REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3199/2013

Date Heard: 26 & 27 October 2016

Made available: 17 November 2016

In the matter between:

PENTREE LIMITED Plaintiff

and

NELSON MANDELA BAY MUNICIPALITY Defendant

RULING
(OBJECTION TO ADMISSIBILITY OF EVIDENCE)

EKSTEEN J:

[1] This is a ruling on an objection to evidence which comes in the course of protracted expropriation proceedings. The defendant has objected to the plaintiff adducing evidence through Ms Jenny Falck, a valuer called as an expert witness, of information given to her by one Edelson, a valuer based in Port Elizabeth.

[2] It is necessary, at the outset, to place the objection in its perspective. The plaintiff claims compensation in terms of section 12(1) and (2) of the Expropriation Act, 63 of 1975 (the Act) in respect of a property (the subject property) expropriated by the defendant on 2 October 2011. The subject property is undeveloped agricultural land and situated within the urban edge of Uitenhage. The plaintiff contends that the subject property offers an above average potential for short term

urban development and it accordingly appointed a team of consultants who embarked upon a comprehensive process to acquire all administrative approvals necessary to undertake a large scale mixed used development centred around a residential core. An application under the Land Use Planning Ordinance, 15 of 1985, was submitted to the municipality in March 2007 for approval of the proposed subdivision of the land. It had not been approved at the time of the expropriation. Extensive evidence has been led relating to the proposed subdivision and numerous related issues which may have an impact upon the feasibility of such a development.

[3] Ms Falck, as alluded to earlier, has been called as an expert valuer to testify in respect of the market value of the subject property at the time of the expropriation. She stated that in the course of her work on the valuation of the subject property she met with Edelson on 12 July 2012 and that she spoke with him on the telephone sometime thereafter but prior to 23 July 2012. During the meeting and the telephone conversation Edelson informed her about a transaction regarding a property (the Motherwell property) which he did not identify specifically but which he said was situated in Motherwell, a township within the Nelson Mandela Metropole and in relative proximity to Uitenhage. He informed Ms Falck that the information relating to the Motherwell property and the transaction in respect thereof had been supplied to a bank for purposes of attaining finance, and that he had been appointed by the bank to value the Motherwell property.

[4] Ms Falck made contemporaneous notes during the meeting and telephone conversation with Edelson and with reference to these contemporaneous notes she testified that Edelson passed the following information to her:

(a) The transaction had not yet been registered, but registration was imminent;

(b) The Motherwell property was about 489 hectares in extent;

(c) Approvals had been granted for the development on the Motherwell property of 4 366 freestanding single storey units on 112 hectares, 533 semi-detached single storey units on 12,25 hectares, 24 two to three storey apartments on 15,8 hectares, a retail site on 11 hectares, public open space of 103 hectares including a nature reserve of 98 hectares, institutional units, roads and 13 mixed use erven on 5.6 hectares;

(d) An application had either already been made or would still be brought to the municipality to increase the number of residential units to be developed to 10 000. The transaction was subject to the increase being granted by the municipality;

(e) The Motherwell property was to be developed in a joint venture between the property owner and a developer (the applicant for the bank finance). The developer would have a 55 % interest in the venture, which excluded 250 residential erven and the commercial component. The land on which the residential portion was to be situate was 112 hectares in extent, excluding the 103 hectares public open space, roads etc;

(f) The property owner would retain a 45% interest in the venture, as well 250 residential erven, and the commercial component;

(g) The developer would pay the property owner R75,4 million for its 55% in the venture, which then comprised 6 142 approved residential units, less the 250 units “retained” by the property owner;

(h) The R75,4 million purchase price for the developers 55% interest in the venture translated into a value of R137 127 364 for the development as a whole and a price of R280 000 per hectare for the 489 hectare property as a whole. This figure is arrived at by dividing R137 127 364 by 489 hectares;

(i) If the 5 892 approved residential units were developed, the cost per unit would be R23 272 (this is arrived at by dividing R137 127 364 by 5 892);

(j) If the applied for 10 000 residential units were developed, the cost per unit would equate to R13 713 (this figure is arrived at by dividing R137,13 million by 10 000);

(k) The payment of R75,4 million would be made in two tranches, namely an initial tranch of R30 million and the remaining R45 million pro rata as the development was sold out. The sell-out period was envisaged to be 20 years;

(l) If a discount rate was used to determine a present value of the units to be sold over that period, the present value for the 5 892 units costing R23 000 was R14 000 and the present value for the 10 000 units costing R14 000 was R8 500. The average of those had present values was R11 250;

(m) The venture would make use of government subsidies.

[5] Ms Falck states that she utilised the information obtained from Edelson to arrive at her valuation of the subject property as set out in her report dated 24 August 2013 which has been filed of record in terms of the provisions of Rule 36(9) of the Uniform Rules of Court and in particular para 4.3 thereof. The alleged transaction is the third in a series of transactions to which she had regard in a comparative sales analysis. Para 4.3 is headed “Transaction No. 3: Unidentified property in Motherwell”. Ms Falck confirmed that the information relating to the

Motherwell property was obtained solely from Edelson and that she had no other source of information against which to verify the correctness thereof. She did not, however, blindly adopt the calculations made by Edelson but recalculated the various values utilising the factual information conveyed to her so as to satisfy herself as to the correctness thereof.

[6] It emerges from her valuation report that she based her conclusion in respect of the Motherwell property, *inter alia*, on the approved density of approximately 6 142 units and excluding the 250 that did not form part of the joint venture (i.e 5 892 units). She calculated the value of each developable opportunity at a rate of R23 267. In the event that the density was increased to approximately 10 000 units, she calculated the value of each developable opportunity at R13 710 per unit. These figures differ marginally from the values calculated by Edelson. She further calculated that, based on what she considered to be a realistic sell-out rate and an appropriate discount rate to determine the present value, that the value per developable opportunity changed to:

(a) Approximately R14 936 per unit for 5 892 units, as opposed to R14 000 as calculated by Edelson; and

(b) R8 800 per unit for 10 000 units as opposed to the 8 500 as calculated by Edelson.

[7] Ms Falck testified, however, that shortly before she took the witness stand she telephoned Edelson again about this transaction in order to enquire whether the transfer had been registered. On this occasion Edelson advised her that the Motherwell property was not situated in Motherwell but in KwaNobuhle (KwaNobuhle

is situated closer to the subject property than Motherwell) and that the transaction was not in the form of a deed of sale but rather a land availability agreement. The owner would make the land available to the developer who would develop it. He confirmed however that the developer would pay an amount of R75,4 million to the owner in exchange for the right to develop the land. Edelson advised that the negotiations between the parties were still ongoing and, as a result, the development had not yet gone ahead and no subdivided erven had been transferred.

[8] At this juncture Mr ***Ford SC***, who appears on behalf of the defendant, together with Mr ***Richards***, raised an objection to this evidence. On behalf of the defendant it is argued that the evidence constitutes hearsay evidence and whereas no application has been brought in terms of the provisions of section 3 of the Law of Evidence Amendment Act, 45 of 1988 (the Evidence Act) it is inadmissible. Mr ***Breitenbach SC*****,** who appears on behalf of the plaintiff, together with Mr ***Townsend***, argued, however, that the evidence in question is not hearsay evidence at all and, if I should find that it is, then it should be admitted in terms of section 3 of the Evidence Act. In these circumstances the second leg of the objection falls away.

[9] I pause at this juncture to record that the parties have advised me that a number of further objections similar in nature relating to further information passed to Ms Falck may be raised later in the proceedings. I can, of course, not rule on such objections at this stage without the evidence first being tendered. I am accordingly requested to deal generally with the issue of whether a party in expropriation proceedings may, through a valuer called as an expert witness, adduce evidence of statements made to the valuer by other persons in respect of matters which have

influenced her valuation of the land, in circumstances where such other persons are not called as witnesses. In **Lornadawn Investments (Pty) Ltd v Minister van Landbou** 1977 (3) SA 618 (T) the Court gave consideration to a similar issue (see **Lornadawn** p. 620 in fin - 621A). I shall revert to this decision in some detail below.

[10] It is expedient to consider first what constituted hearsay evidence prior to the Evidence Act and what the impact of the Evidence Act is on the position. In **Lornadawn** Botha J, as he then was, referred to the description of hearsay evidence by Watermeyer J in **Estate De Wet v De Wet** 1924 CPD 341 as being:

> ".....evidence of statements made by persons not called as witnesses which are **tendered for the purpose of proving the truth of what is contained in the statement**." (Emphasis added)

[11] In **R v Muller** 1939 AD 106 at 119 Watermeyer JA expanded on this dictum and stated:

> "Statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can be tested only by his appearance in the witness box. If on the other hand they are tendered for their circumstantial value, to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the enquiry."

[12] This led Botha J in **Lornadawn** to conclude that evidence which is apparently of a hearsay nature tendered for a purpose other than establishing the truth of the content thereof is not struck by the hearsay rule and that such evidence is

admissible provided that such other purpose for which it is tendered is relevant to the issues in dispute. On behalf of the defendant, however, it is argued that the validity of these pronouncements in **Lornadawn**, and the decisions which followed it, has been impugned by the promulgation of the Evidence Act and that the common law rules relating to hearsay find no application after 1988. In this regard I was referred to the *South African Law of Evidence*, 2nd ed: *DT Zeffert and AP Paizes* at p. 389 where the learned authors state:

> 'No longer is hearsay defined along assertion-orientated lines, with the result that the hearsay status of the evidence no longer depends upon whether or not it is tendered to prove the truth of what it (expressly or impliedly) asserts. In its place is a declarant-oriented definition that, in effect, identifies hearsay according to whether or not the traditional "hearsay dangers" are present.'

[13] Whilst it is true that the common law rules in respect of hearsay no longer find application I am not persuaded that the statement of the learned authors can be accepted without qualification. Section 3(4) of the Evidence Act defines hearsay evidence as being "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[14] At common law, if the evidence of a statement by a non-witness is tendered for a purpose other than its testimonial value then the truth or otherwise is irrelevant and it is not dependent for its reception on the credibility of the asserter. It is not hearsay. (See also **Davey v Minister of Agriculture** 1979 (1) SA 466 (N) at 476H). The position under the Evidence Act appears to me to be much the same. If it is not tendered for its testimonial value its probative value is not dependant on the

credibility of any person other than the person giving such evidence. It is therefore not hearsay as defined in the Evidence Act. The Appellate Division (now the Supreme Court of Appeal) considered the effect of the provisions of section 3 of the Evidence Act in **Mdani v Allianz Insurance Limited** 1991 (1) SA 184 (A) and Van Heerden JA stated therein at 189J to 190A:

> "If A testified that B made such an admission, A's evidence in itself is clearly not hearsay. Whether B in fact made the admission depends upon A's credibility and can be tested by cross-examination. What is hearsay is the content of the admission **if it is to be used to establish the truth of what was said**. Whether the content is true or not, depends entirely on B's credibility." (Emphasis added)

[15] It seems to me therefore that the purpose for which the evidence is tendered may still determine whether it is hearsay or not within the definition in the Evidence Act. This, I think accords with the finding of Botha J in **Lornadawn** where he held at 622F-H:

> "Telkens wanneer getuienis aangebied word van mededelings gemaak deur persone wat nie self getuig in die saak nie, en daar teen sulke getuienis beswaar gemaak word, moet die Hof die aard van die getuienis oorweeg in die samehang van die saak as geheel en tot 'n beslissing kom of die getuienis, objektief gesproke, relevant is tot enige van die geskilpunte in die saak, op 'n grondslag anders as dat die inhoud daarvan die waarheid is. As die antwoord op hierdie ondersoek bevestigend is, dan is die getuienis toelaatbaar vir die besondere doel wat dit relevant maak afgesien daarvan of dit die waarheid is of nie, en die blote feit dat dit terselfdertyd op 'n ander grondslag ook ter sake sou wees indien dit as die waarheid beskou word, kan dit nie ontoelaatbaar maak nie. Tot die mate dat die waarheid van die inhoud van die mededeling relevant mag wees tot 'n geskilpunt, sal die Hof vanselfsprekend nie die getuienis vir daardie doel in ag neem by die uiteindelike beoordeling van die saak nie; gebruikmaking van die getuienis bly beperk tot die besondere doel op grond waarvan dit toegelaat word."

[16] On behalf of the plaintiff it is argued that the evidence set out earlier is tendered as information which, irrespective of whether it is true or not, would have been available to the notional informed buyer and seller and which they would have considered in arriving at the purchase price for the subject property as at the expropriation date. For this contention the plaintiff relied heavily on the **Lornadawn** case and the cases which followed it.

[17] The defendant, on the other hand, argues that the purpose for which Ms Falck has utilised the information as set out earlier, has as its foundation an acceptance of the truth of the information. Reference is made to unquestionable authorities that the facts relied upon by expert witnesses must first be proved in evidence. (See **Price Waterhouse Coopers Incorporated and Others v National Potato Co-operative Ltd and Another** [2015] 2 All SA 403 (SCA).) In the absence of proof of the underlying facts the opinion has no value. The arguments necessitate a consideration of the nature of the evidence and of expropriation proceedings.

[18] In **Lornadawn** Botha J accepted, without reservation, an argument put forward by counsel. The import of the argument is as follows:

[19] In a expropriation matter, where the issue concerns the determination of the quantum of compensation payable there is no lis between the parties and therefore no onus upon the plaintiff, in the ordinary sense of these concepts and the function of the court is that of a “super valuer”; as such the court must place itself in the shoes of the notional informed seller and buyer: on this basis the court must have

regard to everything which such a seller and buyer would have experienced in the open market and all the information which would have been at their disposal; the court cannot itself go into the market to gather information, but it is part of the function of an expert valuer to do so and to found his opinion thereon (compare **Jacobs v Minister of Agriculture** 1972 (4) SA 608 (W) at 628D-E); in the enquiry it is the duty of a valuer

"…. to take into consideration every circumstance likely to influence the mind of the purchaser."

(**Pietermaritzburg Corporation v SA Breweries Ltd** 1911 AD 501 at p. 516); circumstances which would have influenced the seller and the purchaser in the fixing of the purchase price is not limited solely to facts which have been properly proved, but also information which they obtained from other persons, replies to their enquiries provided by other persons, general talk amongst farmers in the area, etc; on that basis a valuer is equally entitled to base his opinion on what he had heard from other people, and to place that information before the court so that the court can judge what weight should be attached thereto and whether the valuer's opinion is founded on strong or weak grounds (see **Lornadawn** at 626A-F).

[20] In accepting the argument Botha J stated at 626G-H:

> "Die kern van die taak van die Hof in 'n onteieningsaak is om die markwaarde van die onteiende goed op die datum van die onteiening te bepaal, …, dit [is] die toets, die maatstaf, van markwaarde wat voor oë gehou moet word en wat van deurslaggewende belang is by die behandeling van die onderhawige probleem: dit is die prys wat vir die betrokke eiendom betaal sou geword het as dit op die datum van die onteiening op die ope mark deur 'n gewillige verkoper aan 'n gewillige koper verkoop was."

[21] Botha J reasoned that in determining compensation the court was in fact busy with an enquiry into the probable conduct of two fictitious persons to whom we should attribute full knowledge of all circumstances which would play a role in the manner in which they would conduct themselves and the manner in which they would have acted in their negotiations with one another in determining a purchase price for the subject property. He then proceeded to state at 627A-D:

> "Dit kom my voor as duidelik te wees dat die gedrag en optrede van daardie persone ook beïnvloed sal word deur tersaaklike mededelings wat hulle van ander mense ontvang. Die belangstellende koper verneem van 'n naburige eienaar dat dit in sy ondervinding in die afgelope 40 jaar nog nooit in daardie omgewing geryp het nie. Die belangstellende verkoper word deur sy buurman vertel dat hy so pas sy besproelingsgrond verkoop het teen 'n prys van soveel per hektaar. Albei partye sal in hulle onderhandelings met mekaar deur sulke en soortgelyke mededelings beïnvloed word tot die mate wat hulle voel dat hulle gewig daaraan kan heg. Onderhewig aan oorwegings van gewig, is sulke mededelings derhalwe direk ter sake in die ondersoek waarmee die Hof besig is, **en dit is so afgesien van die vraag of die inhoud van sulke mededelings objektief gesproke die waarheid is of nie**." (Emphasis added)

[22] The effect of these findings is that evidence of such communications are not dependant for their reception on the credibility of the asserter and the probative value thereof in expropriation proceedings depends on the weight which the notional willing buyer and willing seller would have attached thereto in the light of all the known facts.

[23] Reverting to the argument advanced on behalf of the defendant, Botha J expressly recognised in **Lornadawn** the general rule that the opinion of an expert is of little value unless the underlying facts upon which the opinion is founded are

properly proved in evidence. In doing so he recognised the principles which are set out in the various authorities to which defendant's counsel has referred me. He proceeded, however to hold at 627G-H:

> "Ek is van oordeel dat die algemene reël dat 'n deskundige mening nutteloos is vir sover dit gebaseer is op feite wat nie behoorlik bewys is nie, nie van toepassing is op 'n waardeerder wat sy opinie oor die waarde van 'n eiendom baseer op inligting wat hy ingewin het in die vorm van mededelings van ander mense nie. Die rede daarvoor is nie dat 'n waardeerder 'n besondere soort deskundige is nie maar wel omdat mededelings van ander mense toelaatbare materiaal is by 'n waardasie, op grond daarvan dat sulke mededelings *per se* deel vorm van die inligting wat aan 'n ten volle ingeligte denkbeeldige verkoper en koper beskikbaar sou gewees het en hulle sou kon beïnvloed het in hulle onderhandelinge met mekaar met die oog op die bereiking van 'n ooreenkoms oor die koopprys van die betrokke eiendom."

(See also *The Law of South Africa*, 2nd ed vol 10 part 3 para 146 where the views expressed by the authors Gildenhuys and Grobler appear to me to accord with the position enunciated by Botha J.)

[24] Subsequent to the **Lornadawn** case in the matter of **Davey** *supra* Kumleben J was faced with an argument by counsel, ostensibly based on the judgment in **Lornadawn**, that because a court was acting as a "super valuer" no rules of evidence applied. I am not convinced that Botha J ever suggested that to be the position. Nevertheless, Kumleben J rejected the argument noting that the term "super valuer" cannot serve as a basis for the far reaching submission which counsel made. He held, correctly, that he was bound by the rules of evidence. Save, for this clarification, Kumbleben J expressly approved of the reasoning of Botha J in **Lornadawn** and stated his agreement that the general rule that expert opinions are

of no use when they are based on facts which have not been properly proved did not find application to a valuer whose opinion in respect of the value of property is based on information which he has gathered in the form of communications from other people.

[25] The decision in **Lornadawn** was further referred to with approval in **Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council** 1979 (1) SA 949 (W) where King JA held at 952D-E:

> "The plaintiff has the *onus* of establishing the potentiality of the property alleged by it while in regard to the *quantum* of compensation there is no real *lis* between the parties and, therefore, no *onus* in the legal sense; the Court has to do the best it can with the evidence before it."

[26] I pause to record that in **Southern Transvaal Buildings** *supra* King AJ stated, somewhat loosely, at 958A:

> "While a valuer is entitled to refer to information received, even though hearsay, in arriving at his conclusions, the same as a willing buyer or seller would do, in my view he cannot utilise a conclusion arrived at by another valuer."

[27] Whilst the latter part of the statement is correct the reference to "hearsay" attracted academic criticism (see *Zeffert: 2000 ASSAL* 795 at 802). I think the better view is that it is not hearsay at all in the context of expropriation proceedings for the probative value thereof is not dependant on the credibility of any other person, but rather on the weight which a notional willing buyer or seller would have attached to

the statement in his negotiation. As I understand the reasoning in **Lornadawn** that is what Botha J held.

[28] Mr ***Ford SC*** has referred to **Lornadawn** and the authorities which have followed it as a "line of old cases". It is argued that the legal position has changed substantially in three material respects since these cases were decided. Firstly, the Evidence Act was promulgated in 1988. Secondly, it is pointed out, correctly, that these cases were decided under the Expropriation Act, 55 of 1965 (the 1965 Act) wherein market value was the test. Thirdly, section 25 of the Constitution introduced a new measure of compensation.

[29] I have dealt earlier with provisions of the Evidence Act. I am unpersuaded, for the reasons set out earlier, that the introduction thereof has any impact upon the reasoning in **Lornadawn**. I turn therefore to consider the second leg of the argument. The argument, as I understand it, proceeds on the basis that all the cases to which I have referred and which followed the reasoning in **Lornadawn** were decided on the basis that the core function of the court, which has its origin in the 1965 Act, is to decide the market value of the property as at the date of expropriation and that it is this notion, that gives rise to the idea that in considering the quantum of compensation in expropriation cases there is in fact no *lis* between the parties and no specific onus in the true sense in relation to the determination of the value. This, it is contended, is directly contrary to the provisions of the Act which provides in section 12(1) that the amount of "**compensation**" to be paid to an owner in respect of the property expropriated shall **not exceed** 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. Section 14 of the Act further provides that the amount of compensation for any property expropriated shall, on the application of any party concerned be determined by the High Court (section 14(1)) and that any such proceeding shall be instituted and conducted by way of action (section 14(3)(a)) with the law of procedure applicable in civil proceedings in that court applying in respect of such proceedings (section 14(4)). For this reason, it is submitted, that under the Act a claim for compensation is an ordinary civil action subject to the ordinary rules of evidence, including expert evidence, and that there is no question that the burden of proving the market value in the ordinary course now rests on the party claiming compensation. This, it is suggested, put paid to the notion that an action for compensation is a unique procedure in which the ordinary rules of procedure and evidence will not apply.

[30] As recorded earlier I do not think that Botha J in **Lornadawn** intended to suggest that the ordinary rules of procedure and evidence do not apply in expropriation matters. He clearly recognised that they do, hence the lengthy explanation for him finding the evidence to be admissible. The finding, I think, is based upon his conclusion that the evidence is not hearsay as it is not tendered to establish the truth thereof and that it is admissible irrespective of whether it is true or not. (See **Lornadawn** p. 626C.) It is admissible because the mere fact that such statements were being made is a consideration which a willing buyer and willing seller would have considered, subject to the weight which they would have attached to them, in arriving at a price. The weight which they would have attached to it, and which the Court will attach to it, will depend on a consideration of all proven facts.

[31] It may transpire that the notional informed buyer would conclude that the statement in issue is so incredulous when viewed against all the known facts that he would have attached no weight at all to it. The position is well illustrated by the facts in **Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal** 1991 (1) SA 321 (TPD). In that instance a valuer testified that he had spoken to the purchaser of a property and that he used the information imparted to him in his valuation of an expropriated property. The purchaser of the said property advised that he had purchased a bargain as the said property was overgrown at the time with reeds which was caused by a blocked sewer on the property next door. An inspection *in loco* in the course of the trial revealed that the said property was situated on an incline running down to a railway line. In these circumstances the trial judge considered that it was patently improbable that a marsh could have formed on the property. In the result the court attached no weight at all to the alleged assertion. The weight which can be attached to such communications can, however only be determined at the conclusion of the trial (see also **Lornadawn** p. 638C-E).

[32] It is necessary at this juncture to record the provisions of section 8(1) of the 1965 Act. It provided:

> "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 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 of inconvenience caused by the expropriation; and

(b) In the case of right an amount to make good any actual financial loss or inconvenience caused by the expropriation or the taking of the right." (Emphasis added)

[33] In respect of the expropriation of land, the compensation provided for under the 1965 Act is in all material respects identical to that provided for in section 12 of the Act. What Botha J, Kumleben J and King AJ were considering in **Lornadawn, Davey** and **Southern Transvaal Buildings** *supra* was accordingly "compensation" to be arrived at in precisely the same manner as that provided for in section 12(1) of the Act.

[34] Moreover, like the provisions of section 14 of the Act, section 7 of the 1965 Act also provided that where agreement could not be reached in respect of the amount of compensation the matter was to be determined by a court. Section 9 of the 1965 Act similarly provided:

"(1) Proceedings contemplated in subsection (1) of section 7 shall be instituted and **conducted by way of action**.

(2) The **law of procedure applicable in civil proceedings** in the court in which such proceedings are conducted **shall**, subject to the provisions of this Act and any regulations made thereunder, **apply** *mutatis mutandis* in respect of such proceedings and any award of compensation shall be regarded as if it were a civil judgment of that court." (Emphasis added)

[35] In the circumstances I do not think that the introduction of the Act brought about any change at all in respect of the manner in which the court is required to arrive at an amount of compensation nor to the procedure. The findings in **Lornadawn, Davey** and **Southern Transvaal Buildings** *supra* in respect of the absence of a *lis* between the parties and an onus remain equally valid under the Act. Section 14 of the Act deals with procedure and has no impact on the onus which applies. Onus, is a matter of substantive law. The issue of onus was recently confirmed in **Port Edward Town Board v Kay** 1996 (3) SA 664 (A) 674J-675D where it was held in the proceedings under the Act that:

> "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 … 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 … and *(c)* the *quantum*. Component *(a)* must be shown as a reasonable possibility … Component *(b)* must be proved on a balance of probabilities … Once *(a)* and *(b)* have been conceded or established there is no *onus* in the narrow sense in respect of component *(c)."*

[36] On behalf of the defendant it is argued that component (c) referred in **Port Edward Town Board** *supra* is a reference to compensation and not to the market value of the land. Before the court gets to a consideration of the quantum of compensation, so the argument goes, the plaintiff bears the onus to establish the market value upon which it wishes to rely. I have given careful consideration to the submission, however, I consider the submission to be unsound. In an expropriation matter a person has been deprived of property, which could otherwise have been

sold on the open market, by an organ of State. He is *ex lege* entitled to compensation. The function of the court is merely to fix the compensation to be paid to such an owner to compensate him for his loss. The starting point in the enquiry into the quantum of compensation, which is the function of the court, is the determination of the amount which the property would have realised if sold on the date of expropriation in the open market by a willing seller to a willing buyer. The property has only one value which is to be fixed without reference to the circumstances of a particular owner (see **Pienaar v Minister van Landbou** [1972] 1 All SA 287 (T)). It is for this reason that Botha J concluded that the core function of the court in an expropriation matter is to decide the market value of the property as at the date of expropriation. Once the market value has been established consideration may be given under the Act to factors which may justify a reduction in the compensation. The determination of the market value is therefore an integral part of the court's function in fixing the quantum of compensation. For these reasons I do not think that the introduction of the Act changed the position at all nor do I think that the statutory provisions relied on are inconsistent with the reasoning in the cases referred to.

[37] I turn to the third leg of the argument. Section 25(2) and (3) of the Constitution provides:

> "(2) Property may be expropriated only in terms of law of general application-
>
> *(a)* for a public purpose or in the public interest; 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.

> (3) 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)* the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> *(e)* the purpose of the expropriation."

[38] In support of the defendant's argument that market value no longer lies at the heart of the enquiry I was referred to the matter of **Msiza v Director-General, Department of Rural Development and Land Reform and Others** 2016 (5) SA 513 (LCC) [32] where the Land Claims Court stated:

> "The existing Expropriation Act, 63 of 1975, an Act passed during the Apartheid era makes it clear that market value is the formula for determining compensation due to a person whose land has been expropriated by the State. The Constitution is a rejection of the market based approach to land reform and compensation in cases of expropriation. …"

[39] I think the position may be overstated by the Learned Judges in the Land Claims Court. The Constitution provides for additional factors which may, if appropriate, justify an adjustment to the market based compensation to reflect a just and equitable result. Market value, however, remains an assertive consideration. In **Khumalo and Others v Potgieter and Others** [2000] 2 All SA 456 (LCC) Gildenhuys J applied the constitutional compensation standard as it was incorporated in section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 and

he decided that the court should determine the amount of just and equitable compensation in two stages. First, the court has to determine the market value of the property according to the established principles and valuation methods; and thereafter the court must consider to what extent the market value should be adjusted according to considerations enumerated in section 25(3) of the Constitution. The Land Claims Court followed the same approach in **Ex Parte Former Highland President; in re: Ash and Others v Department of Land Affairs** [2002] 2 All SA 26 (LCC) [25]-[38]. In **Du Toit v The Minister of Transport** 2006 (1) SA 297 (CC) the majority of the Constitutional Court recognised that there are clear differences between section 12(1) of the Act and section 25(3) of the Constitution. Despite these differences they considered that there does not appear to be an inconsistency between them. Although the Constitutional Court was not considering an expropriation of land, they adopted a roughly comparable approach to that which was followed in **Khumalo's** case *supra*. They considered that it was practical to consider first what is payable under the Act, in an expropriation of land that is a determination of the market value, and then to consider if that amount is just and equitable under section 25(3) of the Constitution.

[40] The two staged approach has been applied in other cases in the Supreme Court of Appeal. (See for example **The City of Cape Town v Helderberg Park Development (Pty) Ltd** 2007 (1) SA 1 (SCA) para [20] and [33]; and **Haakdoornbult Boerdery CC and Others v Mphela and Others** 2007 (5) SA 596 (SCA) para [36].) I consider the approach to be correct.

[41] In all the circumstances I consider that in order to fix compensation in terms of section 12(1) of the Act, with regard to section 25 of the Constitution, the primary task of the court in the first instance is to determine the market value of the property. This is so not only because that is what the plaintiff has lost but also because market value is one of the few considerations set out in section 25 which is qualifiable. Once that is determined an adjustment should be made, if necessary, to reflect just and equitable compensation having regard to the further considerations set out in section 25. In considering the market value as first step in the determination of the quantum of compensation I find that there is no *lis* between the parties and there is no onus in the ordinary sense on the plaintiff (see **Port Edward Town Board** *supra*). The reasoning in **Lornadawn** remains equally valid in respect of the first step of the quantification of compensation. In those circumstances I am of the view that Mr ***Breitenbach SC*** is correct that the evidence of Ms Falck of statements made by persons not called as witnesses may be received as information which the notional informed willing buyer and willing seller would have had at their disposal. She is entitled to found her opinion as to the value of the subject property on such information, including statements of prices fetched for comparable properties, (cf **Lornadawn** 627B-C), as it is part of the relevant information which could have influenced a willing buyer and willing seller. The probative value of this information and therefore the strength of the valuer's opinion can, as recorded earlier, only be determined at the conclusion of the trial.

[42] I therefore consider too that Botha J was correct in **Lornadawn** that the general rule that an expert's opinion is of no value to the extent that it is founded upon facts which have not been properly proved does not find application to the

opinion of an expert valuer who testifies in respect of the value of immovable property based upon information which he/she has gained from communications by other people.

[43] On behalf of the defendant it is argued, however, that there is nothing to suggest that a notional willing buyer and seller would have had access to the information provided by Edelson and it was not freely available in the market. There is nothing before me to suggest that Edelson would not have shared this information with an aspirant buyer or seller, if approached, on the same basis as he did with Ms Falck when she enquired from him. In these circumstances I think that an informed notional buyer would have had access thereto and given consideration thereto. (Compare **Lornadawn** p. 628B-C.) The notional buyer in issue is, after all, an informed buyer.

[44] During argument Mr ***Ford SC*** raised a further objection, namely that the Rule 36(9)(b) notice filed on behalf of Ms Falck does not comply with the provisions of the Rule and that the evidence set out earlier herein should be excluded on that basis. The argument was founded primarily on the decision of **Coopers (SA)(Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH** 1976 (3) SA 352 (A). In **Coopers** at 371B-E Wessels JA stated:

> 'In the context in which the phrase "reasons therefore" is used in Rule 36(9)(b) it means, or at least includes, the facts or *data* on which the opinion is based. The facts or *data* would include those personally or directly known to or ascertained by the expert witness … or known to or ascertained by others of which he has been informed in order to formulate his opinions, eg … investigations by others, or information from text-books which are to be duly proved by the trial. However,

"summary" also governs "his reasons therefor"; hence the testimony that the expert witness intends to give need not be fully set out in the summary.

In deciding whether there has been due compliance with sub-rule (9)(b), it is, in my opinion, relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier times (regarded as an element of affording a tactical advantage) frequently caused delays in the conduct of trials. Indeed, all the sub-rules of Rule 36 were formulated with that purpose in mind. Consequently, when summarising the facts or data on which the expert witness premises his opinions, the draughtsman should ensure that no information is omitted, where the omission thereof might lead to the other side being taken by surprise when in due course such information is adduced in cross-examination or evidence."

[45] The notice filed contains the following information relevant to the objection:

'**4.3 Transaction No. 3: Unidentified Property in Motherwell**

4.3.1 Although this transaction has not yet been registered, we have been informed that the registration is imminent. The information used here was obtained from the bank's valuer and is based on the information supplied to the bank for mortgage bond purposes. In June 2011 a property of ± 489ha was to be developed in a joint venture, with 55% of the development to be "sold off" and 45% retained by the other party. The transaction however excluded 250 residential units and the commercial component. Using the purchase consideration of ±R75,000,400 for the ± 55% share, the "value" of the development as a whole could be determined. This came to about R137,000,000, or ±R280,000 per ha.

4.3.2 Based on the approved density of ±6,142 units and excluding the 250 units that did not form part of the joint venture, a rate of ±23,267 per developable opportunity is reflected. However, the buyer was of the opinion that the density could be increased to about 10,000 units, which would have reflected at rate of ±13,710 per unit."

[46] It is argued on behalf of the defendant that the information falls short of what is required in terms of Rule 36(9)(b) as the "unidentified property" does not appear on the diagram of the area included in the Rule 36(9)(b) summary and the bank's valuer is not identified thereby making it impossible for the defendant to investigate the truth of the content of the communication by Edelson or the appropriateness of the comparison with the subject property. The diagram of the area included in the Rule 36(9)(b) notice depicts the entire Nelson Mandela Metropole and reflects the Motherwell Township. Clearly it was not possible to identify the property within Motherwell as Edelson had not confided in Ms Falck in this regard. During her evidence, however, as set out earlier herein Ms Falck revealed that shortly before taking to the witness box she was advised that the property is not situated in Motherwell at all and that it is situated in KwanNobuhle. Particulars of the property were obtained shortly before she testified and information of the erf number in KwaNobuhle and the nature of the transaction are now available and disclosed. Edelson has also now been identified.

[47] In my view there is merit in the objection raised by the defendant to the content of the Rule 36(9)(b) notice. After hearing of the objection, however, the parties requested that I deliver reasons for such ruling as I may make in writing in respect of the general proposition as set out earlier herein. The effect thereof has been that the matter has in any event been adjourned for approximately three months. In the circumstances I conclude that the shortcomings in the Rule 36(9)(b) notice were not designed to obtain any tactical advantage and any prejudice which may have resulted therefrom is cured by the postponement of the matter. The

information which was lacking has now been provided and a full investigation by the defendant relating to the property is now possible. In the circumstances I consider that it would be inappropriate to exclude the evidence on this basis.

[48] In the event and to the extent that I may err in my conclusion that the contentious evidence does not constitute hearsay evidence it is necessary to have regard to the provisions of section 3(1) of the Evidence Act.

[49] The general approach which applies when considering whether to admit hearsay evidence in terms of this section was set out in **S v Shaik and Others** 2007 (1) SA 240 (SCA) at 298 para [170] as follows:

> "Section 3 provides that hearsay evidence is admissible if a Court is of the opinion that it should be admitted in the interests of justice. In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Johburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* 1997 (1) SA 1 (A) this Court held that the admissibility of evidence is, in general, one of law, not discretion, and that there was nothing in s 3 which changed this situation. The section enjoins a Court in determining whether it is in the interests of justice to admit hearsay evidence to have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)*(c)*. Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted."

[50] Section 3(1)(c) of the Evidence Act provides:

> "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
> …
> (c) The court, having regard to-

(i) The nature of the proceedings;
(ii) The nature of the evidence;
(iii) The purpose for which the evidence is tendered;
(iv) The probative value of the evidence;
(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) Any prejudice to a party which the admission of such evidence might entail; and
(vii) Any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[51] The considerations set out in section 1(c)(i)-(iv) have been fully discussed earlier herein. In respect of the aspect of the litigation to which Ms Falck testifies there is in the nature of the proceedings no lis between the parties and no onus in the strict sense upon the plaintiff. The evidence objected to relates to information given to Ms Falck, as a valuer, by other persons in respect of matters which have influenced her valuation of the land. Such information forms part of the general body of information which may have influenced an informed buyer and an informed seller in arriving at the purchase price for the subject property and which a court is required to weigh as part of the mass of information which is relevant to the determination of the market value. The evidence is tendered for that purpose and the probative value of such evidence, or the weight which an informed buyer and an informed seller would have attached thereto is a matter which the court can only determine in conjunction with all the proven facts at the conclusion of the trial. These factors, I think, militate strongly in favour of the admission of the evidence for the reasons which are set out earlier in this judgment.

[52] I have been advised by Mr ***Breitenbach SC*** from the Bar that Mr Edelson is available to testify and in the event that I should rule against the plaintiff the evidence of Mr Edelson will be presented. On behalf of the plaintiff reliance is placed on an American authority which was quoted by Botha J in **Lornadawn** p. 625C-D and which states:

> "From a practical standpoint, if each person previously involved in effecting comparable sales should have to be called to the stand to establish the detailed facts of such sales, it would lengthen litigation of this kind out of all reason and would make it almost impossible for the State or defending landowners to make a proper showing as to valuation opinion within a reasonable time and at reasonable expense. Therefore, within proper limits, facts acquired by hearsay and used by a valuation expert in support of his conclusion that certain sales are comparable and therefore furnish support for his opinion concerning value, have been customarily received in evidence in this State".

[53] In **Davey's** case, *supra,* Kumleben J was somewhat sceptical of this motivation. He stated at p. 477A-B:

> "I am not all convinced that the reception of such evidence without qualification or limitation has or will have this result. The prolixity of these cases, which normally accept such hearsay evidence as admissible, is notorious. As a rule a disproportionately small percentage of the evidence tendered is ultimately relied upon in argument and this case was no exception."

[54] I venture to suggest that the present matter is no different, however, I am nonetheless of the view that there is merit in the view expressed in the American authority. There is, however, a further consideration to be weighed. Edelson conveyed the information to Ms Falck which he had attained from the bank in order

to carry out a valuation of the property for bond purposes. He too was not directly involved in the transaction and obtained such information as he has from the bank, presumably in the form of a written contract and other documents reflecting, *inter alia,* municipal approvals for subdivision. The probative value of the content of the information does not depend upon the credibility of Edelson, or at least not entirely. The truth of the content of the information depends upon the credibility of the participants to the transaction who have not been identified and, are unknown to the plaintiff. As set out earlier, however, the evidence is relevant and material irrespective of the truth or otherwise thereof.

[55] I have referred earlier to the prejudice to the defendant which flows from the Rule 36(9)(b) notice and the summary of the evidence of Ms Falck. This, as recorded earlier, appears to me to be cured by the postponement of the matter. The evidence is to be tendered by Ms Falck and, having been afforded a full opportunity to consider the comparability of the transaction now that the property has been identified the defendant would have adequate opportunity to challenge the correctness of the information conveyed to Ms Falck in cross-examination. The defendant, as the local authority required to approve the subdivisions for the development would be well placed to tender evidence in rebuttal if deemed necessary. This consideration too, I think, militates in favour of the admission of the evidence.

[56] Section 3(1)(c)(vii) is an all-encompassing blanket provision providing for any other factor which should in the opinion of the court be taken into account to be considered. One such factor which, in my view, weighs heavily is the fact that such

evidence had, prior to the promulgation of the Evidence Act, been consistently admitted in matters relating to expropriation. It was admitted because it was considered to be material to arriving at a just conclusion as to the reasonable compensation payable under the Act. That, it seems to me, remains equally so for the reasons which I have set out earlier herein.

[57] In all the circumstances, even if I err in my conclusion that the evidence in issue does not constitute hearsay evidence, I would admit the evidence in terms of the provisions of section 3(1)(c) of the Evidence Act. The interests of justice require it.

[58] In the result, the objection to the evidence of Ms Falck which is set out earlier herein and in paragraphs 4 and 5 of the first Rule 36(9)(b) notice in respect of her evidence is overruled. The said evidence is admitted on the grounds set out herein.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv A Breitenbach SC and Adv Townsend instructed by DHM Attorneys, Somerset West c/o Greyvensteins Inc, Port Elizabeth

For Defendant: Adv EAS Ford SC and Adv G Richards instructed by Rushmere Noach Inc, Port Elizabeth