

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 17531/2022

Date of hearing: 14 November 2023

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Plaintiff

and

PREMIER OF THE WESTERN CAPE PROVINCE

First Defendant

**MEMBER OF THE EXECUTIVE COUNCIL OF THE WESTERN CAPE
PROVINCE FOR TRANSPORT AND PUBLIC WORKS**

Second Defendant

Judgment handed down on: 1 December 2023

JUDGMENT

JAMIE, AJ

[1] The defendants have noted an exception to the plaintiff's particulars of claim on the basis that same does not contain averments necessary to sustain an action.

[2] In order to understand the issues raised on exception, I shall deal, first, with the relevant paragraphs of the plaintiff's particulars of claim, and thereafter with the notice of exception.

[3] The relevant averments in the particulars of claim are as follows:

3.1 On 8 February 2008 the plaintiff ("Shoprite") acquired ownership of portion 4 of the Farm Ronwe No 849, Drakenstein Municipality, Paarl Division, Western Cape, measuring 4261ha ("the property"). [para 5]

3.2 Prior to Shoprite acquiring ownership of the property, the relevant authority¹ proclaimed:

3.2.1 a road reserve measuring 0,3374ha over the property for Main Road 201 Paarl ("the Main Road reserve"); and

3.2.2 a road reserve measuring 0,1146ha over the property for Divisional Road 1110 Paarl ("the Divisional Road reserve"),

collectively referred to as "the existing road reserves".² [para 6]

¹ This term is not defined or explained further in the particulars of claim.

² No details are given as to when this occurred or in terms of what legislation.

- 3.3 The road authority, viz the Premier of the Western Cape, the first defendant, did not thereby acquire ownership of the existing road reserves. [para 7]
- 3.4 Shoprite acquired ownership of the existing road reserves when it acquired the property. [para 8]
- 3.5 On 2 December 2021 Shoprite received two notices of expropriation from the Province in terms of section 27 of the Roads Ordinance, 19 of 1976 (“the Ordinance”). [para 9]
- 3.6 In terms of the first notice (POC1):
- 3.6.1 Shoprite was given notice that a portion of the property measuring 0,3933ha reflected in Sketch Plan No 8 was expropriated by the Premier with effect from 1 February 2022;
- 3.6.2 The portion of the property expropriated consisted of:
- 3.6.2.1 the Main Road reserve measuring 0,3374ha; and
- 3.6.2.2 a new road reserve measuring 0,0559ha (“the new main road reserve”).
- 3.6.3 Shoprite was required to advise of the amount claimed as compensation in terms of section 29 of the Ordinance within sixty days from date of the notice. [para 10]

3.7 In terms of the second notice (POC2):

3.7.1 Shoprite was given notice that a portion of property measuring 0,1352ha reflected in Sketch Plan No 9 was expropriated by the Premier with effect from 1 February 2022;

3.7.2 The portion of the property expropriated consisted of:

3.7.2.1 the Divisional Road reserve measuring 0,1146ha;
and

3.7.2.2 a new road reserve measuring 0,206ha ("the new divisional road reserve").

3.7.3 Shoprite was required to advise on the amount claimed as compensation in terms of section 29 of the Ordinance within sixty days from date of the notice.

[para 11]

3.8 On 31 January 2022, Shoprite responded to the notices of expropriation (which included statements made in terms of section 31 of the Ordinance). [para 12]

3.9 It is apparent from the particulars of claim that Shoprite only claimed compensation in respect of the new main road reserve and the new divisional road reserve. It claimed no compensation

in respect of either of the existing road reserves.³ Back-and-forth correspondence thereafter followed in which the parties made offers and counter-offers in respect of the compensation payable. All of these related only to the new road reserves.

3.10 It was only on 18 August 2022, as per POC9, that Shoprite, in response to a further offer by the Premier, which offer was also in respect of the new road reserves only, purported to accept such offer but to reserve its right to claim compensation also in respect of the existing road reserves. In such letter Shoprite further gave notice that it would take the steps anticipated in section 32(2)(a)(iii) of the Ordinance in respect of the latter should resolution not be reached.

[4] The notice of exception raises two grounds of exception.

[5] The first is based upon a proper construction of POC1 and POC2. After referring to various parts of these documents, defendants aver the following:

“17. In the premises and as far as the existing road reserves are concerned –

a) No expropriation is necessary for defendants to acquire ownership thereof;

...

e) No compensation is due or claimable in respect of the existing road reserves.”

³ Although not pleaded, it appears that the reason for not so doing may have been the content of POC1 and POC2, as discussed below.

[6] The second ground of exception is pleaded as follows:

“18. Section 35(4)(a) of the Roads Ordinance, 1976 and section 26(3)(a)(iii)⁴ of the Expropriation Act No. 63 of 1975 provide that no compensation shall be payable in respect of any portion of an existing road reserve which is taken up as part of the newly expropriated road reserve.

19. In the premises, on plaintiff’s own version, the plaintiff is not entitled to any compensation in respect of the portions of the existing road reserves, measuring areas of 0,3374ha and 0,1146ha of land.”

[7] I shall deal with the grounds of exception in turn.

[8] The principles applicable to determining an exception are well-known and the parties were in agreement in respect thereof. These principles are usefully summarised in *Erasmus, Superior Court Practice* as follows:

8.1 In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff in order to assess whether they disclose a cause of action.

8.2 The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an

⁴ The reference to section 26(3)(a)(iii) is an error and should be to section 26(3)(a)(ii). The matter was argued before me on that basis.

excipient should make out a very clear case before it would be allowed to succeed.

- 8.3 An excipient who alleges that the summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- 8.4 An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- 8.5 Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- 8.6 Exceptions are not to be dealt with in an over-technical manner, and, as such, a court looks benevolently instead of over-critically at a pleading.
- 8.7 An excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.
- 8.8 Courts have been reluctant to decide exceptions in respect of fact-bound issues.
- 8.9 Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient

is required to show that, on every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.⁵

[9] To the above must be added the obvious proposition that an excipient is confined to the complaint(s) in the stated grounds of exception, and the court seized with the matter may, similarly, not go beyond the grounds of exception raised.⁶

[10] I intend to deal with this matter in accordance with the above principles.

The proper construction argument

[11] Ms Dicker SC, who appeared for the defendants/excipients together with Mr de Jager, urged me to construe the notices of expropriation referred to above, POC1 and POC2, as a whole in order to ascertain their meaning and effect. I intend to do so. Because POC1 and POC2 are identical in all material respects, save that the former refers to the expropriation of the existing Main Road reserve and the new main road reserve, and the latter to the existing Divisional Road reserve and the new divisional road reserve, I shall confine myself in what follows to POC1.

[12] POC1 appears at page 16 to 27 of the record. I shall refer to those pages in my analysis of the document.

[13] The first page of POC1, at page 16 of the record, is headed **“EXPROPRIATION OF ADDITIONAL LAND”** and states the following:

⁵ At D1 – 2 , Vol 2, being a summary of what was said in *Merb (Pty) Ltd v Mathews* (unreported) GJ Case No. 2020/15069 (dated 16 November 2021) and *Living Hands (Pty) Ltd v Ditz* 2013(2) SA 368 (GSJ) at 374G

⁶ *Feldman NO v EMI Music SA (Pty) Ltd; Feldman N.O. v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at 5A

“1. You will notice from the attached expropriation documents that additional land of your relevant property(ies) is required for the construction of the new road. The existing road reserve does not provide sufficient space to accommodate the alignment of the new road.

*1.1 In this regard I wish to invite your attention to items 1 to 4 under the heading *NOTA BENE* of the accompanying*

Sketch(es) no.(s) 8

1.2 Please note that compensation can only be claimed for the additional land as set out under item 3 of the sketch(es) and for any improvements which may be affected (sic), but not for the total area of the road reserve as described under item 1.

1.3 The reason why the area under item 1 also appears on the NOTICE(S) OF EXPROPRIATION is only to enable me to have the total road reserve registered against your relevant Title Deed(s) by means of an expropriation endorsement (caveat) as required by the Deeds Registries Act, 1937 (Act 47/1937), since the existing road reserve is not registered as such.”

(Emphasis supplied)

[14] The next document, appearing at page 17 of the record, is headed

“NOTICE OF EXPROPRIATION”. There then follows the heading:

“EXPROPRIATION OF LAND”.

[15] The notice goes on to state the following:

“1. Notice is hereby given that the following property is expropriated by the Premier for road purposes in terms of section 27 of the Roads Ordinance, 1976 (Ordinance 19 of 1976):-

± 0,3933ha of Portion 4 of the Farm Ronwe No 849, Paarl

Sketch plan No.8 attached.

2. The date of expropriation & date of date of occupation is

01 FEB 2022

3. In terms of section 29 of the Ordinance you are requested to advise me in writing within sixty days from the date of notice of the amount claimed by you as compensation for the expropriated property and how much of that amount represents each of the respective amounts contemplated by section 35(1)(a)(i) and (ii) of the Ordinance with full particulars as to how such amounts are made up.

4. For your convenience a form marked A1 which may be used for the statements (claim) required in terms of section 31 of the Ordinance, is attached.”

[16] I point out that the documents referred to in [13] and [14] above is each signed on behalf of the Deputy Director-General: Roads.

[17] The document that appears at page 18 of the record has the notation “SKETCH NO. 8” in the right hand corner as well as details of the property and then contains the following:

“NOTA BENE

In terms of section 35(4)(a) of Ordinance 19/1976 no compensation is payable for the portion of existing road reserve situate within the newly expropriated road reserve. (see 2 below)

1.	TOTAL AREA OF NEW ROAD RESERVE					0,3933 Ha
2.	PORTION OF EXISTING ROAD RESERVE WITHIN NEW ROAD RESERVE					0,3374 Ha
3.	DIFFERENCE BETWEEN 1 AND 2 ABOVE IN RESPECT OF WHICH COMPENSATION CAN BE CLAIMED AS SET OUT IN 4 BELOW					0,0559 Ha
4.	UNIMPROVED LAND 0,0559 Ha		CULTIVATED LAND		IRRIGATED LAND	
	ORCHARDS		VINEYARD		PLANTATION	

[18] The document that appears at page 19 of the record is a sketch plan under the heading “EXPROPRIATION” and also has a reference to sketch No. 8 in the right-hand corner. It contains the following statement:

“The expropriated portion, shown in red, is approximately 0,3933 Ha

and is followed by a diagram showing the property, in extent 3,4261 Ha, and a portion in red, as described above.

[19] The document that appears at page 20 of the record is also a sketch plan and has a block in the lower right-hand corner titled “SKETCH No.8”, and that reference also appears in the lower right-hand corner of the document itself. It depicts in blue the existing road reserve and in red the additional new reserve.

[20] The document that appears at pages 21 to 23 of the record is titled “**INFORMATION SHEET**” and provides information as to the expropriation process and the manner of claiming compensation in relation thereto.

[21] The document that appears at pages 24 to 25 of the record is marked A1 and is a Statement by Owner, to be used for a claim in terms of section 31 of the Ordinance.

[22] Finally, the document that appears at page 26 of the record appears to be the final document in the series. It is addressed to the Registrar of Deeds and states as follows:

“Attached find certified copies of expropriation document/s for the registration of the necessary caveat/s on the relevant title deeds.

Kindly furnish me with the number/s and date of these caveats.”

It is signed on behalf of the Deputy Director-General: Roads and is dated 1 December 2021.

[23] It is clear to me that the first document in POC1, appearing at page 16 of the record, is a cover sheet to the notice of expropriation, as opposed to forming part thereof. This is apparent from the reference therein to “the attached expropriation documents”, as well as the content and style of what is stated therein, particularly the portions that I have emphasised. The letter provides an explanation for the expropriation, draws the reader’s attention to items 1 to 4 under the heading “NOTA BENE”, proffers an opinion or view as to what compensation may be claimed and what may not, as also a reason as to why the existing road reserve is included in item 1 of the accompanying documents, *viz* because the existing road reserve is not registered as such with the Registrar of Deeds.

[24] The notice of expropriation is so headed, and, in paragraphs 1, 2 and 3 thereof, complies with the statutory requirements for such a notice, as

discussed below. The final paragraph thereof is, however, clearly not part of the statutorily required notice and references a form which is attached for convenience, in order to submit a claim. The notice of expropriation appears, as I have said, at page 17 of the record.

[25] The document that appears at page 18 of the record, under the heading “NOTA BENE”, as well as what is stated in paragraph 3 thereof, is clearly not part of the statutorily required notice of expropriation. At best for defendants, it offers the view of an unnamed official (or officials) as to the extent of compensation available. It is however, not within the competence of such official or officials to provide that view, as same is a legal issue to be determined by a court of law where there is no agreement between the parties as to compensation.

[26] In my view, the notice of expropriation, properly construed, comprises the notice so titled, at page 17 of the record, as also the sketch plan to be found at page 19 thereof. The remaining documents may not, in my view, be construed or interpreted as forming part of the statutorily required notice of expropriation, and further, it would be impermissible to have regard thereto in construing or interpreting same. My reasons for this conclusion are set out hereunder.

[27] Section 29(2) of the Ordinance provides, in peremptory terms, for what a notice of expropriation shall contain. Such requirements mirror, in all material respects, those in section 7(2) of the Expropriation Act, Act No. 63 of 1975 (“the Expropriation Act”). The notice, at page 17 of the record, read with the sketch plan to be found at page 19 thereof, comply with what is statutorily

required. The remaining documents are superfluous, and in fact contradict, what is statutorily required.

[28] My reason for referring to the sketch plan at page 19 of the record as being the statutorily required sketch plan, and thus as the one referred to in the notice of expropriation, over the one to be found at page 20 of the record, may be stated briefly:

28.1 The document at page 19 of the record has the appearance of an official document. It is headed "Provincial Administration: Western Cape, Department of Transport and Public Works, Roads Branch" and correlates with the notice of expropriation inasmuch as it reflects the portion expropriated in the notice, and reflects the extent of the expropriated property, as also reflected in the notice.

28.2 In contradistinction hereto, the sketch plan to be found at page 20 of the record bears no apparent official provenance and does not comply with the statutory requirements inasmuch as it reflects and refers to the existing road reserve and the additional road reserve, which is not what is required in terms of either section 29(2)(a) of the Ordinance or section 7(2)(a) of the Expropriation Act.

[29] I have already alluded above to the fact that an official or officials purporting to exercise a statutory power may not take it upon themselves to declare what the legal consequences of the exercise of such power are.

[30] In *Marshall and Others v Commissioner, South African Revenue Service*⁷ the Constitutional Court considered the principle, applied in *Commissioner, South African Revenue Service v Bosch*⁸, that, in cases of marginal questions of statutory interpretation, evidence that the provision in question has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation.

[31] In the Supreme Court of Appeal proceedings in *Marshall* that court had utilised Interpretation Notes issued by the South African Revenue Service in order to interpret the provisions of section 8(5) and (11)(2)(n) of the Value Added Tax Act, Act No. 89 of 1991.⁹

[32] The Court invited the parties before it to file written submissions on the extent to which a court may consider or defer to an administrative body's interpretation of legislation, such as the Interpretation Notes, and whether the approach of the Supreme Court of Appeal was in accordance with this.¹⁰

[33] After considering the parties' submissions, the Court said the following:

“[9] The rule thus originated in the context of legislative supremacy where statutory interpretation was aimed at ascertaining the intention of the legislature. In that particular context custom could ‘tip the balance’ in cases of ambiguous legislation. Bosch recognised that the rule had to be adapted to contextual statutory interpretation. The rationale for relying on consistent interpretation by those responsible for the

⁷ 2019 (6) SA 246 (CC)

⁸ 2015 (2) SA 174 (SCA)

⁹ At para 2

¹⁰ At para 3

administration of legislation also changed from ‘custom’ to the assistance that could be gained from their evidence in determining ‘the meaning that should reasonably be placed upon those words’.”

[10] Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.”

(Footnotes omitted)

[34] Although not directly applicable, I consider the approach in *Marshall* to be analogous to the one that I intend adopting in this matter, viz I do not consider it helpful, or even appropriate, to consider the views of the aforementioned official or officials as relevant to the proper construction of the effect of the expropriation notice, as I have identified it above. A reliance on such views would, in my view, suffer from the same constitutional infirmity identified in *Marshall*.

[35] There is a further reason why the defendant’s contentions in this regard cannot be upheld.

[36] It is now well-established that, as a general proposition, expropriation constitutes administrative action, and must comply with the requirements therefor. The position has been stated thus:

“Expropriation may be the result of statutory provisions directly, or of administrative action based on generally applicable statutory provisions. In both cases, the expropriations have to comply with the requirements for a valid expropriation in terms of section 25(2) of the Constitution. This means that expropriations must take place in terms of generally applicable law. They must be for a public purpose or in the public interest, and they must be accompanied by compensation as defined in section 25(3). Since the South African courts regard expropriation as a subset of deprivations, the requirements of section 25(1) of the Constitution must first be met. Expropriation by virtue of an administrative act in terms of a statute also has to comply with the constitutional requirement of just administrative action. Thus administrative deprivation of ownership must be lawful, reasonable and procedurally fair and must be substantially justifiable in terms of the reasons furnished by the administrator to the person whose rights have been affected.”¹¹

(Footnotes omitted)

[37] The Promotion of Administrative Justice Act, Act No. 3 of 2000 (“PAJA”), is the legislation that gives effect to the right to just administrative action, as required by section 33(3) of the Constitution. In terms of section 3(2)(b)(iii) of

¹¹ Silberberg and Schoeman, *The Law of Property*, 6th Edition, at page 653

PAJA an administrator must give an affected person a clear statement of the administrative action.

[38] As pointed out by Hoexter¹², the placement and wording of section 3(2)(b)(iii) strongly suggests that it relates to action that has already been taken. In that regard, the learned authors say the following:

“The affected person should at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis. Without this information, notice of any right of appeal or review would be pointless.”

[39] A purposive interpretation of section 3(2)(b)(iii) in my view supports my interpretation of the extent of the expropriation notice. To consider the other documents as forming part thereof would impede, not advance, the object of clarity as required by the section.

[40] For the above reasons, my conclusion is that the notice of expropriation, properly construed, as set out above, is confined to the notice itself as well as the sketch plan that I have identified. The remaining documents cannot be used to interpret, let alone confine or reduce, the clear content of what is contained in the notice.

[41] It follows that the defendant's primary argument on this ground of exception, that, properly construed, the defendants were only expropriating the new road reserves by way of the notices of expropriation discussed above,

¹² Hoexter and Penfold, Administrative Law in South Africa, 3rd Edition, at page 521

is without merit. The notices are clear as to the extent of the property being expropriated. The first ground of exception must, accordingly, fail.

[42] Although that should be the end of the discussion in relation to the first ground, I am constrained to deal briefly with an aspect that took up much space in the heads of argument filed by the parties, in particular those of the plaintiff, as also in oral argument. That is the question of the stage at which ownership of the expropriated property vested in the Province.

[43] It will be recalled that the question of ownership was raised both in paragraphs 7 and 8 of the particulars of claim and in paragraph 17(a) of the notice of exception. In my view, the focus by the parties on the question of when ownership of the expropriated property vested in the Province, in relation to the question of whether the plaintiff was entitled to compensation, is misguided. I say so for the reasons that follow.

[44] Section 25(2) of the Constitution provides as follows:

“Property may be expropriated only in terms of law of general application –

(a) ...; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

[45] Section 25(3) provides as follows:

“The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) ...; and

(e) the purpose of the expropriation.”

(Emphasis supplied)

[46] I do not intend embarking on a detailed analysis or discussion of the above provisions, as these will no doubt form part of the subject matter to be determined by the trial court. However, for present purposes I observe:

46.1 The express purpose and object of section 25(3) is to strike an equitable balance between the public interest and the interests of those affected by an expropriation;

46.2 One of the considerations to which attention is directed is the history of the acquisition of the property. This, to my mind, is to be distinguished from the date of its expropriation. While the two may coincide, they need not.

46.3 In giving consideration to the relevant circumstances a court will undoubtedly consider whether compensation has previously been paid to an owner when the property was acquired.

[47] The provisions of the Ordinance, read with those of the Expropriation Act, make it clear that compensation is payable consequent to the proclamation of a public road, even where same has not been expropriated, and thus ownership of the property on which the public road has been proclaimed has not been divested from the owner and acquired by the State.

[48] Section 3 of the Ordinance empowers the Premier, *inter alia*, to declare a public road over private property.

[49] Whereas section 22, read with section 23 of the Ordinance, to my mind, strongly suggest that, upon declaration of such a public road, ownership thereof vests in the Province, I need not decide this point at this stage. Given the complexity of the legal issues involved, I consider this best left to the trial court, if required to be determined. In my view, a definitive determination of this issue by me is not only undesirable, but is in any event not required for a proper determination of the exception.

[50] Section 26(3) of the Expropriation Act, provides as follows, insofar as is relevant:

“In the case of land, which is in terms of an ordinance declared to be a road or acquired for a road without such land being expropriated, the following provisions shall apply, namely –

(a) notwithstanding anything to the contrary contained in any such ordinance –

(i) the compensation to which the owner is entitled, shall be calculated, determined and paid in accordance with section 12,

as if the land to which the declaration or acquisition relates has been expropriated in terms of the provisions of this Act;

....”

[51] The date of commencement of the Ordinance and the Expropriation Act is the same, viz 1 January 1977. However, section 26(3) was only substituted in its present form by section 24 of the Expropriation Amendment Act, Act No. 45 of 1992. As will be apparent from the extracts from the particulars of claim referred to above, the particulars of claim do not plead the date of the proclamation of the existing road reserves as such, or even the ordinance or ordinances in terms of which this was done. It is, however, possible that either or both proclamations would have been in terms of the Roads Ordinance at issue here.

[52] In the event that the proclamation of the existing road reserves occurred after the coming into operation of section 26(3), i.e. 15 April 1992, it would follow that compensation was payable, in terms of the section, upon such proclamation, and, as such, may well have been paid to Shoprite’s predecessor in title.

[53] It would then follow that the particulars of claim might well be excipiable as not disclosing a cause of action without an allegation therein to the effect that such compensation had not been paid. I need say nothing further in this regard, however, because that is not the exception that was taken. These aspects, too, are best left to the trial court, if considered relevant at that stage, depending on the facts that emerge at the trial.

[54] For these reasons, I am of the view that the parties' focus on, and submissions in respect of, ownership are not germane to the legal issues at present. For this reason too, the first ground of exception cannot be upheld.

Section 35(4)(a) of the Roads Ordinance and Section 26(3)(a)(ii) of the Expropriation Act

[55] It will be recalled that this ground of exception is based on the contention that no compensation is payable where a new public road is constructed over or partly on a portion of an existing public road (the ordinance) or in respect of land which, at the time of the declaration, already existed, or was being used, as a road (the Expropriation Act).

[56] In this regard, the defendants/excipients sought to place reliance on the allegation in paragraph 28 of the particulars of claim to the following effect:

"The amounts [claimed in the particulars of claim] are calculated with reference to an area of the existing road reserves of 3 821m²:

28.1 this area is determined by deducting from the total area of the existing road reserves an area of 669m² which consists of tar roads previously constructed on the existing road reserves before Shoprite acquired ownership of the property;

...."

[57] I do not consider that this ground of exception should be upheld, for the following reasons:

57.1 First, it is a factual issue as to what portion of the existing road reserves were taken up with the construction of tar roads, as alleged by Shoprite. Secondly, that is a different question, at least potentially, from one which asks which part of the existing road reserve already existed as a road, or was being used as such.

57.2 The exception procedure is, as indicated above, not suited for the determination of factual issues.

57.3 In any event, I do not believe that the allegations in paragraph 28 can be used in the manner contended for by the defendants/excipients. Those allegations are plainly directed at the computation of Shoprite's claim and do not, in my view, go to the heart of its cause of action. They cannot, accordingly, be used in the assessment of whether Shoprite has pleaded an adequate cause of action.

Conclusion

[58] For the above reasons, the exception must fail. The parties each used two counsel, which was, in my view, warranted.

[59] It is accordingly ordered as follows:

“The exception is dismissed with costs, including those attendant upon the employment of two counsel.”

Plaintiff's Counsel:

M de Beer

JG Cloete

Defendants/Excipients' Counsel:

TA Dicker SC

Instructed by:

L Golding

State Attorney