IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 8866/21

In the matter between:

BUSINESS VENTURE INVESTMENTS 900 (PTY) LTD	Plaintiff
and	
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	First Defendant
MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	Second Defendant

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FIRST DEFENDANT'S ADJUSTED PLEA IN TERMS OF RULE 28(8)

The First Defendant pleads to the Plaintiff's Particulars of Claim as set out hereunder.

1. **AD PARAGRAPHS 1 – 2**

   The contents hereof are admitted.

2. **AD PARAGRAPHS 3 – 3.1**

   The contents hereof are admitted.

3. **AD SUBPARAGRAPHS 3.2; 3.3; 3.4 and 3.5**

3.1 It is admitted that the First Defendant has expropriated the Plaintiff's property, in terms of the notice of expropriation, published in the Provincial Government Gazette of 6 February 2019. It is correct that the expropriation was carried out in terms of Section 9 (3) of the Housing Act 107 of 1997 ("the Housing Act"), read with Section 25 of the Constitution of the Republic of South Africa, and the Expropriation Act 63 of 1975 ("the Expropriation Act").

3.2 The First Defendant pleads that on a proper construction and interpretation of Section 25 of the Constitution, the State, of which the First Defendant is, in appropriate circumstances, when expropriating for a public purpose or in the public interest, may not offer compensation, or the compensation offered may be Nil compensation.

3.3 What this means in simpler terms is that in appropriate circumstances such as in this matter, the State may expropriate without compensation, because the effect of a Nil compensation is tantamount to no compensation.

3.4 It is denied that the Expropriation Act entitles the Plaintiff, as the owner of the expropriated property, to compensation.

3.5 The Plaintiff understands compensation to mean a monetary compensation or compensation with monetary value and based on a market value of the property on a willing seller- willing buyer basis.

3.6 To the extent that it is so, or it is found that the Expropriation Act obliges the State to pay compensation of monetary value and/or of a market related value of the expropriated property, then it is pleaded that the Expropriation Act is unconstitutional and invalid, as it is in conflict with Section 25 of the Constitution and should be struck down as unconstitutional and invalid as prayed for in the counter - claim foreshadowed hereunder. To this effect, the Minister of Agriculture, Land Reform and Rural Development is cited herein as the Second Defendant for purposes of the constitutional challenge.

4. **AD PARAGRAPH 4.1**

4.1 It is correct that the Plaintiff and the First Defendant did not agree on the amount of compensation, because the First Defendant's contention is that on the facts and circumstances of this expropriation, the nature of the property, the intended use, what the Plaintiff used it for, and what it intended to use it for, the history of the property, when and how it was acquired by the Plaintiff, and the purchase price paid if it was acquired through purchase, the Plaintiff is entitled to a Nil compensation, or that the First Defendant was lawfully permitted to expropriate the property without compensation.

4.2 It is therefore denied that the Plaintiff was entitled to compensation beyond what was offered by the First Defendant.

5. **AD PARAGRAPH 4.2**

5.1 It is so that Section 14 (1) of the Expropriation Act confers jurisdiction on the court to adjudicate the dispute where the parties do not agree on the compensation.

5.2 The First Defendant admits to the jurisdiction of this court. This court is also empowered to determine first, whether or not the Plaintiff is entitled to compensation before it could consider the compensation amount the Plaintiff may be entitled to, if any.

5.3 The First Defendant pleads that Section 25(2)(b) of the Constitution cannot be read in isolation with Section 25(3) of the Constitution.

5.4 If the court finds that there is no compensation to be paid to the Plaintiff, then it is the end of the matter. If the court finds that there is some compensation to be paid to the Plaintiff, then it would explain the basis for such finding and the calculation of the compensation.

5.5 It will also determine whether it should be market related based on willing buyer - willing seller principle or based on some other constitutional rationale.

5.6 In the result, should the court conclude that the compensation entitlement arises from the Expropriation Act, then in that event, as

pleaded, the Expropriation Act is inconsistent with Section 25 of the Constitution, and therefore unconstitutional and invalid.

5.7 The court will be called upon, as pleaded in the counter-claim hereunder, to rule that the Expropriation Act is unconstitutional and should be struck down as such by the court.

5.8 However, the First Defendant pleads that a proper reading of Sections 10(4) and 12 (1) of the Expropriation Act read with Section 25 of the Constitution permit, in appropriate circumstances and in appropriate cases, taking into account the factors set out in Section 25(3) of the Constitution, a Nil compensation.

6. **AD PARAGRAPH 5**

It is denied that the Plaintiff is entitled to compensation of not less than R30 055 000,00. Firstly, this amount is way above the market value of the property, based on a willing seller - willing buyer basis. Secondly, the amount is inflated. Thirdly, the amount is in conflict with Section 25(3) of the Constitution.

7. **AD SUBPARAGRAPHS 5.1 – 5.2**

7.1 The contents of these subparagraphs are denied. It is denied that a willing buyer would have paid a willing seller in the open market on the date of the notice of expropriation, an amount not less than R30 000 000,00.

7.2 Section 12 of the Expropriation Act does not entitle the Plaintiff with the compensation based on the market value of the property and on a willing buyer - willing seller basis. If it does, then, Section 12 of the Expropriation Act is unconstitutional and invalid.

8. **AD PARAGRAPHS 6 – 6A**

8.1 The contents of these paragraphs are denied. The amount of R30 055 000,00 is not just and equitable in terms of Section 25 of the Constitution. It is inflated and unjustified, unfair to the State and the public purse and ignores the purpose of the expropriation in Section 25(2) of the Constitution, which is for the public purpose and in the public interest. Further, it ignores the factors postulated in Section 25(3) of the Constitution.

8.2 A market value of the property is not an entry point or superior factor or overwhelming factor nor a decisive factor to any of the factors listed in Section 25(3) of the Constitution, including other relevant factors or circumstances not specifically mentioned in the said provision given the open-endedness of its subsection.

8.3 What Section 25 of the Constitution requires is the payment of just and equitable compensation and not a market value.

8.4 In considering the purpose of expropriating the property in question, the First Defendant had regard to the following legal issues confronting it:

8.4.1 That there is a clear public interest in housing the landless and the marginalized currently residing in informal settlements within the area of the First Defendant;

8.4.2 That the expropriated property is being expropriated for a public purpose, namely provisions of social housing to residents of informal settlements within the area of the First Defendant;

8.4.3 That any monies required by owners of unused properties kept for speculative purposes, ultimately emanate from the public purse which in the First Defendant's case is already strained by the cost of half a billion rand yearly expenditure on the provision of temporary services in informal settlement. And as such, it would not be just and equitable to compensate owners of unused land held for speculative purposes handsomely, the object of Section 25 of the Constitution is not to reward property speculators;

8.4.4 That a Bill of Rights value judgment is to be made when dealing with the purpose of the expropriation in determining what is a just and equitable compensation;

8.4.5 That the rate payers and the First Defendant's finances must not be frustrated by unjustifiable compensation claims in respect of unused land held for speculative purposes;

8.4.6 That the purpose of expropriation must be viewed in the context of the First Defendant's social and political history which created an acute socio-economic disaster of unequal spatial development planning and the creation of the urban poor residing in informal settlement due to landlessness;

8.4.7 It is the purpose of expropriation which ultimately guards against the question of just and equitable compensation being left to market forces, particularly in respect of compensation for unused land held for speculative purposes; and

8.4.8 That giving effect to the purpose of expropriation being the provision of social housing, regard must be had to the gross inequality in relation to health and access to land resources by the residents of informal settlements and their continuing disastrous conditions.

8.5 The First Defendant pleads that the purpose of expropriation enquiry is not mathematical or formulae based but rather it is value based, considering the purpose to be achieved by the expropriation and substantive issues of social justice and the fulfillment of rights in the Bill of Rights.

8.6 Therefore, the First Defendant pleads that the amount of zero compensation is just and equitable under the circumstances.

9. **AD PARAGRAPH 7.1**

The contents of this paragraph are admitted.

10. **AD PARAGRAPH 7.2.**

10.1 It is pleaded that Section 12 of the Expropriation Act is unconstitutional and invalid. As such, no interest can be levied on the strength of it.

10.2 Accordingly, the contents of this paragraph are denied.

WHEREFORE, the Plaintiff's claim should be dismissed with costs inclusive of costs of two Counsel.

THE FIRST DEFENDANT'S COUNTER CLAIM

1. The Plaintiff in reconvention is the First Defendant in convention.

2. The First Defendant in reconvention is the Plaintiff in convention.

3. The parties are referred to as in convention.

4. The Minister of Agriculture, Land Reform and Rural Development is cited in the counter-claim as the Second Defendant and joined as such in terms of Rule 10A of the Uniform Rules of Court because of the constitutional challenge of the Expropriation Act, a legislation which resides under the administration of the Minister. A Rule 10A notice accompanies this counter-claim and was served accordingly on the State Attorney to this effect.

5. A Rule 16A is also issued calling upon interested parties to participate as *amici* if they so wish.

6. The Minister is served care of the State Attorney, 10th Floor, North State Building, 95 Albertina Sisulu Street, Johannesburg and is joined as the Second Defendant in terms of Rule 10A as the National Executive Authority responsible for the administration of the Expropriation Act.

7. The First Defendant (Municipality) repeats paragraphs 3.1 to 3.6; 4.1 and 4.2; 5.1 to 5.7; 7.1 and 7.2; and 8 of the plea hereinabove and prays that they be read as if herein incorporated. A copy of the offer dated 17 April 2020, from the First Defendant to the Plaintiff is annexed hereto and marked as **Annexure "A"**. The contents of annexure "A" must be read as if herein specifically incorporated.

8. Section 12(1)(a)(i), of the Expropriation Act is inconsistent with Section 25(3) of the Constitution and thus unconstitutional.

9. The provision of Section 12(1)(a)(i) requires the First Defendant to offer the amount which the property would have realized if sold on the date of the notice in the open market by a willing Seller to a willing Buyer.

10. To the contrary, Section 25 of the Constitution postulates a just and equitable compensation, taking into account the factors in Section 25(3) and the purpose of expropriation in Section 25(2) of the Constitution.

11. Section 25 of the Constitution does not oblige the State to pay a market value nor a price based on a willing seller - willing buyer principle in the open market. Properly construed, Section 25 of the Constitution permits Nil compensation in appropriate cases and/or expropriation without compensation in other appropriate circumstances taking into account all factors listed in Section 25 (3) which are not exhaustive.

12. The Expropriation Act is at odds with the Constitution and should be struck down as unconstitutional. It serves no legitimate purpose. Any law that is inconsistent with the Constitution as contemplated by Section 2 of the Constitution is invalid.

13. The obligations imposed by the Constitution must be fulfilled. The Expropriation Act is also in conflict with Sections 1(c); 3(1)(2); 7; 8; 9; 10; 12 and 24 of the Constitution.

14. Further, the Expropriation Act infringes on the rights of the vulnerable groups of society, the poor and the landless, the historically disadvantaged population of the society who, due to past discriminatory laws, are landless, homeless and largely unemployed and who, by and large, are dependent on the State to provide housing for purposes of Section 26 of the Constitution, a healthy environment to the needy and the vulnerable by providing accommodation that enable the State to provide water and sanitation in an environment where they enjoy security of tenure, housing which gives them dignity and services which the State is obliged to provide on an equal and equitable basis irrespective of their status in society, an environment which offers them freedom and security and for their children to play safely and receive education.

15. The State should provide and fulfill these rights within its available means and resources. Expropriation of property on a market related value and on willing seller-willing buyer is beyond the means of the State, thus making the fulfilment of the rights in Section 26 of the Constitution an illusion.

16. Accordingly, the Expropriation Act is unconstitutional and invalid.

17. The offer made by the First Defendant to the Plaintiff is just and equitable in terms of Section 25 of the Constitution.

WHEREFORE, the First Defendant prays for relief in the following terms:

a) It is declared that the Expropriation Act 63 of 1975 is unconstitutional and invalid;

b) Alternatively, it is declared that Section 12 of the Expropriation Act 63 of 1975 is unconstitutional and invalid.

c) Parliament is afforded 24 months to remedy the defect in the impugned legislation;

d) In terms of Section 172(1)(b) of the Constitution, the court fashion a just and equitable remedy including the reading in and or reading down of words in the legislation during the period of 24 months when Parliament is required to remedy the defect aforesaid;

e) It is declared that the First Defendant's offer as contained in the offer dated 17 April 2020, is just and equitable in terms of Section 25 of the Constitution.

f) Costs including costs of two Counsel in respect of opposition of the relief herein.

DATED AT SANDTON ON THIS THE 14th DAY OF JULY 2021.

JOHN MASHIANE
First Defendant's Attorney with the right of appearance in the High Court in terms of Section 4(2) of Act 62 of 1995.

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AND TO:
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Service By Email

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Received a copy hereof on this
the day of July 2021

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For: Second Defendant's Representative