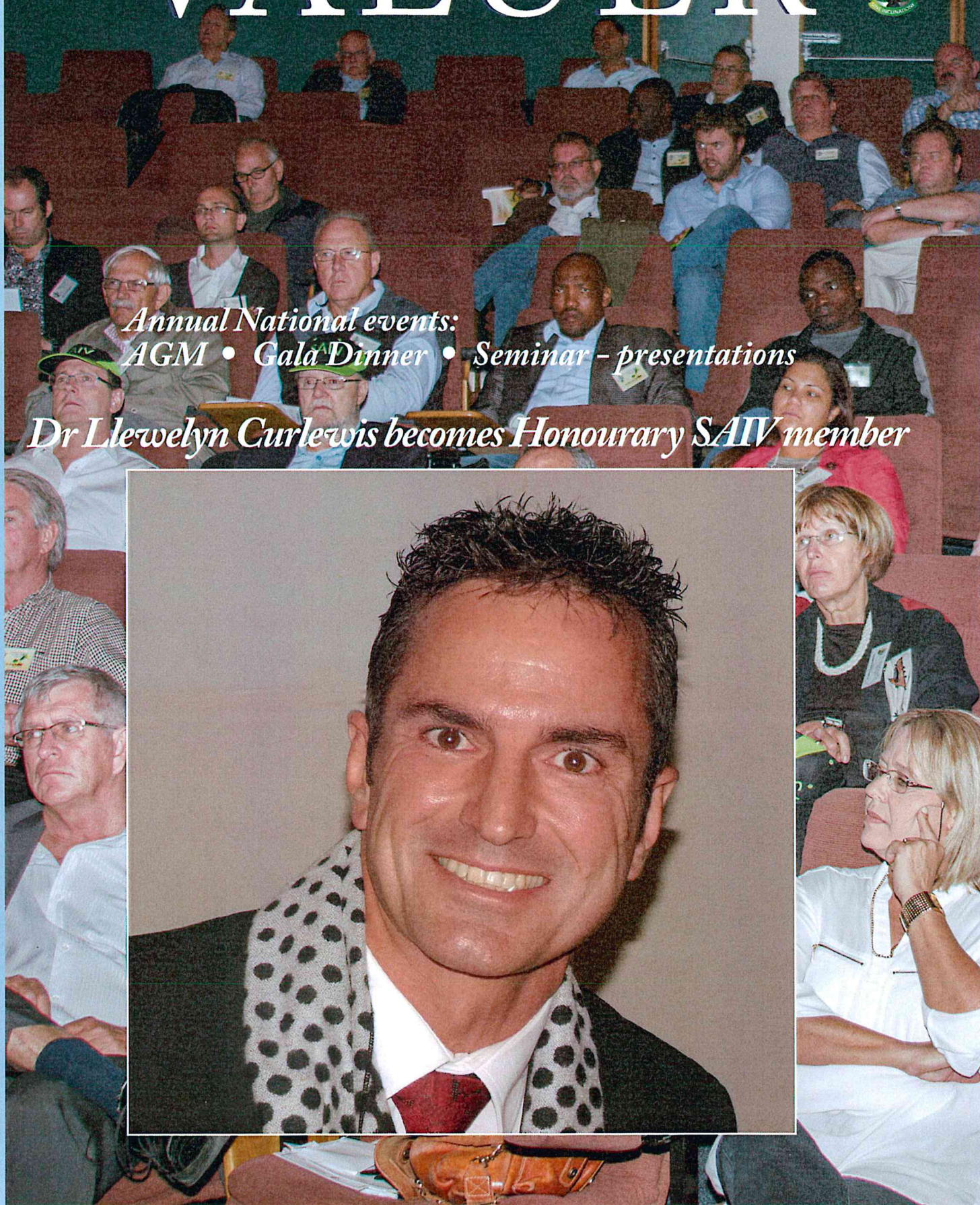


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THE ROLE OF LOCATION TO COMPARABILITY OF SALES – ESTATE LH MILNER & OTHERS VS MUNICIPALITY OF THABAZIMBI

Legal Beagle was recently confronted with the problem of what constitutes a comparable sale, and what to do if there are no comparables in the area. This problem deals mostly with location, ie how wide can we search for sales if there are no good comparables in the immediate area of the subject property?

The Pietermaritzburg Corporation¹ case offers some pointers:

It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuers' difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser...

Our courts have held that the direct sales comparison method or 'comparable sales method' is the most acceptable method of quantifying property values.² In theory this is a simple and easy method to apply. Or is it?

Let's take the case where there are 100 similar stands in a township. If 99 sell for price Rx on a certain date, it is a relatively simple exercise to conclude that the price of the 100th stand should also be Rx. And if two stands are similar in nature and the one sells for Ry, it should also be relatively simple to deduce that the market value of the other stand is Ry. But what if you take these two stands and put them in two different townships?

In theory the method of comparable sales is based on the principle of substitution. This means basically that a buyer will not pay more for the subject property than it would cost him to buy a property of similar productivity. In simple language this notion implies that where two properties are identical in all respects, they would sell at the same price, if sold at the same date. But herein lays a problem: no two properties are ever identical. For this reason comparability is mostly referred to as 'similarity'. The sales comparison approach is the process in which a market value estimate is derived at by analysing the market for similar properties and comparing these.³ It is a simulation model.

In regard to 'similarity' the court in *South African Railways and Harbours v Springs Town Council*⁴ stated:

In answering this question he must take into account not only the property to be valued, but other properties of similar class, character, value, position and other comparative factors. By the statement that no comparative factors are available must be meant that there are no other properties in Springs which abut on railway lines or stand on railway platforms. But this is to interpret the words 'of similar class, character, value, position' as meaning 'of identically the same class, character, value, position'; and to lose sight of the difference between 'same' and 'similar'. A thing is similar to another if, without being identical with it, there is a resemblance in some relevant respect.

In *Davey v Minister of Agriculture*⁵ it was stated that 'comparable' has two meanings, 'able to be compared' and 'worthy of comparison'. Two sales may be to a greater or lesser extent comparable in the first sense, but comparison should be determined in terms of the latter. A sale should therefore be 'worthy of comparison' in order to be 'comparable'.

Guidelines for comparison were laid down in the case of *Sher and Others NNO v Administrator, Transvaal*.⁶

Actual transactions in the market provide direct evidence of market value only if the properties are comparable or if they are such that they can properly be compared by making adjustments for differences between them. Truly comparable sales are those which relate to similar ground in the same area as the expropriated ground and which were concluded at about the date of expropriation. Because of the difficulties which may arise where there are variables, transactions which are said to be comparable must be considered with great care and circumspection.

The factors influencing value are legal, economic and physical in nature. Legal factors relate to aspects such as title deed conditions, zoning and planning. Economic factors relate to externalities and factors that affect income. Physical factors relate to location and property specific factors, eg topography, geology,

access, improvements and others. Gildenhuys⁷ states that comparability is measured against the 'nature of the property, the area it is located in, the general market conditions and the date of sale' (my translation).

'Location, location, location' goes the famous cry of the estate agent. For the estate agent location has to do with value, the better the location, the higher the value. Location is generally accepted as being the primary value determinant in property valuation. For the valuer, location is also measured in relation to the location of the other properties to determine comparability, taking into account all locational characteristics.

For residential valuations, comparable sales in the same neighbourhood are required. Residential stands are mostly standard and most properties in the same neighbourhood would have similar locational characteristics, but adjustments for variations which may exist could be required, for example differences in view, slope, shape, etc.

For other (often larger or non-standard sized) properties, eg farms, land with township potential, etc, the area could be enlarged. Determining value on the basis of comparable sales holds diminished merit if there is a paucity of comparable sales. In that case, or if there are no transactions in the same area, cognisance could be taken of sales in a 'similar' area. This should be done with great circumspection. There are a number of reasons for caution when making adjustments for differences. The weight of evidence offered by a sale requires that a sufficient degree of similarity exists. Making adjustments for dissimilarity affects the reliability of the data. The more and greater the differences between properties, the greater the number of adjustments required, resulting in more subjective elements entering the equation. Dissimilar properties cannot be made similar. It would be like fitting square pegs to round holes.

In *Davey v Minister of Agriculture*⁸ Judge Kumbelin underlined the importance of a realistic and practical approach to comparison:

Theoretically there is virtually no limit to the enquiries and investigations, which can be made and conducted, to determine the defects, attributes, and the potential,

of farm land... But this is not the manner in which a buyer or seller normally sets about deciding upon the price at which to conclude a sale. The practical steps which would be undertaken differ in each case and cannot be precisely enumerated. Much will depend upon the nature of the property concerned, the extent to which its use or potential use related to a specialized activity, and upon the amount that is likely to be paid for its purchase. Obviously a more detailed investigation can be expected in the case of the transaction involving a large sum of money. It is however implicit in the test to be applied that the facts a Court should taken (sic) into account are those which would be known to a buyer, who has taken such practical steps as are reasonably necessary to become properly acquainted with the property he has in mind purchasing.

Moreover, in order to decide which predominates – the similarities or differences – and thus to decide whether they are truly comparable, the enquiry often entails a full investigation of the other farm property or properties sold and all the circumstances relating to such sale or sales. To do this is often an impossible task and would always add to the prolixity of expropriation cases.

At this point it is interesting to bring in the case of *Estate L H Milner & Others vs Municipality of Thabazimbi* (TPD 1982) which was reported on in *The SA Valuer* of February 1985. This is an unreported case but is considered an important one as it sheds practical light on the question of location of comparables. The facts of this matter are that the Thabazimbi Municipality expropriated a piece of farm land approximately 124 hectares in extent for the purpose of township development. The claimants relied on the township potential of the land in claiming compensation. The defendant wanted to lead evidence based on sales and project information in Witbank and Rustenburg to the effect that the local authority, or an institution like Yskor, would be the only possible purchaser of the land for township development and therefore township potential cannot be claimed by the claimant. The case was already in the ninth week when the claimants objected against the proposed evidence on the basis

that the sales in Witbank and Rustenburg should be considered so remote and incomparable that evidence thereof should be disallowed as being irrelevant.

In opposing the proposed evidence by the defendant of sales in Witbank and Rustenburg the claimant argued that there could be no question of comparability unless a thorough study of all the relevant factors in these towns had been investigated. And according to them such an exercise would have taken so much time that any benefit that would be derived from this by the defendant would be far outweighed by the detriment that would be suffered by the claimant as a result of the waste of cost and time required therefore. According to the claimant these transactions did not comply with the conditions necessary for them to be considered comparables.

The defendant however argued that it did not want to rely on the sales as comparables, ie to determine market value, but to illustrate what the position or attitude of property developers in these towns was in regard to (private) township development. The evidence would be that township developers were selling their land to the municipalities because they considered the development thereof unprofitable. In other words they wanted to show the tendency of general pessimism in the market which caused private developers (in other mining towns) to sell their land to municipalities. (However, it appears as if, initially at least, they were going to rely on these prices as the valuer for the defendant had formed a value opinion based on these sales.)

The claimant argued that the fact that township development in these areas was unattractive did not lead to the conclusion that it would also be unattractive in Thabazimbi. The reasons behind these sales were also in dispute by the parties and according to the claimant reasons for the developer's pessimism in Witbank and Rustenburg should be sought in those towns; it could not just *per se* be applied to Thabazimbi.

Another important point made was that the investigation of collateral issues, or of evidence that is likely to cause prejudice or confusion, or which raises difficult questions of credibility should not be entertained by the court unless a high degree of relevance is shown. The judge stated that even if such evidence may logically be deemed relevant, it could be considered legally irrelevant. The question was that whether, after a thorough investigation of the collateral issues, any logical and reasonable deduction could be made from such evidence. The judge was of opinion that it would not be the case.

The judge was of the opinion that no evidence would be produced to prove that the sales were *prima facie* comparable, and that there were many differences in time and location that could not be accepted. The judge also made the comment that where it is shown that a transaction is not comparable, evidence of such transaction would hold no evidential proof.

He stated that no logical conclusions could be made from superficial reference to these sales, as a thorough investigation would be required, which would need a lot of time and cost, which obviously was not considered justified in this case

In the judgment of Grosskopf R (Leagle Beagle has a copy) on the question of the 'allow-ability' of the evidence that the defendant wanted to introduce, it was held that the evidence be considered irrelevant because of remoteness, not necessarily in locality, but because of the vast and drawn out evidence that would have to be heard in order to prove relevance.

After rejecting the evidence as irrelevant, the judge concluded that nothing prevented the defendant in bringing other allowable evidence with regard to the condition of the property market during this period. He was unfortunately not more specific in this regard.

So what we are being told is that it would be better not to look at sales that are remote and dissimilar as the adjustments necessary for comparison may be so many as to make the analysis totally unreliable; or that considerations of cost, as result of long and involved investigations and evidence, could be prohibitive, because court cases should be shortened. On the other hand, we are told that "depending on circumstances, a single transaction is insufficient as reliable evidence of market value" (my translation).

The question can therefore be posed: Does this judgment imply that comparable sales in other towns will always be irrelevant? Legal Beagle thinks not, but the verdict is still out.

The challenge for the valuer is to find a balance between relevance or similarity and practicality. If one sale is too few, then more sales should be investigated, keeping in mind that cost should be a restrictive consideration. ■



By Demick Griffiths

¹ *Pietermaritzburg Corporation v South African Breweries* 1911 (AD) 501 on 516

² *Minister of Water Affairs v Mostert & others* 1966 (4) SA 690 (A) at 723G

³ Appraisal Institute, 1996. *The Appraisal of Real Estate*, 11th edition, P397.

⁴ 1949 (2) SA 34 (T) on 47 - 48

⁵ 1979 (1) SA 466 (N) on 472C

⁶ 1990 (4) SA 545 (A) on 548 C-E

⁷ Gildenhuys, A. 2001. *Ontheieningsreg*, 2nd edition, P 215.

⁸ 1979 (1) (N) at 466

⁹ *Van Zyl v Stadsraad van Ermelo* 1979 (3) SA 549 (A) on 572G