77/90

Case No 606/88

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

NORMAN NATHAN SHER N O.....	First Appellant
JULIUS FEINSTEIN N O.....	Second Appellant
NEVILLE SWEIDAN N O.....	Third Appellant
LAWRENCE ALFRED MEYEROWITZ N O.....	Fourth Appellant
ARTHUR JACOB AARON N O.....	Fifth Appellant
ROBERT LAPEDUS N O.....	Sixth Appellant
YUDEL BACHER N O.....	Seventh Appellant
LAWRENCE TRAKMAN N O.....	Eighth Appellant
BERNARD HERBERT N O.....	Ninth Appellant

and

THE ADMINISTRATOR OF THE TRANSVAAL.....	Respondent

CORAM: CORBETT CJ, BOTHA, MILNE, STEYN JJA et NICHOLAS AJA.

DATE OF HEARING: 17 May 1990

DATE OF JUDGMENT: 23 August 1990.

-/ J U D G M E N T.....

J U D G M E N T

NICHOLAS AJA:

I am with respect unable to concur in the judgment prepared by Milne JA. In my opinion the appeal should be dismissed.

The main issue at the trial before McCreath J was the value in terms of s.12(1) of the Expropriation Act, 63 of 1975, ("the Act"), of the land expropriated by the Administrator of the Transvaal for the purpose of the Wendywood High School. (I shall for convenience refer to the Transvaal Provincial Administration as "the TPA".)

The expropriated land is situated in the municipal area of Sandton. It is 8,5 hectares in extent, and its Deeds Office description is "Portion 3 of the Farm Harrowdene 4 Registration Division IR Transvaal". (I shall refer to it either as "Portion 3" or as "the expropriated portion".) Prior to the expropriation it formed part of

land 28,7113 hectares in extent, described as "The remaining extent of the Farm Harrowdene 4 Registration Division IR Transvaal". (I shall refer to it as "the RE".) The part of the RE which remained after the excision of Portion 3 will be referred to as "the rest of the RE".

The principles which apply in the assessment of proper compensation for ground which has been expropriated are well-established. In terms of s.12(1)(a)(i) of the Act the compensation payable is the amount which would have been obtained for the property if on the date of the notice of expropriation it had been sold on the open market by a willing seller to a willing purchaser, that is, an amount equal to the fair and reasonable market value of the expropriated ground on the date of expropriation. The "willing seller" and the "willing purchaser" are not the person expropriated and the expropriator, but a notional willing seller and a notional willing buyer negotiating with

each other on an equal footing, both of whom are fully informed about the ground at the date of expropriation - its advantages and disadvantages and its potentialities and everything which affects it. In determining the reasonable market value, it is accordingly necessary in the first place to establish the potential of the expropriated ground on the date of expropriation, not as realised actualities, but as reasonable possibilities.

Various methods are available to ascertain the market value of the expropriated ground. The four main methods are: (a) the comparative or market data approach; (b) the income investment or economic approach; (c) the land residual technique; and (d) the cost method. (Jacobs, The Law of Expropriation in South Africa, p 67.) In the present case only methods (a) and (c) have possible relevance.

Where it is appropriate, the comparative approach

is the method of choice. See Minister of Water Affairs v Mostert & Others 1966 (4) SA 690 (A), where Wessels JA said at 723 E:

> "Both the seller and the purchaser will exercise an intelligent judgment in deciding upon the purchase price and will thus be guided by the evidence as to a fair market price afforded by comparable sales of similar land in the area concerned at the relevant time. Comparable transactions, particularly where the sales are concluded after objective and impersonal bargaining, afford the most satisfactory evidence of a fair market value because it demonstrates how circumstances have affected the minds of purchasers and sellers."

Actual transactions in the market provide direct evidence of market value only if the properties are comparable or if they are such that they can properly be compared by making adjustments for differences between them. Truly comparable sales are those which relate to similar

ground in the same area as the expropriated ground and which were concluded at about the date of expropriation. Because of the difficulties which may arise where there are variables, transactions which are said to be comparable must be considered with great care and circumspection. See Minister of Agriculture v Davey 1981 (3) SA 877 (A) where the difficulties and problems are discussed at 902 E - 903 B. The "market" is the open market as distinguished from dealings restricted to members of a limited class such as members of a family. In I.R.C. v Clay 1914 (3) KB 466 (CA) at 475, it was said that market value

> "is such amount as land might be expected to realise if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale."

(See also p 478.)

Method (c) was described by Ogilvie Thompson JA in Estate Marks v Pretoria City Council 1969 (3) SA 227 (A) as follows at 248 - 249:

> "The residual land value method is a complicated exercise involving specialised skills in several spheres. The first step is to determine the optimum development of which the land proposed to be purchased is capable. If it is to be properly done, that entails the preparation of a comprehensive building project, complete with plans and specifications, which complies with all relevant building regulations and town-planning provisions. Thereupon the cost of erecting such a building has to be carefully calculated, as also the estimated nett rentals to be derived from the building. Such nett income is then capitalised at the rate of interest which the prospective purchaser expects from his investment. From this capitalised value, the total cost of the project is deducted, and the residual figure represents the amount which the purchaser

would probably be prepared to pay for the site in question. As the learned Judge a quo succinctly put it, after such a projected scheme has been worked out,

> 'a buyer expecting a certain return on his investment would know that he could afford to pay the residual value of the land so arrived at in order to give him his expected return.'

The validity of a residual land value projection vitally depends upon three basic factors, namely, (a) the development costs of the projected building; (b) the anticipated nett income from the project; and (c) the nett yield required by the prospective purchaser. Error in the calculation of either of the first two of these factors will obviously materially affect the result; and, as will appear more clearly hereafter, even a very small alteration in the yield expected has a profound effect upon the ultimate figure representing the value of the land."

Later in the original judgment there appears an important

important paragraph which has been omitted from the judgment as reported, namely,

> "That is not, however, to say that I am of opinion that the learned Judge should necessarily have determined the value of those erven at the aggregate figure derived by applying McIntosh's residual land value method. As I have already indicated, relatively small variations in any one of the three basic factors of that method of valuing land produce material divergences in the figure ultimately reached. Provided that important fact is appreciated, the method doubtless has many merits - particularly, I venture to suggest, as a comparative check upon the ultimate figure attained by the application of more conventional methods of valuation - but, because of the imponderables inherent in it, the residual land value method of land valuation should, in my opinion, be regarded with circumspection by the Court. Cf. Cripps op. cit. who, at 4-200, indicates that residual land value is not always an

acceptable method of valuation."

Ogilvie Thompson JA was discussing the residual land method of valuation in relation to land which it is proposed to acquire as an investment, namely, for the erection thereon of a building from which income is to be derived by way of rentals. It is debatable whether the method can usefully be applied to land which it is proposed to subdivide and to re-sell as township erven.

It is to be noticed that the use of the residual land value method does not do more than provide a figure for the amount which the notional buyer could afford to pay, and thus would probably be prepared to pay. It does not itself give the exchange value of the land.

Where an accurate valuation is not possible because of a paucity of evidence, the compensation court does not adopt a <u>non possumus</u> attitude. Its approach is

necessarily like that adopted by a court in assessing damages, when, lacking clear proof, it must make do with such relevant data as are available. Illustrative of that approach is Hersman v Shapiro & Co 1926 TPD 367 at 380:

> "But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."

See also Enslin v Meyer 1960 (4) SA 520 (T) at 523 - 524, and Mkwanazi v Van der Merwe & Another 1970 (1) SA 609 (A) at 631. On the application of the principle to expropriation cases, see Dormehl v Gemeenskaps-ontwikkelingsraad 1979 (1) SA 900 (T) where Van Dijkhorst AJ said at 909 G - H:

> "'n Hof moet met die gegewens wat voorgelê is, hoe karig ookal, tot 'n bevinding kom na

die beste van sy vermoë al sal die resultaat neerkom op 'n ingeligte skatting."

The amount which the expropriated property would have realised if sold on the date of the expropriation notice in the open market by a willing seller to a willing buyer is at best a matter of inference or estimate. This is not a field in which the judge ordinarily has the specialised knowledge which is required for the drawing of the proper inferences, and consequently he must depend largely on the testimony of experts. (See Estate Marks (supra) at 253.)

In this case the plaintiffs relied on the expert evidence of Dr Willem Gerke, and the TPA relied on that of Mr Norman Griffiths.

Gerke is a qualified land-surveyor, town-planner and valuer. He has extensive experience in these fields both in his professional capacity and as a township

developer on his own account. He was well-acquainted with the area of Randburg-Sandton in which the RE was situated, having been personally involved in a great deal of the development there.

At the relevant date the RE was zoned under the Sandton Town-planning Scheme "Agricultural Purposes", but it was common cause there would have been no problem in having it rezoned as "Special Residential".

In Gerke's opinion it was not possible in this case to apply the "comparable approach" in determining the value of Portion 3. It would, he said be almost a futile exercise to look for a comparable transaction because in the case of land bought for township purposes so many differences can arise, such as general location, size, the availability and cost of services, and the potential for sub-division. He accordingly adopted what he called "a static residual valuation or calculation" in "a before-

and-after approach". He said that this was a different kind of thing altogether from the normal land residual technique. That, he said, has been rejected "as being (im)practical and very dangerous to rely on because there are so many factors that go into the costs of a building and factors that are unknown". In his approach the calculations were relatively few in number and had relatively small margins of error.

Gerke made two calculations: the first in relation to the RE, which he set out in Exhibit "I", which is headed "Viability Calculation before Expropriation"; and the other in relation to the rest of the RE which he set out in Exhibit "J", which is headed "Viability Calculation after Expropriation". Each of the exhibits has two parts. The first part is headed "ESTIMATED REVENUE" and sets out the number of residential erven, the estimated price per erf, and the total estimated revenue.

The second is headed "ESTIMATED EXPENDITURE" and includes items such as bulk water supply, external sewer works, internal water reticulation, roads and storm water construction, internal sewers and electricity. Exhibit "I" concludes with an "Expected Net Surplus on Sale" of R4 975 356; exhibit "J" with an "Expected Net Surplus on Sale" of R3 172 456. The difference between these two figures, namely R1 802 900, was Gerke's valuation of Portion 3.

There are obvious similarities between the usual residual land value technique and Gerke's static residual valuation: both involve a projection of costs and income. There are also obvious differences: the one is a complicated exercise involving specialised skills; the other is a rough and ready method involving rule of thumb estimates and assumptions. Gerke said in his evidence that the word "static" connotes that the various

inputs are taken as at the date of valuation, and explained -

> "Now we all know that prices change, the costs of services go up, the costs of road making go up, the costs of what you sell the land for in three or four years' time when you are really going to sell it is not going to be the same as if you sell it today. But rather than to try to project all these to the future and then discount them back again to the relevant date I take it as at that relevant date what the income and what the expenditure would have been. In other words then, referring to EXHIBIT I, I estimate what residential erven would have sold for, assuming they had been sold at that date. Even though it might be a year or two before I would sell them. Similarly in regard to the estimated expenditure what the cost would have been at the relevant date. Basically in the long term or medium term they tend to increase both on the income and the expenditure side. Those practically cancel out. My personal

> experience has been that the actual profit has always been in excess of what was originally estimated."

Ogilvie Thompson JA's caution in regard to the use of the normal residual valuation technique applies a fortiori to Gerke's method, which, it is apparent, is only a crude and unscientific variant of the usual technique. The development costs are a matter not of calculation but of estimate, as is the expected income from the sale of erven. In township development, time and the cost of money are of the essence. Gerke's method takes no account of the different times at which various costs will be incurred and items of income will be received. It ignores the factor of interest, which over the years between the date of the purchase of the land and the time when income can be expected to begin flowing may be substantial. Gerke's method did not relate to the real world, but was based on assumptions for which there was no warrant other

than what Gerke said was his experience. He admitted under cross-examination that his method was not mentioned in any text-book, and was not used by valuators. He himself said,

> "(The method) is not a certainty. It obviously has dangers in it too. I mean I cannot deny that, but.... I do not know of a better way."

He said that similar methods are used by township developers for their purposes, but qualified this by saying:

> ""....when I say that township developers, and including myself, have done this kind of exercise in the past of course in practice in the real world one most of the time has the offer of a particular property at a particular price. Not everybody estimates it the same way, I mean uses the same figures..... And this valuation will then show whether I am prepared to buy or whether I am not prepared to buy."

Apart from the aforegoing, Gerke's approach was subject to a more serious fundamental objection. It is in the economic nature of a seller of property to exact the best price he can, and in that of a buyer to pay only what he must. The result of these opposing forces is an agreed price. Gerke's exercise is focussed, not on what the owner would require and the township developer would have to pay (which Gerke ignores) but on what the developer could afford to pay without loss (and it should be added, without profit). It is a theoretical exercise, entirely unconnected with the realities of the market place.

Counsel for the appellants referred to the unreported case of Estate Milner en Andere v Die Stadsraad van Thabazimbi (TPD 6 September 1982) as a case where the Court had adopted Gerke's approach. Whether or not the court was correct in so doing, an important distinguishing feature is that in that case Gerke applied a "risk-reward

factor" in order to determine what portion of the estimated surplus could be paid for the land and what portion could be regarded by the notional developer as his profit. In the present case Gerke applied no such factor: he treated the whole of the estimated surplus as the value of the land, and made no provision for developer's profit. This would, no doubt, be a source of gratification to a seller, who as the owner of "raw land" would reap the rewards to be gained from a developed township. But the result bears no relation to market value.

Gerke gave this explanation for his omission to provide for developer's profit. He said that the land had potential for development for office purposes: it was possible that there could be laid out on it an "office park", in which a number of low bulk office buildings, usually designed by a single architect, are located in a parklike setting. He did not attempt to place a value on

this potential. His approach was that a developer would say:

> "I am prepared to go in for this scheme of buying for development of an office park but I am not going to pay more for it than I will be able to recoup if everything goes wrong. He would then calculate what he could recoup and he would say that is the maximum I am prepared to pay for it."

He was of the opinion that the profits which a township developer stood to make if an application for rezoning to office use was successful warranted a purchase of the land on a "fall-back" basis: he would pay a price which would allow a disposal of the land without a loss in the event of the failure of application for rezoning. The "fall-back" price was the price that would be paid for the land with its potential for a residential township. In order to obtain the land with its office potential, the developer would have been prepared to forego the usual developer's

profit.

Gerke's scenario may be imaginative and ingenious, but it bears no relation to the realities of land-dealing. Fundamental to it is the existence of an office potential for the land. That is necessarily a matter of opinion, but an opinion which is not based on facts is mere speculation. The uncontradicted evidence given by townplanners in this case was that a thorough investigation was a necessary prerequisite. None was made. Gerke said first that a grant of office rights was a realistic probability, and then, under cross-examination, a reasonable hope. That was insufficient to have any impact on a potential buyer's thinking. It was the view of McCreath J that an office potential for the RE was at best a hope. In my view it was rather in the nature of a pipe dream.

But even if there were such a potential, it is

not apparent that a potential developer, even one as sanguine about the prospects as Gerke claimed to be, would be prepared to stage this scenario. Why should he forego the usual developer's profit when determining the price to be offered for the land? And why should he be prepared to lock up his capital unproductively while he awaited the outcome of an application for office rights? In the meantime (a period of 3 years was mentioned as a possibility) he would be paying or losing interest and would have to pass up such other business opportunities as might offer.

In my opinion Gerke's valuation was fatally flawed at its foundation.

McCreath J took a similar view. He considered that, notwithstanding the advantages which in an appropriate case can be gained from the "static residual" valuation and

the "before and after" approach, Gerke's evidence in this case was unacceptable and could not be relied upon. In consequence, the learned judge said, the trial court had "no option but to fall back on the comparable sales approach adopted by Mr Griffiths".

Griffiths said in his evidence that he was a Fellow of the Royal Institution of Chartered Surveyors, a qualification which he obtained by examination in 1967. He arrived in South Africa in 1968 and became a member of the South African Institute of Valuers. He joined the firm of Richard Ellis, which he described as having the largest staff of valuers of any firm in South Africa. Since he became a director and shareholder in 1978, he has controlled the valuation side of the business. Over the years the firm has amassed a wealth of information on valuations on most types of property in the country. It monitors the South African property market on an ongoing basis.

In this matter he was approached by the State Attorney to consider the value to be placed on the expropriated property. His initial objective was -

> "to fully understand, interpret and research the actual market which existed in general and in specific terms at the expropriation date to the extent of identifying the thoughts which were current in minds of buyers and sellers at the expropriation date from the backdrop of the market which existed at that time, as to what factors would be influencing them and then to go further and actually research in the market and see what real world buyers and sellers were actually doing by establishing information on sales which had occurred at or about that time."

Griffiths first read many documents which provided the background of the case; he visited the Sandton Municipality to discuss with the townplanners and the valuers aspects relating to the property; he caused Deeds Office searches

to be made in order eventually to "arrive at a hard core of comparable evidence"; and he inspected the property, had ongoing discussions with township developers and researched relevant financial aspects.

He adopted the comparable approach which Gerke rejected as inappropriate. He took into consideration a number of transactions relating to agricultural land with a township potential in the same general area, viz a transaction relating to the RE itself and transactions relating to land described in the evidence as Hurlingham Extension 5, Benmore Gardens Extension 3, "The King David Site" and Portions 20, 34, 41 and 46 of Waterval 5 IR. On the basis of these transactions, Griffiths formed the opinion that on the relevant date the RE was to be valued at R55 000 per hectare, giving a total value of R1 579 million which Griffiths rounded up to R1,6 million.

As "a check", Griffiths said, he then performéd a

residual calculation in the usual manner, which he set out in Exhibit "N". This gave a residual value for the RE of R1 347 243 which, rounded up to R1 350 000, resulted in a value of R46 923 per hectare.

Exhibit "N" was subjected to severe and detailed criticism by Mr Heher, who submitted that the calculation was unreliable, of small relevance and inaccurate in its content. There is substance in the criticisms, but in my view, counsel for the plaintiffs was wasting his powder. There was nothing to shoot at. Griffiths himself said that this was not a calculation of the value of the land. All that it indicated was a realistic figure which a developer might consider that he could afford to pay. Its accuracy depended very much on input. It was no more than a check, and he did not base his valuation on it. Even as "a check" it can, I think, be ignored.

The RE had formerly been owned by a company named

Harrowdene Estates (Pty) Ltd. The shareholders were Isaac Wilfred Jacobson and Barney Jacobson, who wished to put the company into liquidation. In pursuance of this, and in terms of deeds of sale dated 16 June 1983, the RE was transferred in undivided shares to three family trusts set up by the Jacobsons, viz the I W Jacobson Trust (one half), the Jacqueline Harrowdene Trust (one quarter) and the Irene Harrowdene Trust (one quarter). Members of the families of Isaac and Barney were the beneficiaries of these trusts, which are represented in these proceedings by the plaintiffs. The total price for which the RE was sold to the three trusts was R1 661 000 (which represents a price per hectare of R57 851).

Griffiths said that this transaction had a "certain relevance" - "within the test of comparability it is said that the best comparable is the subject property on its date of expropriation. This sale took place

approximately three months after the expropriation". He did not accept that comparability was excluded because this was an "inter-family" transaction. He considered that "the parties in setting up these trusts obviously wanted to go totally arm's length..... For that purpose they employed an external valuer.... and asked him effectively to put the numbers on the transaction." He referred to the fact that in Exhibit"X" (which was the agreement between Barney Jacobson and the Irene Harrowdene Trust), for example, there was provision for the payment of interest on the purchase price at a rate of 1% over prime overdraft rate after a period of grace.

McCreath J said in his judgment that the figure of R1 661 000 was admittedly based on a valuation by a Mr Balme which had been obtained by the plaintiffs, and that because the valuer had not been called as a witness, the valuation itself could not be regarded as evidence before

the court. There were however two factors which led him to conclude that the transaction was not one which could be disregarded. The one was that the interest stipulated was not nominal - it was not less than the interest which would be payable by a person who was in fact dealing on the open market. The other was the fact that "this was the fair market valuation which the plaintiffs themselves regarded the whole of the remaining extent of Harrowdene to be (at any rate for transfer duty purposes)".

In my opinion this transaction was not in itself evidence as to the market value of the RE. It was not a market transaction in the sense that the price and other terms were hammered out in the heat of competition. They were prima facie imposed by Isaac and Barney Jacobson (there was no evidence to the contrary) and the price does not afford objective evidence of what would have been paid by a willing buyer to a willing seller. That is not to say,

however, that this transaction was entirely irrelevant as submitted by Mr Heher. It was relevant as an admission by the plaintiffs as to the value of the RE on the date of the transaction. It was argued by Mr Heher that because the plaintiffs were laymen with no knowledge of land values, any admission by them was either inadmissible or valueless. I do not agree. An admission by a party of facts which are not within his personal knowledge is admissible as evidence of the truth of the facts asserted in the admission. (See S v Naidoo 1985 (2) SA 32 (N) at 34 - 36.) The weight to be attributed to such an admission depends -

> ".... on the circumstances under which it is made and in particular the source from which (the party) derives his knowledge and the confidence which he reposes in its reliability."

(ibid at 36 H per Thirion J).

In his judgment in the court a quo McCreath J made

an apt quotation from Davies, Law of Compulsory Purchase and Compensation, 1978 at 42:

> "The best way to understand market value is to imagine going to an experienced and competent valuer and asking him for his advice as to the likely price which he would expect a particular property to fetch if it were to be sold."

This, said the learned Judge, is exactly what the plaintiffs did in this case. And the confidence which they reposed in the reliability of Balme's valuation is demonstrated by the fact that they solemnly swore to it on affidavit.

In my opinion, although this transaction was not evidence against the TPA, it was cogent evidence against the plaintiffs.

In regard to the other transactions relied on by him, Griffiths's conclusion was that in 1982 developers were paying between R30 000 and R40 000 per hectare for land in

this area with residential township potential. Making a direct comparison with one of the properties (Hurlingham 5 for which R4 million was paid), the figure for the RE, which had a third of the number of erven, would be $\frac{\text{R4 million}}{3}$ or R1,3 million. And on a similar comparison with another property (Benmore Gardens 3), one reached a value of R40 000 a hectare. Making an adjustment for the higher prices in 1983, he considered that "a fair figure on the whole of Harrowdene would be R55 000 per hectare, which gives us a figure of R1 579 million, call it 1,6 million".

Mr Heher subjected Griffith's evidence on these and the other "comparable" transactions to a rigorous analysis, which demonstrated that none of them could safely be used for the purpose of direct comparison. Mr Heher said that each of the properties

> "possesses so many characteristics of its own which differs from those possessed by the

> others and by the expropriated land and the Remaining Extent of Harrowdene, which require to be adjusted in order to strike a balance, that reliable comparison is excluded".

The submission appears to me to be a just one. It appears, however, that Griffiths also used these transactions not for the purpose of direct comparison but as source material to provide a guide of what raw land with a potential for residential township development was costing in 1982. He said:

> "I think comparability is a little bit of a difficult term because obviously every property is different, every property is unique and in looking at what we call comparable sales we are looking for transactions which have some similarities or some conclusions which can be drawn from those transactions. There may only be one or two relevant facts that we consider to be relevant on those transactions. We are not saying that one property every single feature

> has to be taken into account. There may be one or two features but one is trying to establish what was happening in the marketplace, what people were buying and selling and what money they paid when they bought and sold and why they paid the amounts they paid."

Under cross-examination it was laid to his charge that he was juggling with differences between one property and another, with the result that "comparability is thrown out of the window". He denied the imputation. He said that "it is taking logical assessments from the evidence that one has". When it was put to him that on his approach comparability depended purely on the ability of the valuer to juggle successfully, he replied, "It is the ability of the valuer to draw meaningful conclusions from aspects of comparable sales". And again, "It is a judgmental assessment of the information one has...". He said further that he did not apply other sales on a direct comparison to

the RE. He drew conclusions from the sales which gave a picture of the market in 1982, and then moved on to the market in 1983, when there had been an upward movement. Further on in the cross-examination he explained what he meant by comparability:

> "Comparability is looking at what has happened in the marketplace, establishing what that means, establishing why that happened and saying as that happened how does it impact on one's judgment of what this property is worth in March 1983..... I am putting a bottom line and I am putting a top line and I am saying that in between there is where the subject property must lie, and these (properties) are the bottom line".

What Griffiths appeared to be saying here was that he used the so-called comparables in order to provide data on the basis of which he, as a valuer using his experience, knowledge and expertise, made a judgmental decision. It was argued that his conclusion defies logical analysis. I

am inclined to agree that in the result it amounted to no more than a crude generalisation. But this does not lead to a rejection of Griffiths's evidence as argued by Mr Heher. In Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501 Innes JA remarked 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,..... 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."

In my view that was the position here. If, as seems to be the case, there were no transactions suitable for direct comparison, Griffiths could only employ his skill and experience on the data which were available to decide what a purchaser would have been likely to give for the RE.

Griffiths calculated the value of Portion 3 by applying the rate of R55 000 per hectare derived from the value of the whole of the RE. He said that in his opinion there were "no material features which can be converted into monetary terms to suggest that the value of that portion is any different than the R55 000 per hectare which I place on that whole. So the R55 000 per hectare times eight and a half hectares is R467 000". This he rounded up to R470 000.

It was contended on behalf of the plaintiffs however that the figure of R55 000 per hectare could not

fairly or properly apply pro rata to the 8,5 hectares of Portion 3. The learned trial Judge was inclined to agree that the value of Portion 3 was greater than the portion of the RE which remained after expropriation. It was in certain respects better situated and had other advantages. Moreover, the development of the RE as a whole would also have been financially advantageous to the owner.

> "Even if regard is had to the evidence as a whole and that which was observable at the inspection in loco, I have no given facts on which to determine an additional value for the expropriated portion in relation to the whole once Gerke's method of evaluation is rejected. I have given this aspect of the matter earnest consideration in view of the factors I have mentioned. It seems to me that in view of the fact that I consider that there is merit in the contention that the expropriated portion has some additional value I would be entitled to adopt the figure which can be determined from the transaction relating to the subject property itself, that

> is the whole of the remaining extent of Harrowdene when transfer was passed from the Company to the trusts. This would have the effect that the valuation of Gerke (?Griffiths) of R470 000 is increased to a figure of R491 750 and that is the figure which I propose to adopt."

It is apparent that McCreath J increased by R21 750 the valuation of R470 000 which was based on Griffiths's valuation of R55 000 per hectare. The figure of R21 750 was arbitrary in the sense that it was in no way related to the "additional value" of Portion 3 - it was obtained simply by applying the figure of R57 851 which was the rate per hectare calculated from the price in the company/trusts transaction and had nothing to do with the "additional value".

It is clear that the evidence of Griffiths can be criticized. The method by which he arrived at R55 000 per hectare was not completely satisfactory, and plainly, if

there were anything better on offer, an assessment on that basis would not be the assessment of choice. Similarly, Griffiths's failure to attribute a higher value to Portion 3 than to the rest of the RE is open to criticism. But this court will not set aside the award by the trial court unless it is satisfied that it was wrong. See Estate Marks (supra) at 253 H. It does not follow merely from the fact that an unsatisfactory method was used, or that an arbitrary figure was used by the trial judge, that the conclusion was incorrect. Griffiths's view was not out of line with the admission made by the plaintiffs. As McCreath J said in his judgment, the trial court had "no option but to fall back on the comparable sales approach adopted by Mr Griffiths". He recognized that there might be criticisms with regard to Griffiths's method, but considered that "(his) is the best evidence before the court and the court is therefore dependent thereon in endeavouring to arrive at

a value itself". I am in entire agreement.

In regard to the submission made on behalf of the appellants that a solatium of R10 000 should have been awarded to each of the plaintiffs, I am on this point in respectful agreement with Milne JA.

I would make the following order:

"The appeal is dismissed with costs, including the costs consequent on the employment of two counsel".

H C NICHOLAS

CORBETT CJ)
BOTHA JA) **CONCUR**

77a/90

CASE NO: 606/88
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

NORMAN NATHAN SHER N O	**First Appellant** [1st Plaintiff in the Court a quo]
JULIUS FEINSTEIN N O	**Second Appellant** [2nd Plaintiff in the Court a quo]
NEVILLE SWEIDAN N O	**Third Appellant** [3rd Plaintiff in the Court a quo]
LAWRENCE ALFRED MEYEROWITZ N O	**Fourth Appellant** [4th Plaintiff in the Court a quo]
ARTHUR JACOB AARON N O	**Fifth Appellant** [5th Plaintiff in the Court a quo]
ROBERT LAPEDUS N O	**Sixth Appellant** [6th Plaintiff in the Court a quo]
YUDEL BACHER N O	**Seventh Appellant** [7th Plaintiff in the Court a quo]
LAWRENCE TRAKMAN N O	**Eighth Appellant** [8th Plaintiff in the Court a quo]
BERNARD HERBERT N O	**Ninth Appellant** [9th Plaintiff in the Court a quo]
and **THE ADMINISTRATOR OF THE TRANSVAAL**	**Respondent** [Defendant in the Court a quo]

CORAM: CORBETT CJ, BOTHA, MILNE, STEYN JJA et NICHOLAS AJA

DATE OF HEARING: 17 May 1990
DATE OF DELIVERY: 23 August 1990

J U D G M E N T

MILNE JA:/.....

MILNE JA:

The appellants are the trustees of three trusts. These trusts owned in undivided shares a certain piece of land in the following proportions:

the I W Jacobsen Trust	one half,
the Jacqueline Harrowdene Trust	one quarter and
the Irene Harrowdene Trust	one quarter.

This land (the original land) is described as follows:

> "The remaining extent of the Farm Harrowdene 4 Registration Division IR Transvaal in extent 28.7113 hectares."

By notice of expropriation dated 25 March 1985 the respondent, acting in terms of s 2 of the Expropriation Act No 63 of 1975 (the Act), expropriated a portion of the original land. This portion is 8.5 ha in extent and is described as "Portion 3 of the Farm Harrowdene 4 Registration Division IR Transvaal". In the expropriation notice the respondent offered the appellants the sum of

R510 000 as compensation for the expropriated portion and R10 000 in terms of s 12(2) of the Act. The total of R520 000 was paid to the appellants on 25 March 1985.

The appellants and the respondent did not agree upon the amount of compensation to which the appellants were entitled under the Act.

The relevant date for determination of the compensation payable under the Act was fixed as 8 April 1983. This was agreed between the parties because previous notices of expropriation were withdrawn as will appear later.

The appellants originally claimed that the amount which the expropriated portion would have realised if sold on that date by a willing seller to a willing buyer was not

less than R3 million. Orders were originally sought determining the amount of compensation to which the trusts were, respectively, entitled on the basis of that amount. An additional amount of R30 000 was also claimed in terms of s 12(2) of the Act. On 17 February 1987 the appellants' attorneys notified the respondent's attorneys that the amount of the claim was reduced from R3 million to R1 330 000. A notice of amendment reducing the amount of R3 million was received by the respondent on 25 May 1987 but this reduced the claim not to R1 330 000 but to R1 360 000.

The trial court determined the amount of compensation to be paid to the appellants in terms of s 12(1)(a)(i) of the Act as the sum of R491 750 payable as follows:

(a) To the first to third appellants (representing the I W Jacobson Trust) the sum of R245 875;

(b) to the fourth and sixth appellants (representing the Jacqueline Harrowdene Trust) the sum of R122 937,50; and

(c) to the seventh to ninth appellants (representing the Irene Harrowdene Trust) the sum of R122 937,50.

In terms of s 12(2) of the Act the sum of R10 000 was added to the sum of R491 750. It was also ordered that interest was payable on the sum of R491 750 at the interest rates prescribed in terms of s 26(1) of the Exchequer and Audit Act 1975, for the period commencing 60 days after 8 April 1983 and terminating on 25 March 1985. As the amount awarded was less than that paid by the respondent, the court ordered the appellants jointly and severally to pay the respondent's costs including the costs of two counsel and the qualifying fees of certain expert witnesses. The appellants appealed to this court with leave of the trial

court.

Three notices of expropriation were issued in this matter. The first is dated 30 March 1983 and in that notice the area expropriated measured 8.4995 ha. A company, Harrowdene Estates (Pty) Ltd, was the owner at that time. At the request of that company the notice of expropriation was withdrawn and further expropriation delayed until the transfer of the original land to the three trusts had occurred, the arrangement being that when the property was re-expropriated the market value would be determined as at 8 April 1983. It was also agreed between the parties that the respondent would, in the meantime, be entitled to take possession of the property. A second notice of expropriation was issued but also withdrawn at the request of the owner. Eventually in March 1985 the original land was transferred to the three family trusts in undivided

shares and thereafter, on 25 March 1985, the third notice of expropriation was served.

The respondent initially pleaded that the amount to which the appellants were entitled in terms of s 12(1)(a)(i) of the Act did not exceed R470 000 but this figure was subsequently amended to R510 000 being the amount offered in terms of the notice of expropriation.

The trial court described the original land as follows:

> "It appears herefrom that the property in question lies within the Sandton municipal area. It has a slope from south to north downwards, roughly; possibly a more accurate description would be a downward slope in a north-westerly direction. The plans also indicate that the expropriated land, as well as the remainder of the property registered in the name of the trusts, are adjacent to the residential areas of Gallo Manor and Wendywood and are also in the vicinity of two clubs known as the Cedar Park Club and the Johannesburg Country Club.

It does not appear to be challenged in any way that the area in question is a good residential area. There appears to be a certain difference between the witnesses as to whether it is to be regarded as an excellent residential area, or a good residential area although not in the upper standard of residential areas, but I do not think a great deal turns on this particular aspect. It is also not in dispute that the land is well located in relation to recreational, educational and shopping facilities. It is apparent from the documents before the court that it is in close proximity to the M1 freeway between Johannesburg and Pretoria.

I have referred to Kelvin Drive. There is to the immediate west of the remaining extent, as it is subsequent to expropriation, and also to the west of the expropriated portion of land, an existing street known as Kelvin Drive. The plans for development of the property indicate an extension of that street which would have the effect of separating the expropriated portion from the present remainder. From the evidence it is apparent that the Sandton municipality had initially planned that this extension of Kelvin Drive would be 30 metres wide. This was subsequently changed to a width of 40 metres."

Although the original land was zoned in terms of the relevant Town Planning Scheme for use "for agricultural

purposes" at the relevant date, it was common cause that, as at that date, it was ripe for development for special residential purposes and indeed the plans for such development had already been prepared.

The appellants' main witness was Dr Gerke who was described by the trial court in the following terms:

> "Dr Gerke, a township developer in his own right and who is also a town planner and a land surveyor and also a man with considerable experience in these fields".

His evidence was that there were no sales of land for township development which were sufficiently similar to fall within the category of comparable sales. He accordingly attempted to arrive at the difference between the value of the original land and the value of the balance after expropriation on the basis of what he called a "static residual calculation". This involved determining the

expenditure in regard to the lay-out of the township before the expropriation took place as well as the income to be derived from the sale of erven in such township. A similar calculation in regard to the expenditure involved in laying out a township on the balance of the remaining extent after the expropriation of portion 3 aforesaid was also done, as well as a calculation of the income which would be received from the sale of erven in the latter township. The difference between the net income was then said to determine the value of the expropriated portion. This differs from the usual residual calculation in that it takes revenue and costs as if they were, respectively, received and incurred at the date of expropriation without making any allowance for the delay inevitably experienced in obtaining the necessary approval of a proposed township. Gerke also adopted the approach that the original land had a potential for development for office purposes and more particularly

for development as an "office park". This type of development apparently envisages office buildings which are of a relatively low height and set in park-like surroundings. On the basis of this approach he considered that a prospective purchaser would have been prepared to abandon the 30% profit for which a developer would normally allow, in the hope of realising this potential and on the basis that, should that particular potential not materialise, he would be able to develop the property as a residential township on a "break-even" basis.

The main witness for the respondent was Mr Griffiths, who is described by the trial court as

> "a valuer of several years standing and with considerable experience of township land and the development of townships although not possessing any personal experience as a township developer of any great note ...".

The respondent also called two town planners namely Mr

Malherbe and Mr Ferero. Neither of these persons is a valuer but each is a town planner

> "of considerable experience and each is well acquainted with the town planning principles to be applied and the town planning provisions applicable within the municipal area of Sandton at the time of the expropriation."

Malherbe was in the employ of the Sandton Municipality at the time of the expropriation. The respondent's witnesses were of the view that there were comparable sales and that the value of the expropriated portion should be determined having regard to such sales.

The learned trial judge, after considering the evidence of Gerke, summarized his views as follows:

> "I am of the view that Gerke's evidence in this particular case, and without in any way criticizing his integrity, is unacceptable and cannot be relied upon. In consequence the court has no option but to fall back on the comparable sales approach adopted by Mr Griffiths."

The effect of the evidence of Griffiths is summarized by the trial court as follows:

> "... what Griffiths did was to establish what he called a bottom line and a top line for the sale of township property during 1982 and the limits whereof were approximately between R30 000 and R40 000 per hectare. He accepted the fact, which indeed was common cause, that there was an increase in the values in the property market between 1982 and 1983. Having regard to that factor and to the various sales, and making adjustments for those differences with regard to location and area which might be required, as well as to the improvements situated on certain of the properties, he ultimately arrived at a unit value of R55 000 per hectare for the 28.7113 ha comprising the whole of the remaining extent of Harrowdene [the subject land]. On this basis he concluded that the value of the expropriated land, namely Portion 3 aforesaid, was R467 500 at the relevant date, which he rounded off to R470 000 to arrive at his valuation."

The trial court did not however fix this figure as the value of the expropriated property but the figure of R491 750. I shall, at a later stage, deal with how the learned judge arrived at this figure.

I am, with respect, unable to agree with the trial court's finding that Gerke's approach to the valuation of the expropriated portion was "not entirely objective" or that he was "ill-prepared". In my judgment, however, Gerke's approach was faulty in several material respects. There is some substance in the criticism advanced on behalf of the respondent that Gerke's static residual valuation is not really a valuation but "merely another viability study" aimed at what the owner of the balance of the original land after expropriation could afford to pay for the expropriated portion. As the trial court points out, furthermore, this method

> "... takes income and expenditure as at a fixed date, being the date of the original expropriation without making any allowance for a time factor in regard to the application for and approval of a township on the property and discounting the figures arrived at in order to make provision therefor."

It was common cause in the appeal that it would be

reasonable to assume a period of three years between the date of application and the date of approval of a township even if it were for a purely residential township. Mr Heher, for the appellants, submitted that this factor was taken into account in the 30% that would normally be deducted from the value of the land as representing the developer's profit. It was not, in fact, taken into account in Gerke's main calculation but I shall deal with that point in a moment. 30% is taken to represent the profit that the hypothetical developer would require to make on his expenditure in return for his time, labour and expertise. It does not, as I understand Gerke's evidence, take into account the loss of interest to the developer on his capital outlay during the three years which would elapse before the township was approved. It is true that Gerke said that in his experience (which was very considerable) the price of township stands rose faster than the costs of development,

but that does not deal with the point that the developer would loose interest on what he had paid for the property - either in the form of interest on overdraft if he had borrowed money for that purpose or loss of interest on an alternative form of investment. If one were to take Gerke's starting figure of R1,8 million and, as he suggests one should do, deduct the developer's 30% profit, this gives a figure of R1,26 million as the figure which Gerke suggests a developer could afford to pay for the expropriated portion. Simple interest on this amount calculated at 15% over a period of 3 years would amount to R567 000. I agree with the trial court's comment that the loss of interest would have made the whole proposition unacceptable for any purchaser. The basis on which Gerke suggested that the usual developer's profit of 30% should be omitted from his calculation was that the original land had a potential for office park development. The developer would, so he said,

have been prepared to omit this figure from his calculations of the worth of the property because if such development were permitted his profits would be very great and if it were not permitted he would "break even" with a residential development. I agree with the learned judge's finding that the prospects of an office park development were not shown to be such as to be likely to influence the price which a hypothetical developer would be prepared to pay. In any event, even if such prospects had been demonstrated it is by no means clear to me why it would follow that the developer would, in consequence, not include any allowance at all for his profit in his calculations.

For these reasons I do not think that the rejection of Gerke's approach can be faulted.

The trial court found that "criticism can be

levelled at the residual calculation done by Griffiths" inter alia because he at no time did any residual calculation on the balance of the property after expropriation or on the expropriated portion itself. He said, however,

> "criticism though there may be with regard to the method adopted by Mr Griffiths it is, in my judgment the best evidence before the court and the court is therefore dependent thereon in endeavouring to arrive at a value itself."

I consider that Griffiths' evidence is open to serious criticism. In the first place I agree with the learned judge a quo that his residual calculation is not reliable. Quite apart from the fact that he made no residual calculation in respect of the expropriated portion, and that he failed to take into account that the seller is entitled to use monies paid on account of the purchase price of land prior to actual proclamation provided he puts up

adequate guarantees, he projected present day income and expenditure for three and a half years and then discounted them back to the present day. This, as Gerke demonstrated, was fallacious.

There are, however, more serious objections. They may summarized as follows:

(a) He misconceived the nature of "comparable sales" with the result that he took into account sales that were not truly comparable.

(b) In establishing what he called "a bottom line and a top line" for the sale of township property during 1982 he failed to take into account factors which invalidated the "bottom line figure".

(c) He simply took the average value per hectare of the original land and applied that to the expropriated portion without taking into account:

(i) the greater value per hectare of the expropriated portion because of its better physical features;

(ii) the fact that the expropriated portion was able to be developed more densely than the balance i.e. was able to produce more erven per hectare;

(iii) the value of the expropriated portion as part of the original land i.e. he valued it as if it were a property considered in isolation.

(d) He failed to give proper weight to the most important of the comparable sales which he said he relied on namely the sale of the original land itself.

As to (a): The learned trial judge quoted a portion

of the judgment of Muller JA in Minister of Agriculture v Davey 1981(3) SA 877 (A) at 902E - 903B and it bears repetition:

> " The comparative method of determining the market value of expropriated property is, of course, well-established. This Court has from time to time said that, generally speaking, prices paid for comparable properties in the neighbourhood afford the most satisfactory guide in determining market value. But, it has also stated that evidence of such transactions should be considered with great care and circumspection (Minister van Waterwese v Von Düring 1971(1) SA 858 (A) at 871A). This is necessary because the weight and cogency of such evidence depends to a very large extent upon the degree of similarity of the comparable sales. In applying this method of valuation, the Court must be satisfied that the transactions are sufficiently similar to afford a fair comparison. This is always a question of degree as to which no hard and fast rules can be laid down. The first matter to be considered, in such a case, is whether the land sold is similar, and here regard must be had to factors such as the location of the land, its size, physical characteristics, purposes, surroundings and so on. It is also necessary to look at the sale itself. The purchase price should not be accepted without further analysis because factors such as the time of the sale, the circumstances of the sale -

whether it is a free open market transaction, or a forced sale, or a sale under special circumstances - and the conditions of sale, may all have a bearing on the purchase price agreed upon. Evidence may also show that, for some reason or another, a particular sale is out of line with the prevailing market value of such land. (See Cripps **Compulsory Acquisition of Land** 11th ed paras 4-193, 194; **American Jurisprudence** 2d vol 27 "Eminent Domain" paras 427 and 429; Gildenhuys **Onteieningsreg** at 132-134.)

There is a further reason why evidence of comparable sales should be considered with circumspection. It is often necessary to make adjustments to allow for the effect of dissimilarities. When this occurs - and it happens more often than not - two problems arise. The first is that the more adjustments one is required to make, the less cogent the evidence tends to become. The second is that, if adjustments are made, it is often very difficult to put a money value on them."

The concluding words of this passage suggest that where it is reasonably practicable to put a money value on the dissimilarities then that should be done. In my view Griffiths failed to do so even when it was reasonably

practicable to do so. Furthermore, he did not follow the guide-lines laid down in Davey's case (supra) as to what was a comparable sale. In the first place he demonstrated that he has a rather curious notion of what is a comparable property. Having said that

> "where there are aspects which make the thing [i.e. the property] patently dissimilar it may not prevent it from being used as a comparable"

the following passage then occurs in his evidence:

"I am sorry, you say if there are aspects which make it patently dissimilar it may not prevent it from being used as a comparable? --- No because there may be aspects of the property which have comparability. There may be a particular aspect, the property may have a river running through it and our property has not. The fact that it has got a river running through it does not mean that you kick it out and kick it into touch as not having comparability. But there are, say there can be features of no similarity is what I'm saying but that does not stop it being a comparable."

Nor was this notion confined to his evidence under cross-examination. He revealed a similar approach in his evidence in chief. It was presumably this approach which led him to

regard the area known as Wendywood Ext No 8 as a comparable property. This he regarded as a comparable area for residential erven despite the fact that he was compelled to concede in cross-examination that prices obtained for erven in that township were wholly against the agreed general trend of township prices in the general area under consideration including the original land. When this was put to him, he again demonstrated to my mind a material lack of comprehension as to what constitutes a comparable sale.

"Please, I am not suggesting that your statement about the state of the market was incorrect. I am saying that this township [Wendywood Ext No 8] does not reflect the state of the market --- That I accept, that this, the conformity of sales is not in line over that period with what in fact happened elsewhere in the stand market.
Yes.
And it indicates that there were factors affecting that township, extraneous factors, which you have not told His Lordship about --- That may be so.
How can you say then that the stand prices obtained in this township are comparable in any way to those which would have been obtained on the subject property --- They are evidence of sales to the extent that any purchaser of erven in the market at the expropriated date, expropriation date, had

alternatives of stands to acquire and any purchaser must be considered to be a discerning purchaser and he would look to see what is available in the market. That is the real world factual situation of that.
But that does not render them comparable for the purposes of ascertaining market value? --- They are transactions which occur in the market. That is what comparables are about."

Indeed there are passages in his evidence which suggest that instead of examining the area with the object of trying to find truly comparable sales and then (after making appropriate adjustments for variations of the kind referred to in Davey's case, supra) arriving at some kind of price trend, he appears to take a particular sum of money and thereafter to try to ascertain what sort of property this sum would buy at the relevant date. This is particularly noticeable when he is dealing with one of the properties which he regarded as directly comparable with the original land, namely Hurlingham Ext No 5. After referring to differences between this property and the original land he said:

"But I think once one has gone through all those and tried to adjust for them at the end of the day R4 050 000, that is what R4 050 000 bought you in 1982, and in using it as a comparable I think if we look at our 28 ha of Harrowdene [the subject land] it does not take an awful lot of logic to say that we must be less than R4 million for the whole of Harrowdene but that is what R4 million bought you in the market."

And then again:

"My adjustment on Hurlingham was a relativity [sic] adjustment on the basis that Hurlingham at R4 million, that was what you could buy, the R4 million was R30 000 a hectare and my adjustment was that the rate per hectare on the subject property would be more."

This impression is confirmed by respondent's own heads of argument in which it is stated that

> "Griffiths determined what a given sum of money would purchase at the relevant time ...".

How, one wonders, does one determine the given sum. This savours of putting the cart before the horse. Furthermore, having conceded that there were differences between the original land and certain of the properties which he relied on as being comparable, and having said that he made

adjustments for such differences it is quite apparent that, in fact, he made no adjustments at all or failed to make the proper adjustments. I refer again to the property described as Hurlingham Ext No 5. As the trial judge points out the total area of this property was approximately 139 ha but "it would appear that the unusuable area for subdivision into erven was approximately 101 ha." It was the respondent's case that these facts were well-known both to the seller, the Johannesburg City Council and to the purchaser, Gencor. This is the property which supposedly provided Griffiths with his "bottom line". The unit value on the basis that the property sold was 139 ha was R29 169 per ha. If however one takes into account the fact known to both the contracting parties that of the total area only 101 ha was unusuable, the unit value is almost R40 000. The "bottom line" was therefore the same as the supposed "top line". A further factor for which it was common cause that allowance

or adjustment would have to be made was the major difference in size between the original land and Hurlingham Ext No 5. Taking only the usable area of the latter it is still more than three times the size of the subject land and this accordingly (a) involved a greater risk and (b) influenced the cost of services. In fact, Griffiths himself, when dealing with another property which he relied upon as being comparable namely Portion 46 of the Farm Waterval, said that the figure of R80 515 per ha would have to be adjusted downwards because, being a smaller property, it was considered by him to have a higher value than the expropriated portion. A further factor for which one would expect him to have been able to make a reasonably accurate mathematical adjustment was that the density of units per hectare able to be "produced" on the Hurlingham property was only 5,84 residential units per ha as compared with more than 8 per ha on the expropriated portion. He did not even attempt to do so.

All the other transactions relied upon by Griffiths (with the exception of the King David School properties) provided a unit price either virtually equal to or in excess of the supposed "top line". Benmore Gardens Ext No 3 provided a figure of R39 591 per ha. This sale occurred just over a year before the date of expropriation and no adjustment was made for the Escom servitude and a major road traversing it in arriving at the figure mentioned. All the Waterval sales relied upon by Griffiths provided figures per ha well in excess of his "top line". Admittedly adjustments had to be made because of the size of those properties as compared with the original land and because of improvements on them but what adjustments had to be made was a matter Griffiths found himself unable to explain even in the broadest terms. The King David School properties yielded a combined unit price of R35 347 per ha but Griffiths himself said

> "I do not place a lot of relevance on ... these particular transactions."

The fact that the SA Board of Jewish Education bought these properties for a school may have been a factor influencing the price so that it would not have been an ordinary commercial transaction.

As to (b): This has already been dealt with above.

As to (c): Griffiths adhered obdurately to the view that the value of the expropriated portion bore the same rate per hectare of market value as the value of the balance remaining after expropriation. The trial court found however that this was incorrect and that the expropriated portion was

(i) better situated;

(ii) capable of producing a higher density of

development; and

(iii) that it would be easier and less expensive to develop the original land as a whole and that the development of the property as a whole would result in certain additional advantages to the owner.

It was conceded by the respondents' counsel that these were factors which were legitimately taken into account by the trial court.

Griffiths made no allowance for any of these factors.

As to (d): Griffiths vigorously supported the proposition that the transaction in terms of which the company sold the subject property to the three trusts for

the sum of R1 661 000 on 16 June is a bona fide and "arm's length" transaction. This represents a unit price of R57 851 per ha. He nevertheless arrived at the conclusion that the original land was worth R55 000 per ha. He gave no reason for taking the lower figure but it was, presumably, on the basis of what he regarded as other comparable sales and in particular his "bottom line" figure of R30 000 per ha in the previous year. For the reasons already indicated this bottom line figure was not reliable, and furthermore even Griffiths conceded that there were a number of material differences between the original land and all the properties which he regarded as comparable.

The evidence of Griffiths therefore provided no reliable foundation for a finding that the true value of the expropriated portion was R55 000 per ha. In fact, on his

own evidence, even if one assumes that he was correct in simply taking the value per ha of the expropriated portion as the average per ha paid for by the whole of the original land by the trusts, that value was R57 851 per ha. But as I have already pointed out the learned trial judge found that it would be incorrect to take the value per ha of the expropriated portion as the average per ha for the whole. From this it follows "as the night the day" that the value per ha of the expropriated portion in the view of the trial judge clearly exceeded the sum of R57 850 per ha. I have already referred to the fact that Griffiths' figure of R55 000 per ha works out to a total of R470 000 for the expropriated portion and that the trial court did not fix this figure as the value of the expropriated property but the figure of R491 750. Translated into terms of money, it is clear that what the learned judge did, was to take the proportion which the expropriated portion bore to the

original land and to allocate that portion of the purchase price of R1 661 000 to the expropriated portion. He thus took $\frac{8.5}{28.7113}$ X R1 661 000 and arrived at the figure of R491 740,18 which he then rounded off to R491 750.

The figure of R1 661 000 is, as already mentioned, the price which the trusts paid for the original land. The basic facts relating to this transaction are not in issue. In fact it was common cause before us that the original land was indeed sold by the company, Harrowdene Estates (Pty) Ltd, to the three family trusts of which the appellants are trustees for R1 661 000 on 16 June 1983, and that this price was arrived at on the basis of a valuation procured by the trustees from a certain Mr Balme (who in fact valued it at that figure). This took place just over two months after the (agreed) date of expropriation. It was submitted on behalf of the appellants that, in view of the fact that this was, in effect, a transaction between, and for the benefit

of, members of the family of Isaac Wilfred Jacobson and Barney Jacobson who were the sole shareholders in Harrowdene Estate (Pty) Ltd, it could not be considered to be an ordinary "arm's length" commercial transaction. There is something to be said for this proposition. See Gildenhuys: **Onteieningsreg** p 272 and the authorities referred to under Note 8. The trial court however rejected this argument because interest was charged on an agreement between Barney Jacobson and the Irene Harrowdene Trust whereby the former sold to the latter his shares in and the loan to the company Harrowdene Estates (Pty) Ltd. I do not think this really supports the learned judge's reasoning. In the first place, this is not the transaction in terms of which the transfer of the original property (and not shares) to the appellants was effected. Secondly, interest was only payable on the outstanding balance of the purchase price from the commencement of the third year from the date of the agreement. Be that as it may, if one finds, as did the

learned judge a quo, that this was an arm's length transaction then it affords, on the face of it, the most reliable evidence of the market value of the original land at the date of the expropriation. As the learned judge himself remarked

> "As far as this particular property is concerned it would, of course, if representing a true sale on an open market, be the best possible comparable".

This proposition was conceded, indeed vigorously supported, in the respondent's heads of argument. In the judgment prepared by Nicholas AJA which I have had the privilege of reading, he finds that "... although this transaction was not evidence against the TPA it was cogent evidence against the plaintiffs". I have difficulty with the notion that the transaction was not evidence against the respondent ("the TPA"). The valuation of Balme and the other documents relating to the transaction were put in and

relied upon by the respondent's counsel during the cross-examination of Gerke. Moreover, Griffiths in his evidence in chief, having first testified as to the experience and (by implication) reliability of Balme, gave evidence to the effect that this was to be regarded as an arms-length transaction and relied upon it as supporting his valuation. Having rejected the argument that it was not an arm's length transaction the learned judge must have found that it was indeed a true sale on an open market. There was no suggestion either in evidence or in argument that it was an inflated price. Cf Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council 1979(1) SA (W) 949 at 956D. That being so, it follows that the value per ha of the original land on the basis of a willing buyer and a willing seller on the relevant date was at least R57 850. If, however, one simply allocates the same proportion of this price to the expropriated portion as it bears to the balance of the property then that entirely

fails to take into account what the learned trial judge set out to do namely, to make allowances for the three factors already referred to. The allowance which the learned judge a quo in fact made for these factors was the figure of R21 750. Here, as in Davey's case supra cit, where a considerable number of adjustments were required to be made the court

> "... had to place a somewhat arbitrary money value on such adjustments."

There is evidence that the density of development on the expropriated portion was approximately one quarter higher than that possible on the balance remaining after expropriation and, taking into account the other factors which the trial court considered placed an additional value on the expropriated portion in relation to the whole, it is arguable that a substantially higher sum than the R21 751 allowed by the court a quo should be added. There is, however, no means which I have been able to ascertain to

calculate such a figure on a rational basis. On the other hand I certainly do not think it is unfair to the respondent if one were to take the figure fixed by the trial court.

It follows that, in my view, the figure which should, on the basis of the trial court's findings, have been determined as the value of the expropriated portion, is at least R513 500 (R491 750 + R21 750). While R21 750 is a relatively substantial sum, it represents a small figure expressed in terms of a percentage. In Lornadawn Investments (Pty) Ltd v Minister van Landbou 1980(2) SA 1 (A) the minority of the court regarded this as a reason for not interfering with the order of the court a quo. See the reasoning of Miller JA at p 18H-19F. This reasoning did not however recommend itself to the majority. A judge, in determining the value of expropriated property is not exercising a discretion. Estate Marks v Pretoria City

Council 1969(3) SA 227 (A) at 253E-F. As Rabie JA pointed out at p 8B-C there are a number of decisions of this court to the effect that an appeal of the nature under consideration here is a full appeal and as stated in Union Government v Jackson & Others 1956(2) SA 398 (A) at p 419F-G the determination of value

> "though it relates to matters that may in many respects be so uncertain and so difficult to determine that no one can be dogmatic about them, nevertheless purports to be a finding of fact, a logical deduction from factual data ...".

Consequently, as pointed out by Corbett JA in Minister of Agriculture v Estate Randeree & Others 1979(1) SA 145 (A) at 157E-F:

> "... where it appears, inter alia, that the trial court has adopted the wrong general approach or has misconstrued the evidence or overlooked vital portions thereof or drawn incorrect deductions therefrom and as a result of this has arrived at a valuation which the Court of Appeal considers to be incorrect, then, in my view, proper grounds exist for interference on appeal."

In that case it was held that the manner in which the trial court made its determinations was faulty in several respects and that, as this had led to incorrect valuations, there were good grounds for interference. Here, the trial court, in effect, overlooked the fact that, on its own reasoning, the expropriated portion bore a higher value per ha than the balance after expropriation and that, on the basis (which it accepted) that the sale of the subject property itself afforded the "best evidence" of market value at the date of expropriation, it should have added the increased value to the value based on that sale. The fact, therefore, that there is only a relatively small difference between the sum determined by the trial court and the sum which should have been determined, does not relieve this court from the duty of either making its own determination on the available material or referring the matter back to the court a quo. In all the circumstances, it seems preferable that this

court should make its own determination on the available material. I would accordingly determine the value of the expropriated portion as R513 500.

The only remaining issues relate to the question of the solatium to be awarded in terms of s 12(2) of the Act, the interest, and costs.

The trial court awarded a solatium of R10 000 and added this to the determination of R491 750. Although not foreshadowed in the appellants' heads of argument, it was submitted that, on a proper interpretation of s 12(2), the amount of R10 000 should have been added to the amount payable to each of the plaintiffs. This argument does not appear to have been advanced in the court below and in my view it must be rejected. Ss (2) reads as follows:

> "Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with

> ss (1)(a)(i) in respect of all land, including any portion of a piece of land, expropriated in terms of the notice of expropriation in question, an amount equal to 10% of such total amount, but not exceeding R10 000."

This amount, is in terms, added to the total amount payable in respect of all land and not to the amount determined as the share due to each owner out of that total amount. Cf Huddlestone Motors (Pty) Ltd v SAR & H 1980(4) SA 764 (N) at 767G-H. What has been expropriated here is the land and not the appellants' rights in respect of such land. It surely could not be suggested that if the expropriated property had consisted of 100 ha owned in equal undivided shares by 100 owners and the value of the property was determined as R100 000 then each owner would be entitled to R1 000 in respect of his 100th share in terms of s 12(1)(a) and R10 000 in terms of s 12(2). Reliance was sought to be placed upon the fact that such an award was made in the unreported decision of Boedel Wyle Milner en Andere v Die

Stadsraad van Thabazimbi delivered in the Transvaal Provincial Division on 18 October 1983. All that appears in this regard in the judgment in this regard is the following:

> "Ingevolge die bepalings van artikel 12(2) van die Onteieningswet, 63 van 1975, is die onderskeie eisers ook geregtig op 'n solatium van 10% op die bedrag wat aan elkeen van hulle betaalbaar is met 'n maksimum van R10 000 per eiser."

The learned judge however gives no reasons for this conclusion and it appears likely that the matter was not argued.

The trial court awarded interest to the appellants as follows:

> "Interest is payable on the aforesaid sum of R491 750 at the interest rates prescribed in s 26(1) of the Exchequer and Audit Act 1975, for the period commencing 60 days after 8 April 1983 to 25 March 1985."

There was no cross-appeal against this order and accordingly the correctness or otherwise of that order is not an issue

which is before this court. The appellants do, however, seek an order for interest on the increased amount which, it was submitted, this court should award, for the period commencing 60 days after 8 April 1983 and concluding on 25 March 1985, and thereafter on the difference between the increased amount (which I have held to be R513 500) plus R10 000, and the total amount of R520 000 which was paid to the appellants on 25 March 1985. It is, therefore, necessary to examine the legal basis on which the trial court awarded interest. If that basis was correct then this court can properly award the interest now claimed; if it was not, the trial court's order will stand because there was no cross-appeal against it. Here again the basic facts are not in issue. Although the original notice of expropriation of 30 March 1983 was withdrawn, it was expressly agreed between the appellant and the respondent that:

(a) the market value of the expropriated portion would be determined as at 8 April 1983;

(b) the appellants would give the respondent beneficial occupation of the property as if that had been the date of expropriation.

The respondent in fact had the right to beneficial occupation as from 8 April 1983 and that is the relevant date when considering the provisions of s 12(3) of the Act. Klipriviersoog Properties (Edms) Bpk v Gemeenskaps-ontwikkelingsraad 1984(3) SA 768 (T). S 12(3) of the Act provides (omitting portions not material to this case) that interest at the standard interest rate determined in terms of s 26(1) of the Exchequer and Audit Act, 1975 shall be payable from the date on which the State takes possession of the property in question in terms of s 8(3). The effect of s 8(3) in the circumstances of this case is that the State had the right to take possession of the property in

question on the expiry of 60 days from the date of expropriation. It was submitted on behalf of the respondent that s 12(3) had no application since the obligation to pay interest only arises where there is an expropriation and, since it is common cause that the original notice of expropriation was withdrawn, no statutory obligation to pay interest arose. The trial judge found, however, that there was nothing in the Act to prohibit the parties coming to an arrangement in regard to interest and that it was implicit in the arrangement which was made that

> "... if the defendant had access to the property no prejudice should result to the plaintiffs, ... in consequence thereof."

I agree. I would add that since the respondent insisted upon the date of expropriation being deemed to be 8 April 1983 it cannot be heard to say that it was not. To hold otherwise would be to allow respondent to have its cake and eat it and, as the learned judge a quo held,

> "... to adopt any other approach would border on an immoral attitude... ."

It follows that, in my view, the appellants are entitled to interest as claimed on the increased amount which should have been awarded.

Finally, there is the question of costs. While the amount by which the trial court's determination has to be increased is relatively small in relation to the total amounts awarded, it is by no means insignificant and, in my view, the appellants are accordingly entitled to the costs of appeal. The costs of the proceedings in the court a quo fall to be determined by the provisions of s 15(1)(c) of the Act. The difference between the compensation awarded and the amount offered is R21 750. The difference between the amount of compensation awarded and the amount last claimed, one month prior to the date for which the proceedings were

for the first time place on the roll, is R1 308 250. This is on the basis that the amount last claimed by the appellants one month prior to that date was R1 330 000. This was disputed by the respondent on the sole ground that the letter of 16 February 1987 reducing the claim from R3 million to R1 330 000 was not a "claim" as envisaged by the Act. That is beside the point. The question is whether that was the amount of the claim at that stage. One would ordinarily ascertain that amount from the pleadings but I do not think that this is the sole source to be examined. If the plaintiff has unequivocally and unconditionally stated in a letter to the defendant's attorneys that the claim is reduced (or increased) to a particular amount on the relevant date, then it seems to me, that this is as effectual for the purposes of s 15 as a notice of intention to amend the plaintiffs pleadings. The section does not deal with the situation where the claim, having being

decreased to a particular figure one month before the relevant date, is thereafter increased. Presumably this is because the legislature envisaged that by then some of the costs of trial would already have been incurred and that the trial court would exercise its discretion in terms of s 15(3). The appellants are accordingly entitled to $\frac{21\ 750}{1\ 308\ 250}$ ths of their costs in the court below.

In the result I would make the following order:

A. The appeal is allowed to the extent set out below, with costs including the costs consequent upon the employment of two counsel.

B. The order of the court a quo is altered to read as follows:

1. The amount of compensation to be paid to the plaintiffs in terms of s 12(1)(a)(i) of the Expropriation Act, No 63 of 1975

in respect of Portion 3 of the Farm Harrowdene 4, Registration Division IR, Transvaal, is the sum of R513 500 payable in the following manner:

(a) To first to third plaintiffs inclusive the sum of R256 750.

(b) To fourth to sixth plaintiffs inclusive the sum of R128 375.

(c) To seventh to ninth plaintiffs inclusive the sum of R128 375.

2. In terms of s 12(2) of the aforesaid Act there is added to the aforesaid amount of R513 500 the sum of R10 000.

3. Interest is payable on the aforesaid sum of R513 500 at the interest rates prescribed in terms of s 26(1) of the Exchequer and Audit Act 1975 for the

period commencing 60 days after 8 April 1983 and terminating on 25 March 1985 and thereafter on the sum of R21 750 to date of payment.

4. The defendant is ordered to pay $\frac{21\ 750}{1\ 308\ 250}$ ths of the plaintiffs costs including the costs of two counsel; such costs to include the qualifying fees of Dr Gerke and Mr Bickley.

a.j. Milne

STEYN JA: **Concurs.**

776/90

CG SAAKNOMMER: 606/88

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
(APPÈLAFDELING)

In die saak van:

NORMAN NATHAN SHER NO	**Eerste Appellant** (Eerste Eiser in die hof a quo)
JULIUS FEINSTEIN NO	**Tweede Appellant** (Tweede Eiser in die hof a quo)
NEVILLE SWEIDAN NO	**Derde Appellant** (Derde Eiser in die hof a quo)
LAWRENCE ALFRED MEYEROWITZ NO	**Vierde Appellant** (Vierde Eiser in die hof a quo)
ARTHUR JACOB AARON NO	**Vyfde Appellant** Vyfde Eiser in die hof a quo)
ROBERT LAPEDUS NO	**Sesde Appellant** (Sesde Eiser in die hof a quo)
YUDEL BACHER NO	**Sewende Appellant** (Sewende Eiser in die hof a quo)
LAWRENCE TRAKMAN NO	**Agtste Appellant** (Agtse Eiser in die hof a quo)
BERNARD HERBERT NO	**Negende Appellant** (Negende Eiser in die hof a quo)

en

THE ADMINISTRATOR OF THE TRANSVAAL	**Respondent** (Verweerder in die hof a quo)

CORAM: **CORBETT HR, BOTHA, MILNE, STEYN ARR et NICHOLAS WAR**
AANGEHOOR: **17 MEI 1990**
GELEWER: **23 AUGUSTUS 1990**

U I T S P R A A K

STEYN AR

Ek het die uitsprake van my kollegas Milne en Nicholas gelees. Ek stem saam met dié van my kollega Milne AR, en met die bevele deur hom voorgestel, maar voel nietemin genoop om die volgende bykomende opmerkings te maak. Die Harrowdene verkope aan die drie familie trusts mag weliswaar die eindresultaat wees van besluite deur Isaac en Barney Jacobson, maar die verkoopprys was klaarblyklik nie deur hulle vasgestel nie. Dit is gegrond op die waardasie deur Balme, 'n persoon van aansien op sy gebied.

Die feit dat die verkoopprys en ander bepalings van die Harrowdene verkope nie op die aambeeld van mededinging uitgeklop is nie het nie noodwendig tot gevolg dat dié transaksies nie 'n betroubare aanduiding is van wat 'n gewillige koper aan 'n gewillige verkoper sou betaal het nie. Dit is algemene kennis en ervaring (na my oordeel altans) dat vele vrye eiendomsverkope nie "aambeeld transaksies" is nie maar nogtans betroubare

aanduidings is van markwaarde. Die "aambeeld element" is ook nie 'n statutêre vereiste vir die bepaling van daardie waarde nie.En die blote feit dat 'n koper en verkoper ooreenkomstig die waardasie deur 'n betroubare waardeerder hul kontrakprys bepaal eerder as om dit self op eie oordeel te probeer vasstel, is geen rede om hul transaksie buite rekening te laat by die bepaling van die markwaarde van die betrokke eiendom nie. Dit is myns insiens trouens 'n versigtige en heel aanvaarbare wyse van prysbepaling. En dit is a **fortiori** so waar die voornemende koper en verkoper onderskeidelik 'n familie trust en 'n "familie maatskappy" is omdat die persone by só 'n transaksie betrokke in weerwil van die familie element uiteraard vertrouensposisies beklee teenoor hul onderskeie instellings. Daar is na my mening geen houdbare aanduiding of suggestie dat dit nie die geval by die "Harrowdene-Trusts" transaksie was nie of dat Balme nie 'n onbevange (en dus objektiewe) oordeel met sy

waardasie gevel het nie. Daar is gevolglik geen goeie rede om daardie transaksie slegs te beskou as 'n erkenning deur die appellante maar nie as bewysmateriaal teen die respondent ten aansien van die markwaarde van die onteiende gedeelte nie.

Om te beslis dat 'n onteiende nooit by die begrip "gewillige verkoper" ingesluit kan word nie en dat sy houding of optrede altyd buite rekening gelaat moet word by die bepaling van markwaarde afgesien van die omstandighede van 'n bepaalde geval, sal na my mening verkeerd wees. Dit sal maklik denkbaar tot gevolg hê dat belangrike feite van wesenlike relevansie soms misgekyk word met 'n gevolglik verkeerde vasstelling van markwaarde. Dit is byvoorbeeld denkbaar dat die eienaar van uiteindelik onteiende grond voor ontvangs van die onteieningskennisgewing en in onkunde van die feit dat die onteiening van sy eiendom oorweeg word of reeds op besluit is, sy betrokke eiendom teen 'n prys deur hom

bepaal vir verkoop aanbied, dat 'n aantal gewillige, ongebonde, deeglik ingeligte en kompeterende voornemende kopers wat in staat is om te betaal, met daardie prys tevrede is, dat die flinkste een onder hulle dan sy aanbod aanvaar om die eiendom teen dié prys te koop terwyl albei van hulle steeds in onkunde is van die voorgenome onteiening, maar dat die onteiening daarna geskied voordat die transaksie behoorlik gefinaliseer kan word. Indien só 'n feite-kompleks buite rekening gelaat moet word by die daaropvolgende bepaling van markwaarde van die onteiende grond en 'n laer syfer dan in 'n onteieningsgeding vasgestel word, sal dit na my mening 'n onregverdige resultaat wees.

Die reg moet by die beregting van geskille as't ware sy voete op die grond hou deur al die relevante feite in ag te neem. Word dit nie gedoen nie faal die reg in sy doel, wat die behoorlike regulering van die gemeenskap is, veral deur vermyding of tempering van

geskille en konflikte op regverdige wyse.

Indien, in die bogemelde voorbeeld, die gebeure wat die onteiening voorafgegaan het nie in aanmerking geneem is nie, en 'n markwaarde laer as die reeds ooreengekome verkoopprys vasgestel word, sal die tereg verbysterde onteiende, wat meesal die gewone "man op straat of op die plaas" sal wees, sekerlik met die oortuiging gelaat word dat die reg se voete nie op die grond is nie, in elk geval wat onteiening betref. Daardeur kan hy maklik beweeg word om die opmerking te herhaal wat mnr Bumble teenoor die heer Brownlow kwytgeraak het (OLIVER TWIST, hoofstuk 51), of meer nog, dié van George Chapman in REVENGE FOR HONOUR III (ii). Só 'n reaksie sal gewis nie bevorderlik wees vir die aansien wat die reg onder die burgery moet geniet om dit in staat te stel om die effektiewe en vreedsame ordening van die gemeenskap te verseker nie, en behoort gevolglik vermy te word.

M T STEYN AR