

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Du Toit v Minister of Transport

CCT 22/04

Decided on: 08-09-05

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The Constitutional Court today gave judgment in a matter concerning the manner in which compensation for expropriation under the National Roads Act of 1975 should be calculated.

The Roads Board extracted about 80 000 cubic metres of gravel from Mr Du Toit's land for the purposes of upgrading a road close to his farm in the Western Cape. He believed the amount of compensation paid to him should have been calculated on the basis of the market value of his gravel and not only the financial loss suffered by him because of the use of his land by the Board. Therefore, he claimed he should have been paid R801 980 as compensation

The High Court awarded Mr Du Toit compensation in the amount of R257 623, holding that this was a just and equitable estimate. The Minister then appealed to the SCA, which found that Mr Du Toit provided unreliable evidence of the market value of the gravel, and the possibility that he would suffer any financial loss from the expropriation was highly speculative, bearing mind the limited market that existed for the gravel. It accordingly upheld the appeal and reduced the compensation to R6060, which it regarded as just and equitable compensation as required by section 25 of the Constitution.

Mr Du Toit then applied to this Court for leave to appeal, contending that he was entitled to what he regarded as the full value of the gravel taken, namely, R801 980, and not R6060, which was the amount calculated on the basis of his actual loss.

All the judges agreed that the appeal should be dismissed and that because of the public interest involved, there should be no order for costs against Mr Du Toit.

The Court was divided, however, on the precise sections of the Roads Act that were applicable, as well as on the exact relationship between the Act and Section 25(3) of the Constitution which deals with compensation for expropriation.

Mokgoro J writing for the majority [Madala, Moseneke, Sachs, Skweyiya and Yacoob JJ concurring] emphasises that every act of expropriation and all compensation for expropriation must comply with section 25 of the Constitution. She notes that the Act does not include the same range of relevant circumstances to determine compensation as

does the Constitution. However, the Act has not been challenged and therefore cannot be bypassed. She therefore finds that applying the Act in conformity with the fundamental values of the Constitution entails considering what compensation is payable under the Act and then considering, with reference to relevant factors listed in section 25(3), whether that amount is just and equitable.

Mokgoro J finds that what was expropriated was the right to use the land which includes the right to extract gravel. She also agrees with the SCA's finding that Mr Du Toit had established neither the market value of his gravel nor his actual financial loss. She concludes that factors such as the current use of the property; the history of the acquisition and use of the property; the purpose of the expropriation and other relevant factors served to confirm that there is no other basis on which Mr Du Toit can be justifiably compensated. She therefore holds that the amount of compensation awarded to Mr Du Toit by the SCA is just and equitable and reflects an equitable balance between public and private interests.

In a separate judgment, Langa ACJ, as he was when the matter came before this Court [with the concurrence of Ngcobo, O'Regan and van der Westhuizen JJ] holds that what was expropriated was both Mr Du Toit's gravel and the right to use his land. He states that the suggestion of Mokgoro J that the Act can be reconciled with section 25(3) by first undertaking the Act's approach to the calculation of compensation and then considering whether that calculation is consistent with the test set by the Constitution, is not permitted by our Constitution. The Constitution expressly avoided the approach to the calculation of compensation set out in the Act, and insists upon an approach where justice and equity is paramount, not a second level "review" test.

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He agrees, however, that Mr Du Toit has no prospects of success upon appeal because the amount of compensation arrived at it is just and equitable within the meaning of the Constitution. He would therefore have dismissed the application for leave to appeal on that basis.