would therefore have been entitled to assume that consents in one form or another would eventually have been obtained, but they would have also had to make allowance for the procedure and the time it would require to overcome that restraint. In the instant case a need and desirability application would in any event have had to be launched and in the course of that application the question of the current and future zoning would have had to be considered. No extra time or effort would therefore have had to be devoted to the matter of the zoning. In the result any possible diminution in the value due to the specific zoning at the time, or its removal, was overtaken by the requirement of a notional need and desirability application which would largely cover the same ground. Consequently there is no need, as it happens, to invoke s 12(5)(f)

of the Act.

As far as the Green Wedge policy is concerned the court *a quo* cannot in our view be criticised for its approach that the notional negotiating parties would have had regard to the inhibiting effect the Green Wedge policy might have had on the approval of the Leggo scheme in a need and desirability approval application.

Factors having a negative impact on the value of the property

The court *a quo* identified a number of what may be termed "negatives". Some we have mentioned earlier in this judgment. In the context of the notional need and desirability application these would be, in particular, (i) the risk that the necessary consent would not be granted (ii) the risk that the consent, if granted, would be so attenuated as to make the project economically unattractive (iii) the additional delay inherent in the consideration of the Green Wedge policy and its impact on the subject property.

The negotiating parties would have had regard to these

negative factors. The notional purchaser would have laid great stress on them and the notional seller would have been compelled to make concessions. The ultimate price would have been a compromise.

The value to be placed on the property

What remains is that consideration must now be given to the further process followed by the court below in determining the value of the land with due regard to "the negatives" referred to above.

Having rejected Fitchett's approval and hence his valuation based on agricultural values the court *a quo*, while critical of many of Labuschagne's assumptions, took at its starting point Labuschagne's valuation of R120 000 per hectare.

Labuschagne in evidence suggested that a price of R120 000 per hectare for the disposable 70 hectares of land was justified on a consideration of sales which he had traced in developments of, broadly speaking, a similar character. The learned judge discusses

5 of the properties or developments, namely, the conditional sale of sub 2 of lot 1016, in extent 25.7 hectares; the sale of sub 1 of Inhlanhlinhlu No. 4647 (referred to as "Koelwaters"), 17,8 hectares in extent, and of Koelwaters extension, approximately 9 hectares in extent; the Joymac property which was expropriated in August 1988, with a usable portion of 27 hectares; the sale of sub 2 of lot 1015 (on which the Caribbean Estate was developed); and the San Lameer extensions, being a number of purchases made to enlarge the golf course on the San Lameer property. Some of the transactions he considered to be not sufficiently similar to warrant consideration. The remainder he held exhibited features which would call for considerable adjustments in order for them to be used for comparative purposes. The per hectare valuations of these properties in any event varied from R95 000 to R228 000. In the result the learned judge rejected Labuschagne's estimate of R120 000 and fixed the per hectare value at R52 000.

It is, with respect to the learned judge, not clear how he determined this figure. His grounds for rejecting the properties mentioned by Labuschagne and for suggesting that the values obtained called for adjustments are, we think, sound. Subject to that observation we nevertheless feel that some broad guidance is to be gleaned from these per hectare values. They all establish the fact that the agricultural value of the land suggested by Fitchett cannot be the starting point. They also show that a per hectare value of R120 000 as a starting point in an exercise directed to determining the value of the property is not an unreasonable one provided that thereafter one takes adequate account of the many factors which call for adjustments to be made. In the main the factors to be considered, where one is concerned with a proposal which is as yet only a proposal on paper, are those which most directly relate to the timing of the development and to the cost which would have to be incurred in order to realise the proposal. This in our view can be

done either by attempting to give weight to those factors by adjusting the per hectare value or perhaps more advantageously by bringing considerations which call for a modification of the notional price into account when considering the value of the property as a whole. We propose to adopt the latter approach and take as our starting point, while recognizing the validity of the court below's criticisms, Labuschagne's figure of R8 400 000, which represents R120 000 per hectare for 70 hectares.

As stated earlier Labuschagne reduced his starting figure to R7 million to allow for the period of one year to obtain the necessary consents in order to proceed with the development of the scheme. This figure was further reduced by the plaintiff in argument to take account of the risk of not getting full developmental rights. We think that this latter concession is sound in principle. The learned judge was, moreover, clearly right in holding that the evidence fell short of establishing it as a probability

that the requisite need and desirability certificate would have been obtained within a period of only 9 months to a year. He held that a period of two years would have been more realistic. The finding of the learned judge in favour of such a reduction seems to us to be justified on the probabilities and we have found ourselves obliged to determine, as best we could, what adjustments would be appropriate. Indeed, we were invited by counsel to take upon ourselves the duty of so valuing the property. The most practical way for us to do so is to attempt to put a numerical value on the factors found by the learned judge to be those calling for an adjustment to Labuschagne's starting figure. The extended period found by the learned judge, taken in conjunction with the risk that the developer might not get the full rights he asks for, e.g. 300 sites instead of 427, warrants a discount of 25%.

The learned judge also said that the length of the selling programme (which was assumed by the plaintiff's witnesses to be

within 3½ years) and the percentage commission which was allowed for selling agents, were unrealistically low. He did not in his judgment express in numerical terms what adjustments he made for these and the further contingencies that development might not commence immediately and, having commenced, that sales might lag, but obviously these were grounds for a further adjustment and account, at least in part, for his lower value. The numerical consequence which we have concluded should be made for these contingencies is a further 20% discount.

There are certain other findings by the learned judge which we hold to be justified and which we must similarly translate into a numerical value. These are that Labuschagne's estimate of the levies was far too low having regard to the anticipated deficit on the golf course and the levies charged elsewhere at such estates, for instance, at San Lameer. This would have had a negative impact on the price. Another finding by the learned judge which we hold to

be correct is that the cost estimates for the installation of sewerage was insufficient. On the same basis as above a further deduction of some 3% would be justified for these underestimations. If this is done one arrives at an overall reduction of the order of 48% which, on R7 million, produces the figure of R3 640 000 which was the court *a quo's* estimate.

In the result we have not been persuaded that the learned judge erred when determining the value of the property. Once the approach of the defendant's valuer has been found to be unacceptable and that of the plaintiff's to be vitiated by an inadequate allowance for what we have described as the negative aspects, the evidence permits of no other procedure than the one, however rough and ready, which we have followed.

In our view both the appeal and the cross-appeal must accordingly be dismissed.

Costs

The parties were agreed that in the event of both the appeal and the cross-appeal being dismissed the order as to costs should be that the appeal and the cross-appeal are both dismissed with costs.

There is one further matter which merits mention. At the commencement of the hearing of the appeal counsel for the appellant was catechized about the state of the record on appeal. The record consisted of 41 volumes. It included a bundle of documents. In the index the documents in the bundle are not separately itemised or described and the cross-referencing of the exhibits is sometimes confusing, all of which, in a record of this magnitude, rendered the index of little practical use. A large proportion of the documents in the bundle, all of which had to be read by members of the court, was never referred to in evidence. Counsel for the appellant, when taxed with these deficiencies in the record, properly stated that he was unable to resist a special order

for costs. Counsel were thereupon requested to agree on an estimate of the number of documents in the bundle not referred to in the evidence (and therefore erroneously included in the record). This exercise revealed that approximately 20% of the record had been unnecessarily duplicated. Had the appeal succeeded this court would have been disposed to mark its displeasure at the state of the record by a special order for costs but since the appeal falls to be dismissed such an order would serve little purpose.

The appeal and the cross-appeal are both dismissed with costs.



P M Nienaber
Judge of Appeal



C Plewman
Acting Judge of Appeal

CONCUR

VAN HEERDEN JA
VIVIER JA
MARAIS JA