Republic of South Africa

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

Appeal Case no.: A142/2020

First instance case no.: 23175/2017

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Samela
The Hon. Mr Justice Papier

Hearing: 22 January 2021
Judgment: 20 April 2021

In the matter between:

ROYAL SQUARE INVESTMENTS 330 (PTY) LTD Appellant

and

THE PREMIER, WESTERN CAPE First Respondent
THE MEC, TRANSPORT & PUBLIC WORKS (W. CAPE) Second Respondent

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JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 20 April 2021.)

BINNS-WARD J (SAMELA and PAPIER JJ concurring):

[1] On 5 April 1973, the Administrator of the Province of the Cape of Good Hope issued a proclamation (Proclamation 137 of 1973) which, amongst other matters-

(i) in terms of s 120 of the Divisional Councils Ordinance 15 of 1952,[1] declared as a *main road* a stretch of land 22 kilometres in length that traversed the then existing Cape and Stellenbosch Divisions and the then existing Bellville, Kuils River and Brackenfell Municipalities, and

(ii) in terms of s 1A of the Trunk Roads Ordinance 28 of 1960,[2] declared such *main road* to be a *trunk road*.[3]

The road in question is now known as the R300, and that is the label by which I shall refer to it in this judgment.

[2] The 1952 Divisional Councils Ordinance defined '*main road*' to mean 'a road declared as such by or in terms of any law'. It defined a '*proclaimed road*' as 'a main road or divisional road' and a '*public road*' as 'a proclaimed road or a minor road'. The net effect was that the R300 qualified as a '*public road*' within the meaning of that term in the Ordinance. In terms of s 127(2)(a) of the 1952 Divisional Councils Ordinance,[4] the responsibility for constructing the road over any part of the R300's route where no declared road already existed rested on the Administrator. This incidence of the legislation was underscored, in the case of a road also declared to be a trunk road, by the provisions of s 3 of the Trunk Roads Ordinance.[5] Construction of an actual roadway over the whole of the

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[1] Section 120 provided as follows insofar as relevant:
'*(1) Subject to the provisions of section 121, the Administrator may by proclamation-*
a) ..
c) on application by the council concerned, declare a main road along a line where no declared road, trunk road or public road exists;
... '
'(4) The Administrator may after consultation with the council concerned. by proclamation -
(a) subject to the provisions of section l27(2)(a), declare a main road along a line where no declared road, trunk road, public road or public street exists;
(b) ...'
Section 121 required prior notice to given of an intention to make a declaration in terms of s 121, and afforded the opportunity for interested parties to submit objections to the proposal.

[2] Section 1A provided that the Administrator could, by proclamation, declare a main road or portion thereof to be a trunk road.

[3] The italicised words were specially defined in the respective Ordinances.

[4] Section 127(2)(a) provided: '*Notwithstanding the provisions of sub-section (1), the Administrator – (a) shall construct any main road declared under section 120 (4)(a); and (b) ...* '. The wording of s 120(4)(a) is quoted in note 1 above. The Proclamation makes no reference to an application by the affected divisional councils, and it would therefore appear that insofar as relevant the declaration of the R300 as a main road was made in terms of s 120(4)(a), rather than s 120(1)(c).

[5] Section 3 provided as follows insofar as relevant:
'***Construction of trunk roads and maintenance of certain trunk roads transferred to Administrator***
Notwithstanding the provisions of any other ordinance, from the fixed date -
(a) the council shall be relieved of its powers, rights and duties in respect of the construction and reconstruction of trunk roads and the maintenance of permanently surfaced trunk roads;

declared route of R300 has not yet been completed. It may be inferred that the declaration of the road along a line where no actual road exists must have been in terms of s 120(4)(a) of the Ordinance.[6]

[3] The land that features in the current litigation is situated on a part of the declared route of the R300 on which nothing has as yet been constructed. The land in question, currently designated as Erven 12692 and 12693 Durbanville ('the R300 erven'), was part of Farms 311/57 and 311/61 Durbanville at the time the Proclamation was made. The R300 erven are situated within what was the jurisdictional area of the late Divisional Council of the Cape at the time the R300 was declared as a road.

[4] Little could the Administrator have imagined, when he issued the Proclamation 48 years ago, that that part of it which provided for the route of the R300 to traverse portions of Farms 311/57 and 311/61 would give rise to the most extraordinary amount of litigation; see *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C), *Arun Property Development (Edms) Bpk v Stad Kaapstad* [2005] ZAWCHC 86 (15 November 2005), *City of Cape Town v Arun Property Development (Pty) Ltd and Another* [2008] ZAWCHC 22; 2009 (5) SA 227 (C) (7 May 2008), *Arun Property Development (Pty) Ltd v City of Cape Town* [2012] ZAWCHC 399 (31 October 2012), *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 (16 April 2014) and *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37 (15 December 2014); 2015 (3) BCLR 243 (CC); 2015 (2) SA 584 (CC). For all I know there may even have been other judgments in the course of the litigious history that have escaped my notice.

[5] In the current round of the ongoing litigation, the appellant, Royal Square Investments 330 (Pty) Ltd (to which, for convenience, I shall refer as 'the plaintiff'), has brought an action for the following substantive relief (set forth in prayers (a) to (c) in the particulars of claim):

> (a) an order declaring that the plaintiff is the owner of Erven 12692 and 12693 Durbanville;
>
> (b) an order directing the defendant [by which is meant the first defendant, the Premier of the Western Cape; alternatively, the second defendant, the MEC for

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(b) the council's powers and rights in respect of the construction and reconstruction of trunk roads and the council's powers, rights and duties in respect of the maintenance of permanently surfaced trunk roads shall be conferred and imposed on the Administrator;
(c) ..., and
(d) *... .'*

[6] See note 1 above.

Transport and Public Works in the Western Cape] to purchase Erven 12692 and 12693 Durbanville from the plaintiff for a purchase price of R96 570 500 and generally in accordance with the provisions of regulation 38 of the LUPO [Land Use Planning Ordinance 15 of 1985 (W. Cape)] Regulations and section 12 of the Expropriation Act [Act 63 of 1975];

(c) in the alternative to (b): an order directing the defendant to pay compensation to the plaintiff in respect of the constructive expropriation of Erven 12692 and 12693 Durbanville in the amount of R96 570 500.

This judgment is concerned with the determination of an appeal and a cross-appeal from a judgment given at first instance (per Dolamo J) in respect of a number of exceptions noted by the defendants to the plaintiff's particulars of claim.

[6] Farms 311/57 and 311/61 (subsequently consolidated as Erf 10357, Durbanville) were rezoned and subdivided for township development purposes many years after the declaration of the R300. It is pleaded that the R300 erven were created when they were subdivided from 'the development property' on or about 5 November 1999. The erven are separated from each other by De Villiers Road; Erf 12692 is constituted by the proclaimed R300 land to the north of De Villiers Road, and Erf 12693 is the R300 land to the south thereof. They remain vacant land.

[7] The particulars of claim allege that the aforementioned farms were owned by the University of Stellenbosch when the Administrator proclaimed the R300. During the 1980's the University sought professional advice on the optimal future use of the land. It was advised that the land should be earmarked for township development because it lay within the area into which the nearby town of Durbanville might be expected to expand. The University was told that various planning instruments related to the land by virtue of decisions that had been made by the relevant government authorities. It was advised that, amongst other matters, planning provision had been made for a network of higher order roads across the land, including the declaration of the R300.

[8] The pleaded case is that the University was informed that –

1. the Metropolitan Planning Committee had, on the instructions of the Administrator, compiled an urban structure plan for the Cape Metropolitan Area with a view to planning aspects of future road networks, residential developments and other land uses on an overarching scale.

2. in August 1986, the directorate of the Cape Metropolitan Planning Committee recommended for approval the 'revised structure plan – 1986 (Kuils River Valley North of the N1)' ('the Kuils River Structure Plan').

3. on 13 June 1988, the Provincial Executive Committee, Cape of Good Hope, approved the overarching structure plan for the area North of the N1 ('the 1988 structure plan') in terms of Section 4 (6) of LUPO.

4. the Kuils River Structure Plan and the 1988 structure plan made provision for four classes of existing and proposed roads of a 'fundamentally non-residential nature', namely –

   (i) trunk roads and major arterials (class 1 roads);

   (ii) primary distributors (class 2 roads);

   (iii) district distributors (class 3 roads); and

   (iv) local distributors (class 4 roads).

The R300 was reflected in 'the Kuils River Structure Plan' (in which it was referred to as 'the proposed Cape Flats freeway') and also in the '1988 structure plan', as well as in 'certain transport plans established for the Cape Metropolitan Area in terms of the Urban Transport Act 78 of 1977'.

[9] The University subsequently sold the still undeveloped land to Arun Property Development (Pty) Ltd ('Arun'). Arun took transfer in 1997. It had similar advice concerning the road planning decisions affecting the property. It established that the provincial and local authorities would not approve any applications in respect of the development of the property as a township unless the development plan was compatible with the applicable planning instruments, and, in particular, unless the development plan made provision for the contemplated network of higher order roads, including the R300.

[10] The currently existing township development on the 'development property' was undertaken pursuant to a series of so-called 'development applications' that had over time been submitted by the University and Arun to the relevant authorities. These included an application, in 1991, to rezone the land from agricultural use to subdivisional area in terms of

s 22 of LUPO[7] and a series of subsequent rezoning and subdivision applications submitted with a view to obtaining approval for the undertaking of primarily residential development on the property in three phases.

[11] The particulars of claim give the following information concerning the so-called development applications:

1. In September 1992, the application to rezone the development property to subdivisional area was granted by the provincial authorities, specifically by the Ministerial Representative, subject to certain conditions, including the following:

   1.1 '*Toegang en paaie:*

   Toegange en paaie moet gekoördineer word met die plaaslike owerheid by die beplanning daarvan en waar toegang vanuit 'n aangrensende plaaslike owerheidsgebied of 'n geproklameerde hoofweg beplan word, moet bewys van die nodige skakeling met sodanige instansie tesame met die finale beplanning ingedien word' (condition 8);[8]

   1.2 '*Struktuurplan voorstelle:*

   Die algemene beplanning, onderverdeling en ontwikkeling van die eiendom is verder onderhewig aan die algemene bepalings van die goedgekeurde strukteerplan van toepassing op die eiendom ...' (condition 9)[9]

2. On 20 February 1998 and 19 March 1998, the subdivision and rezoning applications in respect of Phase 1 of the development were approved by the local authority, subject to certain conditions including the following:

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[7] Section 22(1)(a) of LUPO provided: '*No application for subdivision involving a change of zoning shall be considered in terms of this Chapter, unless and until the land concerned has been zoned in a manner permitting of subdivision, in terms of Chapter II.*'

[8] '*Access and roads:*

The planning of access and roads must be coordinated with the local authority, and where provision is made for access from an adjoining local authority area or proclaimed main road, proof of the required engagement with such entity must be lodged together with the finalised plans.' (My translation.)

[9] '*Structure plan proposals*

The overall planning, subdivision and development of the property is further subject to the general provisions of the approved structure plan applicable to the property... .' (My translation.)

'*<u>Vehicular Access</u>:*

No direct vehicular access shall be permitted off Trunk Rd 81 (R300), Brackenfell Boulevard, Golf Course Road and Langeberg Road'.

3. On 8 October 1998, 25 October 1998 and 15 December 1999, the subdivision and rezoning applications in respect of Phase 2 of the development were approved by the local authority.

4. On 12 April 2002, the subdivision and rezoning applications in respect of Phase 3 of the development were approved by the local authority.

[12] It will be noted that none of the pleaded dates of subdivisional approval in respect of the respective subdivisions that constituted the three phases of the development corresponds with the pleaded date of the subdivision in terms of which the R300 erven were created.[10]

[13] The plaintiff is a related company to Arun, having the same shareholders and directors. The plaintiff acquired registered ownership of the R300 erven from Arun. It took transfer of them from Arun in December 2008 'as part of a restructuring of the group of companies'.

[14] It is alleged that confirmation of the respective subdivisions constituting the three aforementioned phases of the development duly occurred, as contemplated in s 27 of LUPO,[11] and that by no later than 24 March 2009, more than 50% of the total number of saleable land units in the subdivisions had been sold.

[15] It is apposite to mention at this stage that the 1952 Divisional Councils Ordinance was repealed in terms of s 218 of the Divisional Councils Ordinance 18 of 1976 and the Trunk

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[10] On or about 5 November 1999, see paragraph [6] above.

[11] Section 27 of LUPO provides:

'***Confirmation of subdivision.***
1) If a Surveyor-General has approved a general plan or diagram as contemplated by section 26, the owner concerned shall, within a period of five years after the application has been granted under section 25 or within such longer period as the Administrator or the council concerned, as the case may be, may determine, furnish the registrar of deeds concerned with such documents and information as he may require, comply with the requirements of the said registrar in connection with the cancellation of existing conditions of title, provide services in accordance with a condition imposed under section 42 (1) in respect of the subdivision and obtain the registration of at least one land unit.
(2) Where an owner has failed to comply with the provisions of subsection (1) in relation to a subdivision or a part thereof, the granting of the application under section 25 shall be deemed to have lapsed in relation to the said subdivision or part thereof at the expiry of the period contemplated by subsection (1), and the diagram or general plan concerned shall be amended in accordance with the requirements of the Surveyor-General.
(3) As soon as the provisions of subsection (1) have in relation to a subdivision or part thereof been complied with in such manner that the granting of the application concerned under section 25 cannot lapse in terms of subsection (2) of this section, such subdivision or part thereof shall be deemed to be confirmed.'

Roads Ordinance was repealed by s 67 of the Roads Ordinance 19 of 1976. The 1976 Divisional Councils Ordinance and the Roads Ordinance both came into operation on 1 January 1977. The plaintiff recorded in its particulars of claim that in terms of s 66(4) of the Roads Ordinance, 1976, any proclamation issued under the provisions of any law repealed by the Roads Ordinance, 1976, or the Divisional Councils Ordinance, 1976 was deemed to have been issued in terms of the Roads Ordinance, 1976. It is relevant, however, to have wider regard to s 66, which insofar as currently pertinent provides:

> 66. **Savings.—**
>
> (1) Every trunk road, main road, divisional road, minor road or road of necessity and public path lawfully in existence immediately prior to the commencement of this ordinance shall be deemed respectively to be a trunk road, main road, divisional road, minor road or public path declared and classified as such under this ordinance and the person who, immediately prior to such commencement, was responsible for the construction, reconstruction, maintenance, repair and improvement of any such public road or public path shall, subject to the provisions of this ordinance or any proclamation or notice issued hereunder, be deemed to be the road authority for such public road or public path; provided that where a municipal council other than a village council was immediately prior to such commencement the road authority for a public road, road of necessity or public path in its outer municipal area, the divisional council in whose divisional area such outer municipal area is situate shall be deemed to be the road authority for such road or path.
>
> (2) ...
>
> (3) ...
>
> (4) Any proclamation, notice, certificate or other document issued, any direction, approval, permission or authority given, any appointment or regulation made or any other action taken or thing done under the provisions of any law repealed by this ordinance or the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976) shall be deemed to have been issued, given, made, taken or done under the provisions of this ordinance.
>
> (5) Any expropriation commenced by a road authority or proceedings for the determination of compensation instituted by or against a road authority prior to the commencement of this ordinance shall be continued as if this ordinance has not been passed; provided that the parties concerned may agree to proceed with such expropriation or proceedings in accordance with the provisions of this ordinance in which case the provisions of this ordinance shall apply to such expropriation or proceedings as if it or they had commenced or been instituted in terms of this ordinance.

The Administrator was thereby deemed to be the relevant road authority in respect of the R300. It is not in issue that the first defendant (the Premier) has since assumed the relevant powers and responsibilities of the erstwhile Administrator.

[16] The claim for the declaratory order sought in respect of the ownership of the R300 erven sought in terms of prayer (a) of the particulars of claim is being made because, so the plaintiff pleads, 'the defendant' contends that '*the R300 land vested in the first and second defendants as the road authority by virtue of Proclamation 137 of 1973 and in terms of section 145 of the Divisional Councils Ordinance of 1952*'.

[17] Section 145 provided:

> The ownership of all public roads and public paths, as well as the land occupied thereby, shall vest in the council: provided that if any such road or path is closed, diverted or reduced in width, the land thereby ceasing to be occupied by a road or path, together with the works and things attached·to such land, shall continue so to vest in the council unless, if it is not registered in the name of the council, the Administrator by notice in the Provincial Gazette directs that such land or portion thereof, together with the works and things attached thereto, shall pass to and vest in the owner of the property of which such land originally formed part.

(The provision has effectively been repeated in s 22 of the currently applicable Roads Ordinance, 1976.)

[18] The plaintiff has pleaded that, as Arun's successor in title, it is the owner of the R300 erven by virtue of the following considerations:

1. The proclamation of a road (including proclamation of a road in terms of the Divisional Councils Ordinance of 1952 and/or the Roads Ordinance of 1976) constitutes advanced notification of a public authority's intention to implement a road scheme over the land in question.

2. The mere proclamation of a road (including proclamation of a road in terms of the Divisional Councils Ordinance of 1952 and/or the Roads Ordinance of 1976) does not bring about the vesting of the land in question in the public authority.

3. In order for the land in question to vest in the public authority, the authority must acquire the land for the purposes of a road scheme (or for some other public purpose), which it does by purchasing or expropriating the land subject to payment of compensation.

4. The R300 properties have not been purchased or expropriated

[19] The plaintiff claims that, as the owner of the R300 erven, it is entitled to an order, as prayed in terms of prayer (b) of the summons, directing one or other of the defendants to purchase the erven. It relies on regulation 38 of the regulations made under LUPO in this regard. Regulation 38 fell to be read with regulation 37, and also with s 28 of the Ordinance.

[20] The LUPO regulations provided as follows:

> 37. Where land in a subdivision is required by a local authority in connection with the supply of services for purposes directly related to the needs arising from the said subdivision, such land shall be surrendered to the local authority free of charge.
>
> 38. Where land in a subdivision is required by any other authority for a purpose other than that referred to in regulation 37 (excluding land required to be surrendered in terms of Section 28 of the Ordinance), it shall be purchased by the relevant authority at the market value applicable to the total land unit; provided that such authority shall not be obliged to purchase the land until such time as the owner can prove that 50of the total number of saleable land units in the relevant subdivision have already been sold; provided further that if any dispute arises between the owner of the relevant land and any authority over any matter in terms of this regulation, any of the parties involved may refer such dispute to the chief director for submission to an appeal committee in terms of section 43(2)(c) of the Ordinance.

[21] Section 28 of LUPO provided:

> **Ownership, on subdivision, of public streets and public places.**
>
> The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need.

[22] The plaintiff has alleged that the reservation of Erven 12692 and 12693 for the construction of the R300 by virtue of the Administrator's Proclamation and the subsequently adopted planning instruments, which the rezoning and subdivision of the development property had to accommodate, is '*unrelated to the normal need for public streets serving the development and was and is instead required for a road network planned for and serving the region as a whole*'. It alleges that the R300 erven are therefore '*land in a subdivision ... required by any other authority for a purpose other than that referred to in regulation 37*', as contemplated in regulation 38 of the LUPO regulations.

[23] The particulars of claim go on to allege that '(i)*n terms of section 26(3) of the Expropriation Act ..., where land is in terms of an ordinance declared to be a road or acquired for a road without being expropriated, the compensation to which the owner is entitled shall be calculated, determined and paid in accordance with the provisions of section 12 of that Act, notwithstanding anything to the contrary contained in the ordinance*'. The amount claimed by the plaintiff in terms of prayer (b) of the summons is the product of a computation in terms of s 26(1) read with s 12 of the Expropriation Act 63 of 1975, which the plaintiff alleges affords the appropriate way to quantify its entitlement in the circumstances. Section 12 of the Expropriation Act is one of the provisions in the Act that prescribe how the amount of compensation payable in respect of expropriated land falls to be computed.

[24] Section 26 of the Expropriation Act provides as follows:

> **Application of Act**
>
> (1) Subject to the provisions of section 5, the provisions of this Act shall not derogate from any power conferred by any other law to expropriate or take any property or to take the right to use property temporarily, but shall not preclude the expropriation or the taking of property or the taking of any such right being effected either under the said provisions or under the said power: Provided that if any such power is exercised after the commencement of this Act, the compensation owing in respect thereof shall mutatis mutandis be calculated, determined and paid in accordance with the provisions of this Act.
>
> (2) .....
>
> (3) In the case of land which is in terms of an ordinance declared to be a road or acquired for a road without such land being expropriated, the following provisions shall apply, namely-
>
> (a) notwithstanding anything to the contrary contained in any such ordinance-
>
> (i) the compensation to which the owner is entitled, shall be calculated, determined and paid in accordance with section 12, as if the land to which the declaration or acquisition relates had been expropriated in terms of the provisions of this Act;
>
> (ii) no compensation shall be paid in respect of land which at the time of the declaration or acquisition already existed, or was being used, as a road; compensation in respect of unregistered rights shall be paid in accordance with section 13;
>
> (iv) the amount of the compensation shall be determined in terms of section 14, if the amount of the compensation cannot be agreed upon;
>
> (v) the rights to precious metals, precious stones, base minerals and natural oil shall continue to vest in the person (including the State) in whom they vested prior to such declaration or acquisition;
>
> (vi) the date on which the province becomes liable for the payment of compensation in terms of the provisions of the ordinance in question shall be regarded as the date of expropriation;

(vii) the executive committee shall within sixty days of the declaration of the land to be a road, notify the owner thereof, mutatis mutandis in the manner contemplated in section 7, if the land was not already a road at the time of the declaration;

(viii) the executive committee shall furnish the local authority (if any) in whose area of jurisdiction the land is situated and the Registrar of Deeds in whose deeds registry the title deed to the land is registered, with a copy of the notice referred to in subparagraph (vii); and

(b) the Registrar of Deeds referred to in paragraph (a) (viii) shall on receipt of the said copy cause an appropriate endorsement of the declaration of the land to be a road to be made in his registers.

(4) .....

(5) If any land is expropriated after it had been declared to be a public road and the provisions of subsection (3)(b) complied with in respect thereof, the endorsement referred to therein shall serve as a note contemplated in section 31(6)(a) or 32(5), as the case may be, of the Deeds Registries Act, 1937 (Act 47 of 1937).

(6) If an executive committee is in terms of the ordinance in question required to expropriate any land for a road after the declaration thereof to be a public road, it may act in accordance with the provisions of subsection (3) (a)(vii) and (viii).

(7) An executive committee may, in respect of any land which was prior to the commencement of this subsection declared to be a road, request the Registrar of Deeds concerned to have such an endorsement made in his registers as is contemplated in subsection (3) (b), notwithstanding that the executive committee is not required to do so.

The date of commencement of the Expropriation Act was 1 January 1977.

[25] At the date that the Land Use Planning Ordinance came into effect, and prior to its substitution in terms of s 24 of the Expropriation Amendment Act 45 of 1992, with effect from 1 May 1992, s 26 of the Expropriation Act had provided as follows:

(1) The provisions of this Act shall not derogate from any power conferred by any other law to expropriate or take any property or to take the right to use property temporarily: Provided that, subject to the provisions of subsection (2), if any such power is exercised after the commencement of this Act, the expropriation or the taking of the property or the taking of the right to use the property temporarily, and the determination of the amount of the compensation therefor, shall be effected, *mutatis mutandis*, in accordance with the provisions of this Act.

(2) Subject to the provisions of subsections (3) and (4), the provisions of this Act shall not derogate from the provisions of any other law relating to the taking or use or expropriation of property by a provincial administration or a local authority for the

purposes of the construction or maintenance of a public road or the taking or use of property by a provincial administration or a local authority for the purposes of the construction or maintenance of any water, electricity, drainage or sewerage works, and the provisions of this Act shall not apply to the taking or use of property by the Rand Water Board in terms of section 24 (b) or (j) of the Rand Water Board Statutes (Private) Act, 1950 (Act 17 of 1950), or any expropriation in terms of section 120 of the Precious Stones Act, 1964 (Act 73 of 1964), or section 183 of the Mining Rights Act, 1967 (Act 20 of 1967).

(3) If compensation is to be paid for the taking or use or expropriation of any property contemplated in subsection (2), and the amount of such compensation is not agreed upon, the provisions of section 14 shall mutatis mutandis apply in connection with the determination of such amount.

(4) The amount of compensation paid or determined for the taking or use or expropriation of property contemplated in subsection (2) shall not be more than what it would have been had it been calculated in accordance with the provisions of section 12 (1), (2) and (5).

[26] Section 130 of 1952 Divisional Councils Ordinance empowered councils to '*take*' any land '*for the purposes of public road*s'. In terms of s 131, councils were empowered, if so required by the owner thereof, to pay compensation for any land so taken. The compensation fell to be determined as provided for in s 132. The taking provisions in the Divisional Councils Ordinance were substituted by the provisions of Chapter III of the Roads Ordinance, which provided for the expropriation of land '*for road purposes*'.[12] The provisions in Chapter III concerning the computation of compensation for expropriated land were immediately superseded by s 26 of the Expropriation Act, which happened to come into operation on the same day as the Ordinance did.

[27] The alternative claim to that in prayer (b), advanced in prayer (c) of the summons, is for compensation for what is alleged to be the 'constructive expropriation' of the R300 erven. The alternative claim is pleaded as follows in para 49-54 of the particulars of claim:

49. As a result of the provision for the network of higher order roads running across the development property, as contained or contemplated in or required by Proclamation 137 of 1973 and/or the planning instruments and/or the subdivisional rezoning approval:

[12] Section 27 of the Roads Ordinance.

1. the plaintiff (and/or its predecessor in title, Arun) was and is precluded from undertaking any development on the R300 land;

2. the plaintiff (and/ its predecessor in title, Arun) was and is unable to use the R300 land for any purpose ordinarily forming part of the exercise of the right of ownership;

3. the R300 land has been sterilized and the plaintiff's right of ownership and the ordinary common law incidences, competences and privileges forming part of the right of ownership in respect thereof have been made worthless to the owner;

4. the R300 land has become unmarketable and has no value to the owner, alternatively a negligible value.

50. The provision of the network of higher order roads running across the development property, as contained or contemplated in or required by Proclamation 137 of 1973 and/or the planning instruments and/or the subdivisional rezoning approval constituted and/or resulted in a taking of the R300 land, alternatively of the plaintiff's right of ownership and of the incidences and/or competences and/or privileges ordinarily associated with such right.

51. Such effective taking –

1. was done by a public authority acting in terms of the Divisional Councils Ordinance of 1952 and/or the Trunk Roads Ordinance of 1960 and/or LUPO

2. was done by or on behalf of the first defendant and/or the second defendant;

3. was done for a public purpose and in the public interest, namely for the purpose of public roads and/or forward planning in respect of public roads to serve the region as a whole.

52. In the premises:

1. The effective taking constituted a constructive expropriation of the R300 land.

2 Compensation is payable for the taking in terms of section 25 of the Constitution.

53. The amount of such compensation is to be calculated, determined and paid in accordance with the provisions of section 25(3) of the Constitution, which provides as follows:

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

(a) the current use of the property;

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

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) *the purpose of the expropriation.*'

54. The value as set out in paragraph 48 [R96 570 500] represents just an equitable compensation, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including those listed in section 25(3)((a) to (e) of the Constitution.

[28] The defendants excepted to the plaintiff's particulars of claim on the following grounds:

1. All of the relief sought in terms of the summons was dependent upon the plaintiff establishing that it was the owner of the R300 erven. The defendants alleged that it was evident, by virtue of the following considerations, that the plaintiff '*could not, and did not acquire ownership of the R300 properties*':

   (i) The effect of Proclamation 137 of 1973 was to make the land identified in the proclamation 'a public road'. In terms of s 145 of the Divisional Councils Ordinance 1952 ownership of all public roads '*vest*(s) *in the council*'.

   (ii) In addition, the Proclamation declared the R300 to be a trunk road within the meaning of the Trunk Roads Ordinance 28 of 1960. Section 7 *ter* of that ordinance vested ownership of all trunk roads constructed by the Administrator, or for the maintenance of which he was responsible, as well as the land occupied thereby, in the Administrator.

   (iii) The Proclamation had also increased the declared road beyond the statutory width for such roads. The notice of exception recorded that s 134(1) of the 1952 Divisional Councils Ordinance had provided that

'(f)or the purpose of increasing the width of a public road to its statutory width, a council –(a) shall, where the boundaries of the statutory width have been defined under sub-section (2) of section one hundred and thirty-three, take the additional land in accordance with the boundaries so defined'.[13] Furthermore, in terms of s 130(4) of the said Ordinance, '(i)*f, in accordance with the provisions of subsection (1), land is taken by a council .... all rights and interests in respect of such land vested in any person other than the council shall be deemed to have been extinguished,* ...'. ('The first ground of objection.')

2. Insofar as the plaintiff relied on the provisions of s 66(4) of the Roads Ordinance 19 of 1976, which deemed any proclamation issued under the (then repealed) 1952 Divisional Councils Ordinance and/or the (then also repealed) Trunk Roads Ordinance to have been issued under the 1976 Roads Ordinance, the defendants contended that (i) as the 1976 Roads Ordinance did not have retrospective effect, the Administrator had not been required to purchase or expropriate the R300 land in terms of the Roads Ordinance following its coming into effect and (ii) as s 66(4) of the Roads Ordinance did not alter the fact that the 1973 Proclamation included the R300 properties, no part of the R300 erven remained capable of '*a further act of expropriation, following the 1973 Proclamation*'. (My underlining, for emphasis.) ('The second ground of objection'.)

(The first and second grounds of objection were directed at the plaintiff's claim in prayer (a) of the summons.)

3. The LUPO regulations are not applicable. This is, so contend the defendants, because the 1973 Proclamation predated LUPO, which only came into operation on 1 July 1986. The Proclamation is deemed to have been made in terms of the 1976 Roads Ordinance. LUPO '*makes no reference to the proclamation of roads or to any purpose other than land use planning through structure plans, zoning schemes and subdivision of land*'. LUPO does not operate with retrospective effect and therefore does not apply to the 1973 Proclamation. ('The third ground of objection'.)

[13] Underlining provided for emphasis in the notice of exception.

4. The fourth ground objection was advanced on the basis that even if the LUPO regulations did apply, the pleaded particulars did not '*sustain a case under Regulation 38*'. ('The fourth ground of objection'.)

5. Insofar as the plaintiff's claim in terms of prayer (b) is premised on the Expropriation Act, the defendants contended that the 1975 Expropriation Act did not apply with retrospective effect to the 1973 Proclamation. ("the fifth ground of exception'.)

(The third to fifth grounds of objection were directed at the claim in prayer (b) of the summons.)

6. The sixth ground of objection was framed as follows in the notice of exception:

'18. At paragraph 52 of the POC, the Plaintiff alleges that the 1973 Proclamation resulted in a constructive expropriation of the R300 properties, which is compensable in terms of section 25 of the Constitution, 1996.

19. However, as a function of legality, the constitutionality of the 1973 Proclamation must be determined with reference to the Constitution of the Republic of South Africa Act, 1961. Section 25 of the Constitution, 1996, finds no application on the facts.

20. In any event, section 25 of the Constitution, 1996, does not guarantee compensation for constructive expropriation or regulatory takings.

21. The Plaintiff's POC, therefore, cannot sustain a case under Claim C.'

(The sixth ground was directed at the pleaded claim in support of the relief sought in terms of prayer (c) of the combined summons.)

[29] The defendants also excepted on the ground that the pleading was vague and embarrassing and that they were consequently 'prejudiced in their ability to plead to' it. The notice of exception provided no particularity in support of that complaint.

[30] In a judgment delivered on 28 August 2019, the court a quo dismissed the exception based on the first and second grounds of objection, but upheld the defendants' exceptions to the claims pleaded in support of prayers (b) and (c) of the summons. Dolamo J subsequently granted leave to the plaintiff to appeal to the full court against his order upholding the exceptions. Leave to cross-appeal was also granted to the defendants in respect of the dismissal of their exception to the claim for a declaratory order in terms of prayer (a) of the

summons. It was common ground between the parties, correctly so in our judgment, that the court a quo's refusal to uphold the exception on the other grounds was an appealable decision in the peculiar circumstances; cf. *Minister of Water and Environmental Affairs and Another v Really Useful Investments No 219 (Pty) Ltd and Another* [2016] ZASCA 156 (3 October 2016); [2017] 1 All SA 14 (SCA); 2017 (1) SA 505 (SCA) in para 2, citing *Makhothi v Minister of Police* 1981 (1) SA 69 (A) (which, at 73A-B, refers to *Blaauwbosch Diamonds Ltd v Union Government* 1915 AD 599 at 601).

[31] It would be logical, by virtue of the fact that the relief sought by the plaintiff in terms of prayer (b), alternatively (c), of the summons hinges on it being the owner of the R300 erven, to deal first with the defendants' cross-appeal against the dismissal by the court a quo of the first ground of objection advanced in the notice of exception. It will be recalled that, in essence, that ground of objection was predicated on the defendants' construction of s 145 of the 1952 Divisional Councils Ordinance. The contention was that it followed from the provision in that section that '(t)*he ownership of all public roads and public paths, as well as the land occupied thereby, shall vest in the council*' that from the moment of the declaration of the R300 as a public road the University had been divested of ownership of that part of its property over which the declared route of the intended road was to run (i.e. what has since become the R300 erven) and full dominion thereof transferred to the road authority. It was necessarily implicit in the defendants' argument that a declaration of a public road in terms of s 120 of the Ordinance resulted ipso facto in the expropriation of the affected land without compensation. The reference in the second ground of objection to the R300 erven not being susceptible to '*a further act of expropriation*' confirms as much.[14]

[32] The court a quo upheld the plaintiff's counsel's argument that the construction contended for by the defendants was demonstrably incorrect if s 145 were construed, as it obviously should be, consistently with the well-established principles of contextual interpretation.[15] The court a quo was also mindful of '*the well settled interpretive canon that legislation may not be construed to permit confiscation of land without compensation unless*

[14] See paragraph [28]2 above.

[15] Cf. *Chisuse and Others v Director-General, Department of Home Affairs and Ano*ther [2020] ZACC 20 (22 July 2020); 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) at para 46-59; *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16 (5 June 2014); 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15 (12 March 2004); 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) at para 90, and *Dadoo Ltd and Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 543.

it so provides in clear terms'.[16] No attention was given by the court a quo or the litigants to a reported judgment of the Eastern Cape Division in respect of the construction of the 1952 Divisional Councils Ordinance that runs against the meaning contended for by the defendants and lends support to the conclusions of the court a quo on this aspect of the case. In *Le Grange v Sterkstroom Divisional Council* 1970 (1) SA 1 (E) at 4E-H, Kannemeyer J held that the expression '*for the purposes of public roads*' in s 130(1) related to the taking of land '*in order that it may be used as public road*'. Kannemeyer J considered that the phrase '*the purposes of public roads*' related to the carrying out by divisional councils of their '*duties and powers in connection with the construction, maintenance, repair and improvement*' of public roads provided for in s 126 of the Ordinance. If the effect of a declaration in terms of 120 were to vest the land in the road authority, it would obviously not be necessary for the council to take it for the purpose of constructing the road, and s 130 would, in the context postulated by the learned judge, be redundant. The judgment in *Le Grange* is not binding on this court but, as an existing authority on one of the questions before us, it would be remiss of us not to have careful regard to it. It is persuasive, in my respectful view.

[33] The plaintiff's counsel argued that a number of contextual indicators in the legislation served to demonstrate the fallacy in the construction for which the defendants contended. In my judgment, their argument was well-made. Reference to only a few provisions of the 1952 Divisional Councils Ordinance is sufficient to show that the defendants' contention that s 145 was intended to give a proclamation of a public road in terms of s 120 of the Ordinance an expropriating effect if the affected land was in private ownership is misconceived.

[34] Section 146(2) of the Ordinance prohibits the owner of any land from building or permitting any person to erect a building '*on <u>his land</u>, if such land falls within the statutory width of <u>a proclaimed road</u> or the width of a declared road*,[17] *but has <u>not yet been taken for the purposes of such road</u>, except with the approval of, and in accordance with plans approved by the local authority and the Administrator*'. The plain wording of the provision, highlighted by the words I have underlined, is irreconcilable with the notion that the mere

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[16] See *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37 (15 December 2014); 2015 (3) BCLR 243 (CC); 2015 (2) SA 584 (CC) at para 34, citing *Belinco (Pty) Ltd v Bellville Municipality and Another* 1970 (4) SA 589 (A) at 597C; *Administrator Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A) at 325B-F and *South Peninsula Municipality and Another v Malherbe NO and Others* 1999 (2) SA 966 (C) at 983A-B.

[17] The defined meaning of 'declared road' in s 1 of the Divisional Councils Ordinance was that '*assigned thereto by section 1 of the National Roads Act, 1935 (Act No. 42 of 1935)*'. Act 42 of 1935 was repealed by s 29 of the National Roads Act 54 of 1971, with effect from 1 October 1971. The legislation pertained to '*national roads*'.

declaration of a road vests ownership thereof in the Administrator or the council. Its unambiguous import is that a declared road remained the property of its registered owner until and unless the land constituting it was taken from the owner for the purposes of the road.[18]

[35] That that was so was underscored by the link in the proviso to s 146(2) to s 131(4) and the second proviso in s 148(1). The proviso to s 146(2) went as follows: *'... provided that nothing herein contained shall be construed as derogating from the provisions or sub-section (4) of section one hundred and thirty-one and the second proviso to sub-section (1) of section one hundred and forty-eight*'. Section 131 was the provision in the Ordinance that regulated the payment of compensation by a divisional council in respect of the taking, in terms of s 130, of any land for the purposes of public roads and public paths. Subsection 131(4) prohibited, save with the prior permission of the Administrator, the payment of compensation by a council for improvements effected to land taken for road purposes if such improvements were made within the statutory width of a road any time after the statutory width of the road had been fixed. The second proviso to s 148 was an equivalent provision to s 131(4) that applied in respect of the payment of compensation for land within an urban local authority area taken for road purposes.

[36] The words 'take' and 'taking' are commonly used synonymously with 'expropriate' and 'expropriation'. It is plain from the context that that is how they were used throughout Chapter X (ss 119-149) of the Ordinance, which, as its title suggests, is devoted to roads. It is confirmed in s 148(1), where it is provided that in '*inner municipal areas*'[19] '*the provisions of Chapter X of the Municipal Ordinance, 1951 (Ordinance No. 19 or l951), relating to the expropriation of land and the payment or compensation therefor shall apply, instead or the provisions of sections one hundred and thirty, one hundred and thirty-one and one, hundred and thirty-two of th*(e) *Ordinance*'.

[37] Section 136 *bis* of the 1952 Divisional Councils Ordinance is another provision that serves to confirm that privately owned land on which proclaimed roads fall to be constructed needs first to be taken by roads authority for that purpose. The section provides as follows:

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[18] The pertinent provisions of s 146 of the 1952 Divisional Councils Ordinance have effectively been re-enacted in s 17 of the Roads Ordinance, 1976.

[19] '*Inner municipal area*' was defined in s 119 of the Ordinance to mean '*that portion of a municipality which has by actual survey been subdivided into erven, lots or plots (excluding any area subdivided into agricultural erven, lots or plots any of which is 2, hectares or more in extent) and the streets, roads, thoroughfares and lanes abutting thereon*'.

> Notwithstanding anything to the contrary contained in any other provision, a council may where a vineyard, an orchard, a plantation or irrigated land adjoins a proclaimed road, provisionally take only so much land (hereinafter referred to as the provisional width, as the Administrator may approve and in such event the provisions of this Chapter relating to the taking of land for the construction or widening of, and the: erection and re-erection of fences along, proclaimed roads shall, until the Administrator directs otherwise, *mutatis mutandis* apply in respect of such provisional width.

The underlined wording confirms that the mere declaration of a proclaimed road did not vest ownership in a council. If the road was yet to be constructed, the land over which it was to run needed to be taken for that purpose if it did not already belong to the council. It is clear that 'the provisional width' referred to in this section contemplates a narrower length of land than that comprising the road's full 'statutory width'. This demonstrates that the defendants' contention that it was only necessary to take land for road purposes where the declared width was wider than the standard statutory width cannot be sustained on a contextual reading of Chapter X of the Ordinance.

[38] Section 130(4) of the Ordinance provided that it was upon the taking of the land for road purposes in terms of s 130(1) that '*all rights and interests in respect of such land vested in any person other than the council shall be deemed to have been extinguished*'. Section 130 therefore provided for the extinction of owner's proprietary rights in the taken land, and s 145 for the vesting of them in the council. The two provisions were complementary. It is necessary for governmental purposes to identify in which organ of state expropriated property resorts. Section 145 addressed that issue in respect of roads for which a divisional council was the road authority, just as ss 7(1) and 7 *ter* did in respect of public roads that had been declared as trunk roads.

[39] Indeed, in the current case it should not be overlooked that the R300 was also declared to be a trunk road. The combined effect of ss 120(4)(a) and 127(2)(a) of the 1952 Divisional Councils Ordinance and ss 3, 7 and 7 *ter* of the Trunk Roads Ordinance was that were the R300 constructed over land where there was no existing road when the proclamation was made, the Administrator, rather than the divisional council or municipality concerned, would be the responsible authority for taking the required land, which would *thereupon* vest in the Administrator, not the council. Section 7(1) of Trunks Road Ordinance provided that in this regard the Administrator had the powers, rights and duties conferred by law on the divisional council. The relevant powers, rights and duties were those conferred in terms of

Chapter X of the 1952 Divisional Councils Ordinance. The defendants' argument that s 130 of the 1952 Divisional Councils Ordinance did not empower *the Administrator* to take land 'for the purposes of public roads' was accordingly misconceived.

[40] The effect of s 66(4) of the Roads Ordinance was that the R300 fell, with effect from 1 January 1977, to be regarded as if it had been proclaimed in terms of the Roads Ordinance. It was accordingly deemed to have been classified as a trunk road and a main road in terms of s 4 of the new ordinance. The Roads Ordinance remains in force.

[41] Any taking of land necessary to construct the road is therefore now regulated by Chapter III of the Roads Ordinance read with s 26(3) of Expropriation Act. The notion that an expropriation of the R300 erven in terms of the Roads Ordinance would be '*a further act of expropriation*' is erroneous because the erven had not been taken for road purposes under the previously subsisting legislation, the 1952 Divisional Councils Ordinance. Retrospectivity therefore does not present as a question for consideration. The evident object of s 66(4) was to ensure that practical issues concerning roads proclaimed under the repealed legislation could be addressed in terms of the substituting ordinance. It is in the nature of a transitional provision; one directed at regulating the practical consequences of dealing with uncompleted business commenced under a statutory instrument that is replaced by another.

[42] The plaintiff's counsel also argued, and the court a quo appeared to agree, that the judgment of the appeal court in *Steinberg v South Peninsula Municipality* [2001] ZASCA 93 (19 September 2001); 2001 (4) SA 1243 (SCA) and the dictum of Moseneke DCJ in the Constitutional Court's judgment in *Arun Property Development* supra, at para 35, apropos a higher-order road provided for in terms of a structure plan, that '(w)*hen the local authority resolves that the time has come to build the road, the land must be expropriated and compensation must be paid to the owner*' supported the correctness of the construction of the pertinent provisions of the 1952 Divisional Councils Ordinance for which they contended. The defendants' counsel countered that neither of those authorities was in point: the question in *Steinber*g's case fell to be determined with reference to the Roads Ordinance, 1976, and the Constitutional Court in *Arun Property Development* was concerned with LUPO, not the Divisional Councils Ordinance.

[43] I am inclined to agree that we should be careful not to read too much into the dictum in *Arun Property Development*. There is nothing in the judgment to indicate that the learned deputy chief justice had any particular provision of the Divisional Councils Ordinance in

mind when he uttered the words on which the plaintiff's counsel place reliance. The position with regard to the judgment in *Steinberg* is different, however. Whilst it is true that the statutory context in that case was the Roads Ordinance, the findings by the appeal court as to the character of the pertinent statutory scheme are nevertheless germane because the scheme in issue was directed at the same subject matter previously regulated by Chapter X of the 1952 Divisional Councils Ordinance. A comparative analysis shows that, in the respects relevant to the current case, the scheme evident in the 1952 Ordinance was transposed in essentially unaltered form to the 1976 Roads Ordinance. Thus, ss 3 and 4 of the Roads Ordinance corresponded in all material respects with s 120 of the 1952 Ordinance, s 17 with s 146, s 22 with s 145, and s 27 with s 130. The equivalence between the instruments is far wider than just in the respects that I have illustrated. I picked out only the four aforementioned points of correspondence because of their particular relevance to the issue under consideration.

[44] The issue in *Steinberg* concerned a claim for compensation for the 'constructive expropriation' of land situate within or adjacent to a proclaimed road that had not been constructed. For reasons unrelated to the issue under consideration in this part of the current appeal, the court in *Steinberg* found it unnecessary to decide whether constructive expropriation was a cognisable concept in our law, but it did explain how the statutory scheme in respect of the proclamation of a public road worked under the Roads Ordinance. It held that '*although the approval of the road scheme might affect the value of the property, it was nothing more than advance notification of a possible intention to construct a road which, if implemented in the form approved, would result in a taking. <u>It was not in itself a taking</u>.*'[20] The demonstrable equivalence between the statutory schemes under the two ordinances begs the question whether there is any basis to materially distinguish the effect of a road proclamation under the Roads Ordinance from one under the preceding Divisional Councils Ordinance; particularly in circumstances where a declaration under the Divisional Councils Ordinance is expressly deemed to be have been made under the Roads Ordinance. I am not persuaded that the defendants have shown that there is.

[45] For all of the foregoing reasons, I accordingly consider that there was no merit in the first and second grounds of objection raised by the defendants. I should perhaps record that I do not, with respect, agree in all respects with the reasoning of the court a quo in reaching the

[20] In para 12. (My underlining for emphasis.)

same conclusion.[21] However, as appeals are generally concerned with results of cases rather the reasoning by which they were determined, all that matters is that we are satisfied that the exception based on the first and second grounds of objection was correctly dismissed. The defendants' cross-appeal will therefore be dismissed.

[46] Turning then to the plaintiff's appeal against the upholding by the court a quo of the defendants' exceptions to its claims in terms of prayers (b) and (c). I shall treat first of the defendants' third to fifth grounds of objection, which, it will be recalled, relate to the applicability of regulation 38 of the LUPO regulations.

[47] One is able to say at once that there is no merit in the retrospectivity argument advanced by the defendants in support of these grounds of objection. As the plaintiff's counsel correctly pointed out, the LUPO regulations, if they were applicable, came to bear because of events that occurred after the enactment of LUPO. The particulars of claim do not pretend to suggest that the regulations affected the consequences of the Proclamation between the time it was made and the commencement of LUPO on 1 July 1986. The allegation is that the regulations came to bear after the confirmation of the subdivisions of the development property and after the requisite minimum number of saleable erven in the subdivisions had been sold. LUPO was in force at the time. The allegations do not bear on the existence of the R300 pursuant to the 1973 Proclamation. Instead, they allege the imposition by the regulations, *post-1986,* of an obligation on the road authority to purchase the land over which the road was declared once the conditions prescribed in regulation 38 for the triggering of the obligation had been satisfied.[22]

[48] The question remains, however, whether regulation 38 of the LUPO regulations was applicable in the factual context alleged in the particulars of claim. The answer, turning, as it does, on statutory interpretation, is a matter of law. In the circumstances, the court a quo was entitled to decide the question raised by the defendants' third ground of objection generically, rather than being limited by the specific bases upon which the defendants contended for the conclusion that the regulation did not apply; cf. *Paddock Motors (Pty) Ltd v Igesund* 1976 (3)

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[21] In particular, I do not agree that anything turned on the nuances of the meaning of the word '*vest*' in s 145, as the judgment of the court a quo appears to suggest. '*Vest*' plainly has the meaning that both sides acknowledged that it does. The question, rather, is when, on a proper construction of the legislation, did or does the vesting occur.

[22] In their written submissions, the defendants' counsel appear to indicate that the retrospectivity argument was advanced only ex hypothesi an acceptance of the defendants contention that the 1973 Proclamation had an expropriating effect. It would indeed be only in such a context that the argument could notionally be feasible.

SA 16 (A) at p.23 and *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) in para 7.

[49] The issue is whether subsidiary legislation under LUPO was intended to, or competently could, derogate from the provisions of the Roads Ordinance and the Expropriation Act in respect of the taking of land for road purposes. Another approach would be to ask whether the declaration of a public road before the subdivision was granted resulted in land in the subdivision being '*required by any other authority*' within the meaning of regulation 38.

[50] The defendants' counsel submitted, correctly, that the ambit of the LUPO regulations was defined by the empowering provision in terms of which they were made. Section 47(1) of LUPO provided in that regard as follows: '*Subject to the provisions of sections 7(2) and 8* [which are not relevant for present purposes], *the Administrator may make regulations relating to matters which shall or may be prescribed by regulation in terms of this Ordinance and, generally, relating to all matters which he deems necessary or expedient to prescribe in order to achieve the purposes of this Ordinance*'. Section 47(1) plainly vested a discretionary power in the Administrator, but his discretion was limited to regulation-making in respect of matters he might reasonably have regarded as necessary or expedient to achieve the purposes of LUPO. Any regulations that he purported to make while acting beyond the limits of his discretion would be ultra vires. The regulations should therefore be construed as far as possible to have a meaning compatible with the Administrator having made them acting within his powers; that is, in a way that would uphold their validity (cf. e.g. *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A) at 738D-E).

[51] The defendants argue that LUPO and the Roads Ordinance are separate pieces of legislation treating of quite discrete subject matter. LUPO, they say, is concerned with the regulation of town planning through the use of structure plans, zoning schemes and the subdivision of land, whereas the Roads Ordinance is directed at matters of transport, including the proclamation, construction and maintenance of roads of various classes and the acquisition of land and use of land for road purposes and matters ancillary thereto.[23]

[52] The defendants' argument enjoys some support in the dichotomous characterisation of transport-related and town planning legislation by the Constitutional Court in *Reflect-All*

[23] See the definition of '*purposes*' in s 2 of the Roads Ordinance; viz. '*in relation to public roads and public paths includes any matter ancillary to or connected with such roads or paths*'.

1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another [2009] ZACC 24 (27 August 2009); 2009 (6) SA 391 (CC) ; 2010 (1) BCLR 61 (CC), in which the minority judgment referred to the Gauteng Transport Infrastructure Act 8 of 2001 (Gauteng), which replaced the old Transvaal Roads Ordinance 22 of 1957, as '*road planning*' legislation.[24] The term was apparently used in contradistinction to 'town planning'. Reference to the character of legislation generally in this country supports a distinction of that sort for regulatory purposes. Physical planning measures, that is matters directed at governing matters of land use and spatial planning, are generally dealt with in discrete legislation from matters of transport in general; and transport-related matters tend in turn to be regulated by individual enactments that are discernibly divisible into distinct categories such as road transport, aviation, ports, merchant shipping and so on. Infrastructural planning related to higher order roads is a subject dealt with in transport-related legislation. Thus, for example, the Roads Ordinance co-existed with LUPO, and continues to do so with the spatial planning legislation that has replaced LUPO.

[53] Some degree of overlap is, however, only to be expected between town planning and higher order infrastructural planning because townships do not exist in a vacuum, and matters like higher-order roads and rail links are things that interlink towns and assist in their efficient functioning and prosperity. The general legislative and administrative framework does nonetheless create a clearly discernible delineation of responsibility between local government level town planning ('municipal planning'), at which LUPO was directed, and areas of governmental responsibility such as national and provincial roads, for example. This division of responsibilities is also reflected in the functional areas of competence listed in Schedules 4 and 5 of the Constitution.

[54] The only roads that were provided for in terms of LUPO were '*public streets*'. The term '*public streets*' was defined in s 2 of the Ordinance with reference to land vested in a local authority in terms of s 28 of the Ordinance. The text of s 28 is set out paragraph [21] above. The R300, which was declared as a trunk road in terms of the Trunk Roads Ordinance, and is therefore currently deemed to have been declared as such in terms of s 3(1)(a) of the Roads Ordinance, would not, when constructed, vest in a local authority. And it would not be the responsibility of a local authority to take the land necessary to enable the road to be constructed. Nor is any local authority the 'road authority' for the R300.[25] It is

[24] In doing so, the judgment acknowledged that the Infrastructure Act also dealt with rail transport.

[25] See para (a) of the definition of 'road authority' in s 2, and also s 66(1) of the Roads Ordinance, 1976.

therefore not a 'public street' within the meaning of LUPO. Furthermore, the road's existence was not determined by the decision of a subdivision application in terms of LUPO. That was established by a proclamation made in terms of Chapter X of the 1952 Divisional Councils Ordinance, and is now regulated under the Roads Ordinance. The status of the R300 as a road was also not determined by any zoning decision or provision under LUPO; it was, and remains, regulated under the Roads Ordinance.

[55] In my view, these considerations militate decisively against the correctness of any construction of regulation 38 of the LUPO regulations in any way that would contradict the scheme or effect of the Roads Ordinance. The scheme of the Roads Ordinance is that the road authority is not obliged to take the land over which a public road has been declared, but that it may do so at a time of its choosing if and when a road needs to be constructed there. The provisions of the Roads Ordinance in respect of the acquisition of land for road purposes would be irreconcilable with regulation 38 of the LUPO regulations if the latter were construed as the plaintiff would have it.

[56] The plaintiff argues that LUPO regulation 38 is applicable because the R300 was reflected in the relevant structure plans for the area in which the R300 erven are situated, and the relevant planning authorities had advised that they would not approve any applications for rezoning and subdivision for the development of a township on the farms that did not make provision for the R300. The argument is not persuasive.

[57] Provision for the R300 follows from the proclamation of the road (which, as discussed, is deemed to have occurred under the Roads Ordinance), *not* from any of the structure plans referred to in the plaintiff's particulars of claim. The R300 might not exist in a physical form over the 'development property', but it exists as legal concept, and by its existence as such impacted on the use rights of the owner of the property with effect from the date of the Proclamation. No decision under LUPO could competently purport to alter those established incidents of the proclamation of the road under a different law, for the Ordinance itself contained no provision permitting that.

[58] The general purpose of a structure plan compiled in terms of s 4 of LUPO was '*to lay down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned*'; see s 5 of LUPO. Any structure plan that purported to ignore the

reality of a proclaimed road (even one yet to be constructed) therefore could not hope to fulfil the purpose for which it was prepared, and it would have been irrational for the Administrator to purport to approve it. Similar considerations would apply in respect of an urban structure plan drafted under the Physical Planning Act 125 of 1991, a guide plan in terms of the Physical Planning Act 88 of 1967, or a transport plan prepared under the Urban Transport Act 77 of 1978.

[59] The advice allegedly given to the University and Arun that any decision in respect of the rezoning or subdivision of Farms 311/57 and 311/61 would have to take account of the existence of the R300 was merely in confirmation of the existence of a relevant state of affairs *dehors* the provisions of LUPO and any application for rezoning and subdivision that the landowner might choose to submit under that Ordinance. The reality of the already existing road, albeit only in conceptual form, did not constitute a requirement imposed in terms, or arising out, of LUPO. The fact that the R300 was reflected in a structure plan approved in terms of s 4 of LUPO was also, for the reasons explained in the preceding paragraph, just incidental. The restricting effect of the R300 on the landowner's ability to use the land did not arise from any provision of LUPO or from the determination of any application made thereunder; it arose rather from the declaration of the road in terms of the 1952 Divisional Councils Ordinance and the subsequent incidence of the Roads Ordinance. This conclusion is supported by the fact that the R300's status as a proclaimed road would not be affected in any way were the rezoning and subdivision approvals granted under LUPO to lapse for any reason. It would also not be affected by the lapsing of the (time-limited) applicable structure plan. These features serve to illustrate that the existence of the road was entirely unrelated to the operation of LUPO.

[60] It is of little surprise in the circumstances that the R300 erven were not included in the three phases of development provided for in the series of rezoning and subdivision approvals alleged in the particulars of claim. As noted above,[26] the R300 erven were the subject matter of a separate subdivision. They represented the parcels of land that would remain in the ownership of the development property after the confirmation of the subdivision of the three constituent phases of the development and the transfer to, or vesting in, third parties of all of the development property. They represented residual land outside of those parts of the two farms that were subdivided for township purposes. The local authority was obliged in terms

[26] In paragraphs [6], [11] and [12].

of Chapter II of LUPO to accord the residual land recognition as separate land units. That would also be necessary for land survey[27] and deeds registry purposes. [28] It is also only because of an external factor – the existence of De Villiers Road, which presumably vests in the local authority – that there are two R300 erven instead of just one erf. The R300 erven were not land *within* the area subdivided for development and use for township purposes; they were, in my judgment, therefore, on any approach, not '*land in a subdivision ... required by any other authority for a purpose other than that referred to in regulation 37*'.[29]

[61] Even if I were wrong in holding that the R300 erven were not in the subdivisions approved under LUPO, the wording of regulation 38, especially by its employment of the word '*purchase*' and its prescriptions of how the price is to be determined and any dispute thereanent resolved, is irreconcilably inconsistent with the scheme for the taking of land for road purposes in terms of Chapter III of the Roads Ordinance read with s 26 of the Expropriation Act (in either its original or current form). It would not have been within the competence of Administrator to make subsidiary legislation under LUPO that had the effect of contradicting, amending or overriding the provisions of superordinate legislation such as applicable Acts of Parliament or provincial ordinances. The Administrator must be taken to have been aware of the relevant provisions of the Roads Ordinance and the Expropriation Act when he made the LUPO regulations. In the circumstances it must be presumed that he could not have intended that regulation 38 should have the import contended for by the plaintiff.

[62] In my judgment, the use of the word 'purchase' and the means provided in regulation 38 for the determination of the purchase consideration in the event of a dispute about the price indicate that the 'requirement' by any other state authority contemplated in the regulation is one asserted by such other authority when the application for subdivision is advertised. It would also have to be of a character different to that which would attend an expropriation of the land concerned because the financial consequences of the expropriation of land are regulated in a completely different manner to the determination of a purchase consideration as contemplated by regulation 38.

[63] Counsel did not refer us to any examples in which regulation 38 has been applied in practice. I have struggled to conceive of circumstances in which the regulation would apply

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[27] Cf. s 26 of LUPO.

[28] Section 43 of the Deeds Registries Act 47 of 1937.

[29] My underlining for emphasis.

when it is always open to an organ of state, at a time of its own choosing, to expropriate any land that it requires for its legitimate purposes. It seems to me that the regulation is only likely to apply when the requirement by a state authority for a particular piece of land in a subdivision has been made known during the administrative processing of a subdivision application, and has consequently been incorporated as a condition of approval.

[64] That type of situation postulates the imposition of the condition as the *fons et origo* of the obligation on the developer to submit to the requirement. It is a situation quite distinct from that obtaining in the current case, where the basis for the road authority's entitlement to keep the land reserved for its purposes, namely the Proclamation, is unrelated to the applications for the rezoning and subdivision of the land. A state authority that engages in a subdivision application in the manner that I have postulated would thereby become a party to the application process, cognisant, and accepting, of the implications of regulation 38. Something akin to consensus would be involved between the planning authority imposing such a condition, the state authority requesting it and the developer accepting it.

[65] Certainly, at the time the LUPO regulations were made, in December 1988, the notion that an element of consensus was involved in township development pursuant to the conditional approval of land development applications enjoyed authoritative support; cf. *Administrator Cape Province v Ruyterplaats Estates (Pty) Ltd* 1952 (1) SA 541 (A) at 550H-551F, referred to in *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2008] ZASCA 79 (2 June 2008); 2008 (6) SA 12 (SCA); [2008] 4 All SA 297 (SCA), in para 4. The attribution of something akin to a consensual aspect to the 'requirement' would afford a sensible basis for the acquisition contemplated by the regulation being in the nature of a *purchase*, instead of an *expropriation*.

[66] It is evident that if regulation 38 were applicable in the circumstances set out in the particulars of claim it would materially subvert the rationale or scheme of the Roads Ordinance, which allows for long-term road planning by way of the identification of road routes long before the construction of the roads is actually required, and allows the road authority to defer having to acquire the affected land until transport needs impel that, and adequate funding is available to carry out the contemplated scheme. Those incidents of the Roads Ordinance were acknowledged in *Steinberg* supra, at para 11, and, in respect of comparable provincial legislation in Gauteng, also in *Reflect-All* supra, at para 67. They were aspects of the roads legislation that were expressly regarded as operating for the public good. In *Steinberg*, the court held that if the road authority were obliged to take land for declared

roads and pay for it other than at a time of the road authority's choosing '*forward planning and good government would become economically impossible*'.

[67] The application of regulation 38 in the circumstances alleged in the particulars of claim would defeat the intentions of the Roads Ordinance, for it would require the roads authority to take the land over which the route of the proclaimed land had been declared not when it considered it right and opportune to do so, but instead at a time fixed by the progress of a private property development on adjacent land, and irrespective of any connection between the need for the construction of the road at that time and the needs arising from the development. The adverse implications of any such application of the regulation on the scheme devised in the Roads Ordinance are obvious and significant.

[68] I have demonstrated how the regulation is capable of being interpreted in a manner that would not bring it in conflict with other higher order legislation. Such an interpretation is to be preferred in principle to the one contended for by the plaintiff, which would have the opposite effect. My conclusions on this matter lead me to uphold the defendants' contention that regulation 38 is not applicable on the pleaded facts.

[69] But even if my conclusions were misconceived, the appeal against the decision by the court a quo to uphold the exception to the plaintiff's claim in prayer (b) of the summons should nevertheless still be dismissed by reason of the plaintiff's failure to adequately allege that the road authority 'required' the R300 erven. Reference to the Roads Ordinance shows that the prescribed manner for a road authority to signify its requirement of any land for road purposes is to serve or cause to be served a notice of expropriation in accordance with s 29 of the Ordinance. For the reasons discussed earlier in this judgment, the mere designation of any land as a declared public road does not amount to a requirement that the land be taken for such purpose, it indicates only that the land may possibly, not necessarily, be needed, dependent on a decision yet to be made.

[70] Regulation 38 is directed at land that is actually required by an authority. Why else oblige the authority to purchase it? Construing the regulation to oblige a road authority to purchase land for a road that it has no current intention to construct and may never build would result in absurdity. Prudent fiscal management would be undermined to the obvious detriment of the public interest.[30] The plaintiff has not alleged that it has been served with a notice in terms of s 29 of the Roads Ordinance. It has therefore not made out a case that

[30] Cf. *Reflect-All* supra, in para 67, endorsing the remarks in *Steinberg* supra, in para 11.

either it or the local authority could consider the land to be 'required' by the defendants within the meaning of regulation 38.

[71] In view of the conclusions reached on the third and fourth grounds of exception, which are by themselves determinative, it is not necessary to decide the fifth ground of objection. Suffice it to say that there would be no merit in any contention that s 26 of the Expropriation Act would not apply in respect of the computation of the compensation payable by the road authority for the taking or expropriation of the R300 in terms of Chapter III of the Roads Ordinance. As discussed earlier in this judgment, however, regulation 38 is not concerned with that and contains its own provisions concerning the determination of the monetary consideration that an authority which purchases property in terms of the regulation has to pay. Notably, such consideration does not include any provision for an amount to make good any financial loss incurred by the landowner by reason of the state authority's requirement of the land (as in s 12(1)(a)(ii) of the Expropriation Act) or a solatium (as in s 12(2) of the Expropriation Act).

[72] For all of the foregoing reasons, the appeal against the judgment of the court a quo upholding the exception to the claim in terms of prayer (b) of the summons will be dismissed.

[73] Lastly, it is time to consider the appeal against the upholding by the court a quo of the exception to the alternative claim, in prayer (c), for payment of an amount in compensation for the so-called 'constructive expropriation' of the R300 erven.

[74] In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 32-34, the Constitutional Court, in the context of the property clause in s 28 of the Interim Constitution, made the following observations concerning the distinction between expropriation and deprivation:

> [32] The word 'expropriate' is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation. Whilst expropriation constitutes a form of deprivation of property, s 28 makes a distinction between deprivation of rights in property, on the one hand (ss (2)), and expropriation of rights in property, on the other (ss (3)). Section 28(2) states that no deprivation of rights in property is permitted otherwise than in accordance with a law. Section 28(3) sets out further requirements which need to be met for expropriation, namely that the expropriation must be for a public purpose and against payment of compensation.
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> [33] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public

authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board*, Trollip J said:

> '(T)he ordinary meaning of "expropriate" is "to dispossess of ownership, to deprive of property" (see eg *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (N) at B 327G); but in statutory provisions, like secs 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) at 422--3, 424; *SAR & H v Registrar of Deeds* 1919 NPD 66; *Kent NO v SAR & H* 1946 AD 398 at 405--6; and *Minister van Waterwese v Mostert and Others* 1964 (2) SA 656 (A) at 666--7.'

[34] The Zimbabwean Constitution also provides that property may not be compulsorily acquired, save under a law which requires the acquiring authority to pay fair compensation. In *Hewlett v Minister of Finance and Another*, Fieldsend CJ considered the meaning of 'acquire' in those sections of the Constitution. He referred to the following dictum of Innes CJ in *Transvaal Investment Co Ltd v Springs Municipality*:

> '. . . juristically, the word "acquire" connotes ownership; the ordinary legal meaning implies the acquisition of dominium. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the dominium; but the narrower meaning is the accurate and more obvious one.'

Fieldsend CJ continued:

> 'It is true, too, that “compulsory acquisition” is used in both English and Roman-Dutch law to denote the expropriation of property by an authority - whether State, local or public utility - usually for some public purpose, most commonly in relation to land. It is, of course, common cause that property in s 16 is not limited to land.
>
> Cases relied upon by Mr Kentridge clearly establish that it is not every deprivation of a right which amounts to a compulsory acquisition of property, as for example regulation of a landlord's rights which in effect diminished his rights (*Thakur Jagannatha Baksa Singh v United Provinces* 1946 AC 327 (PC)), regulations which limited an owner's right to build above a certain height on his land (*Belfast Corporation v OD Cars Ltd* [1960] AC 490), and legislation allowing licensed pilots to provide pilotage only if they were employed by the port authority (*Government of Malaysia v Selangor Pilot Association* (supra)).

> It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the fundamental freedoms protected refer to the right not to be deprived of property without compensation whereas the sections giving actual protection provide that no property of any description shall be compulsorily taken possession of and no interest in or right [over] property of any description shall be compulsorily acquired except on certain conditions including compensation. This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed government could be made virtually impossible if every deprivation of property required compensation.'

In *Davies and Others v Minister of Lands, Agriculture and Water Development*, Gubbay CJ cited the aforesaid passages with approval and held that s 11(c) of the Zimbabwe Constitution does not afford protection against deprivation of property by the State 'where the act of deprivation falls short of compulsory acquisition or expropriation'.[31]

The distinction between deprivation and expropriation in s 28 of the Interim Constitution is equally apparent in s 25 of the 1996 Constitution.

[75] In *Steinberg* supra, at para 4, Cloete AJA, with reference to aforementioned passage in *Harksen*, observed that a '*fundamental distinction is drawn in section 25 between two kinds of taking: a deprivation and an expropriation. It is only in the case of an expropriation that there is a constitutional requirement for compensation to be paid. The purpose of the distinction is to enable the State to regulate the use of property for the public good, without the fear of incurring liability to owners of rights affected in the course of such regulation*'.[32] The learned judge proceeded, in para 6, to say '*The principle of constructive expropriation creates a middle ground, and blurs the distinction, between deprivation and expropriation. According to that principle a deprivation will in certain circumstances attract an obligation to pay compensation even although no right vests in the body effecting the deprivation. It is the determination of those circumstances which can give rise to problems*.' In para 7, Cloete AJA recorded that counsel for the appellant in that case (which it will be recalled concerned a claim based on an alleged constructive expropriation) had urged the Supreme Court of Appeal to have regard to the United States jurisprudence on the issue. He noted, however, that the US Supreme Court had, in *Penn Central Transportation Co et al v New York City et al* [1978] USSC 180, 438 US 104 123-4 (1978), acknowledged that '*While this Court has*

[31] Footnotes omitted, and underlining supplied for highlighting.
[32] The statement in *Steinberg* of the reason for the distinction was endorsed in *Reflect-All* supra, in para 63.

recognised that the "Fifth Amendment's guarantee ...[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v United States, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Cloete AJA pointed out that that passage in *Penn Central* had been reiterated in three subsequent US Supreme Court decisions.[33]

[76] The SCA allowed in *Steinberg* that there may be scope for '*the development of a doctrine akin to constructive expropriation in South Africa*', but acknowledged that any such development might be beset by difficulties of a constitutional policy character. The court found it unnecessary to go further than that because it concluded that '(t)*he fallacy in the argument advanced on behalf of the appellant is that it postulates that advance notification by a public authority of a possible or even probable intention to embark on a course of conduct which, if ultimately persisted in, must necessarily result in a taking, is to be equated to an expropriation. If this were the law a public authority such as the respondent* [a road authority under the Roads Ordinance] *would be obliged to acquire and compensate the owners of all rights which might be affected by a proposed undertaking in the public interest, in advance of a final decision as to the extent of the undertaking or even whether it will be implemented at all. The consequence would be that forward planning and good government would become economically impossible*.'

[77] The judgment in *Steinberg* stands as authority for the proposition that the declaration of the R300 did not result in a taking of the affected land in the sense of an expropriation within the meaning of s 25 of the Constitution. That conclusion is, of course, consistent with the determination earlier in this judgment in relation to the exception to the claim in prayer (a) of the summons that the plaintiff remains the owner of the R300 erven.

[78] The court in *Steinberg* found that a consideration whether the proclamation of a road in terms of the Roads Ordinance, 1976, constituted constructive expropriation did not arise

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[33] *Kaiser Aetna v United States* [1979] USSC 179; 444 US 164, 174-5 (1979); *Hodel v Irving* [1987] USSC 79; 481 US 704, 713-4 (1987); and *Lucas v South Carolina Costal Council* 505 US 1003, 1015 (1992). The notion of constructive expropriation as a concept in US law appears to have derived from the remark of Holmes J in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), that '*while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*'. In his dissenting Opinion in *Lucas* supra, Justice Stevens cited a number of US Supreme Court decisions in which it had been held that in some circumstances a law that renders property valueless nonetheless does not constitute a taking.

because, as the court pointed out with reference to s 17(1) of the Roads Ordinance, the claimant could, notwithstanding the proclamation, use her land as she wanted to if she sought and obtained permission from the road authority.[34] Section 17(1) was, of course, equally available to the plaintiff in the circumstances of the current case. Moreover, in my opinion, there was also nothing to prevent the plaintiff, if it felt that its position was being irrationally or arbitrarily prejudiced by the longstanding and possibly interminable sterilising effect of the road declaration to apply to the Premier for the deproclamation of the R300 route over the R300 erven.[35] The Premier is empowered by s 3(2) of the Roads Ordinance to withdraw the proclamation of a road. The provision does not expressly provide for an affected landowner to apply to the Premier to exercise the power invested in him by that provision, but that any interested party may seek to prevail on the Premier to do so is implicit. The interest of landowners affected by the route of any such road in the withdrawal of a road proclamation is acknowledged in s 3(3), and I see no reason therefore why such a landowner could not seek to prevail on the Premier to withdraw the proclamation if the landowner were able to show that there were good reason to do so.

[79] It is the fact that such remedies are available, not the positive or negative result of a resort to them, that determines whether the regulatory interference with ownership amounts to an effective taking. This is so because the question is whether the regulation in issue – in this case the Proclamation and the legislation that enabled its making and determines its regulatory consequences – constitutes an effective taking, not whether an ameliorating provision in terms of the regulatory legislation is successfully or unsuccessfully availed of by the affected owner. That much is borne out, in my view, by the majority judgment in *Reflect-All* supra.

[80] The proceedings in *Reflect All* were concerned, insofar as relevant for the purposes of the current matter, with a challenge to the constitutionality of sub-secs 10(1) and (3) of the Gauteng Transport Infrastructure Act. The challenge was advanced on the grounds that the impugned provisions resulted in the arbitrary deprivation of property, and were consequently incompatible with s 25(1) of the property clause in the Bill of Rights. A secondary question

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[34] *Steinberg* in para 10.

[35] '*Deproclamation*' is a word that does not yet appear to have obtained recognition in the Oxford English dictionaries, but it is listed in the *Dictionary of South African English on Historical Principles*, an online publication developed by the Dictionary Unit for South African English, an affiliate institute of Rhodes University. The use of its derivative '*deproclaim*' in our jurisprudence goes back at least the better part of a century; cf. *Pienaar v Treasure Trove Diamonds Ltd* 1931 AD 354 at 365.

was whether the provisions effectively conduced to the expropriation of land without compensation, in conflict with s 25(2) of the Constitution. The litigation in *Reflect-All* did not concern a claim for compensation for constructive expropriation. It was therefore not necessary for the Constitutional Court to determine whether constructive expropriation is a cognisable concept under the Constitution. However, the idea that it might be was regarded with scepticism in the majority judgment in the obiter remarks at para 65.[36]

[81] The majority judgment in *Reflect-All* did, however, contain some statements of general principle that are germane to the issue of whether the deprivation in issue in the current case could be considered tantamount to expropriation, a question that goes to the heart of the concept of 'constructive expropriation'. Thus in paragraph 32, Nkabinde J wrote '*The protection of the right to property is a fundamental human right, ... (h)owever, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of landownership, the state may regulate the use of private property in order to protect public welfare, e.g. planning and zoning regulation but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all state interference but to safeguard it from illegitimate and unfair state interference*'.[37] Similar observations about the import of the property clause have been made in other judgments of the Constitutional Court; see e.g., *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR (CC) at para 48-52; and *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9 (6 October 2004); 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC), at para 81-82. In *First National Bank* supra, at para 52, it was remarked '*That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts*'.

[82] In the current matter it is not contended by the plaintiff that the applicable regulatory legislation was arbitrary. The contention is that its effect crossed the boundary between

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[36] Nkabinde J remarked '*Cloete AJA* [in *Steinberg*] *considered the possibility that there may be room to develop a narrow doctrine of constructive expropriation for the South African context, especially in cases where a public body utilises its power to regulate private property so excessively that it may be characterised as expropriation; in other words, when the regulation in a particular case goes too far. I am not sure whether this would be appropriate in our constitutional order. This in any event is not such a case. If regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its obligations in regulating the use of private property for public good*.'

[37] Footnotes omitted.

'deprivation' and 'expropriation' within the scope of s 25. In that regard, the majority in *Reflect-All* held '*courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state*'.[38]

[83] In *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 (18 April 2013); 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC), in para 59, the Constitutional Court referred to that remark and added '*There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state*'. The effect of the latter observation was to confirm that an 'effective taking' or 'constructive expropriation' cannot occur unless the state thereby acquires property, which may be corporeal or incorporeal.

[84] The plaintiff's counsel argued that the material distinguishing feature between *Reflect-All* and the current case was that the Gauteng Transport Infrastructure Act contains provisions that permit application to be made for a determined road route to be altered to enable the affected landowner to escape the sterilising consequences of a route determination if that would be fair and feasible in the peculiar circumstances, whereas, so it was contended, there is no such opportunity afforded in terms of the legislation pertaining to the declaration of the R300. The significance of that aspect of the Gauteng legislation did indeed play a material role in saving the impugned provisions from constitutional incompatibility on the grounds of arbitrariness. The point asserted in the majority judgment in *Reflect All* was that the sterilisation of the use of the land by the route determination was only relative, not absolute, because the landowner could apply for a route variation. The extent of the deprivation occasioned by the legislation therefore fell short of that which could be regarded as expropriation. For the reasons mentioned above, I consider that the same considerations apply in respect of the Roads Ordinance.

[85] In my view, the judgment in *Agri SA* (CC) supra, appears to recognise the concept of constructive expropriation for the purposes of s 25 of the Constitution, in that it appears to acknowledge that regard must be had to substance rather than form in deciding whether a particular deprivation amounts to expropriation. *Agri SA* (CC) recognises that there will be cases where there is no bright line between a deprivation amounting to an effective expropriation and one falling short of that.[39] The judgment indicates that is an issue that necessarily will fall to be decided on a case-by-case basis; although the Court did hold that

[38] In para 64.
[39] In para 63-64

difficulty in drawing the distinction is much more likely to arise in the context of a deprivation of incorporeal property than where corporeal property is involved.[40]

[86] The plaintiff's counsel relied on the potential difficulty in being able to draw the distinction between deprivation and expropriation to contend that the defendants' objection to the claim in prayer (c) was not properly susceptible to decision on exception, involving, so they contended, questions more appropriately decided in a trial. I was initially attracted by that argument, but I have concluded on reflection that it too glibly evades the point of the exception, which is that no cognisable claim has been made out in the particulars of claim. If that is the case, then it would be wrong to send the claim to trial on the basis that something (even if one does not know quite what) might emerge there to give it some foundation.

[87] For there to be an expropriation, there has to be an acquisition by the state of something equivalent to the core essence of the expropriatee's property, whether it be corporeal or incorporeal.[41] Where the property is corporeal, that will ordinarily be evinced by a taking of the thing itself; in the current case, the land constituting the R300 erven. Indeed, the plaintiff's case is that it is the land that has been constructively taken. The allegation is that 'the effective taking' of the R300 erven was done by a public authority acting in terms of the Divisional Councils Ordinance of 1952 and/or the Trunk Roads Ordinance of 1960 and/or LUPO.

[88] The allegation of an effective taking having occurred in terms of 1952 Divisional Councils Ordinance or the Trunks Roads Ordinance can only refer to the effect of the 1973 Proclamation. The defendants' contention in their exception to the claim in prayer (c) that a taking in the pre-Constitutional era is not amenable to the protection of property rights afforded in terms of s 25 of the Constitution is well made; cf. *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 13-20, *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at para 6 and Woolman *et al* (eds), *Constitutional Law of South Africa* 2 ed. (Jutastat e-publications) at 31.8, s.v. 'Retrospectivity'.

[89] It is also clear from the provisions of the Ordinances discussed above, that the effect of the Proclamation was in any event a deprivation, not an acquisition by the state of ownership of the affected property. It also did not deprive the owner of all of its rights to use the land. It also did not result in the acquisition by the road authority of any rights in the land

[40] In para 64.
[41] *Agri SA* (CC) supra, in para 58.

that had previously vested in the owner. That Arun subsequently chose to use the land in such a way as to render that part of it that is now constituted by the R300 erven of no practical use to it, was of its doing, not that of the state. It no doubt did so in order to extract the maximum economic potential of the land even with the encumbrance of a declared trunk road running through it. In any event, if the Proclamation was the allegedly expropriating act, it was not the plaintiff but the University of Stellenbosch that would have been the property-owning victim of the expropriation. Once the University's property or any rights it had therein had been 'effectively expropriated', it would not have been in a position to pass on to its successors in title any greater rights in the land than it had been left with after such effective expropriation.

[90] The plaintiff sought in its particulars of claim to qualify itself, as the successor to Arun, as the rightful claimant for compensation by alleging that the effective taking was manifested by the *combined* effect of the Proclamation and the rezoning and subdivision applications. In my judgment it is clear, however, that the decisions made in terms of LUPO did not in any manner affect the status of the R300 erven beyond what had already been done by way of the 1973 Proclamation. At most, the alleged indication by the provincial administration that any subdivision of the farms could not impinge on the declared status of the R300 erven as part of a planned trunk road might in the given context have resulted in an arbitrary deprivation of the land if there were no realistic prospect at the time of it being needed for the declared purpose. There is, however, no allegation in the particulars of claim to that effect; and even if there had been I am not certain that a claim for compensation for so-called 'constructive expropriation' of the land would have been the appropriate remedy. I have difficulty with the notion that Arun could in the circumstances have accepted the town planning conditions imposed under LUPO with reference to the declared status of the R300 erven and then claimed compensation for the consequences of having done so.

[91] If the R300 erven are indeed not marketable or amenable to development, as alleged in the particulars of claim, it is nevertheless evident from the factual context alleged in the pleading that that is so not because of the proclamation of the R300, but because of the manner in which the plaintiff and its predecessors in title have chosen to use the land units of which the R300 land formed a small part at the time the road was declared. If they had left it as farmland, as it was in 1973, there is nothing to suggest that, pending the taking of the R300 land to construct a road, the owners could not use the property for that purpose. Just as the plaintiff seeks to have the value of the R300 erven assessed with reference to the value of the

original ‘development property’ of which it formed part considered as a whole, so too would the question of whether there has been an effective taking of the land fall to be assessed with reference to the extent of the regulatory effect of the proclamation of the road on the land units as they were at the time the Proclamation was made. If it appears on such an assessment, as indeed appears to be the case on the facts alleged in the particulars of claim, that the ability of the owner to use, develop or market the land was impacted by the Proclamation only to a relative degree with regard to the extent of the land as a whole, the notion that the regulation constituted a deprivation going so far as to amount to a constructive expropriation becomes untenable.

[92] To sum up on the third exception, the state has not acquired anything from the landowner by virtue of the Proclamation or the LUPO decisions. Neither of those decisions could therefore be characterised as constituting an acquisition of the land by the state. For the reasons stated above I therefore do not consider that a constructive expropriation has been established on the basis of the pleaded facts. But if I am wrong, and also for the reasons discussed above, the relevant taking could have occurred only by way of the 1973 Proclamation. The subsequent LUPO decisions, which acknowledged the existence of the declared road did not entail a taking or further taking. In the circumstances, the pleaded facts do not bring the case within the ambit of s 25 of the Constitution, which does not apply to expropriations effected before the Constitution came into operation.

[93] The appeal against the decision of the court a quo to uphold the exception to the claim advanced in prayer (c) of the summons will accordingly also be dismissed.

[94] It seems to me that as both the appellant and the cross-appellants were unsuccessful, it would be just that each party bear its own costs in the proceedings before the full court, such costs to include the costs of the applications to the court a quo for leave to appeal and cross-appeal, respectively. It goes almost without saying that the suspension of the order made in terms of paragraph 3 of the order of the court a quo will cease to be of effect from the date of the dismissal of the appeal and cross-appeal by this court.

[95] The following order is made:

1. The appeal against the dismissal by the court a quo of the exceptions to the claims advanced in prayers (b) and (c) of the plaintiff’s particulars of claim, as amended, is dismissed.

2. The cross-appeal against the dismissal by the court a quo of the exception to the claim advanced in prayer (a) of the plaintiff's particulars of claim is dismissed.
3. Each party shall bear its own costs in the appeal and cross-appeal, including the costs of the respective applications to the court a quo for leave to appeal and cross-appeal.

A.G. BINNS-WARD
Judge of the High Court

M.I. SAMELA
Judge of the High Court

T.D. PAPIER
Judge of the High Court

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