



Republic of South Africa

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

Case No. 21362/2017

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 13 February 2019

Date of judgment: 15 February 2019

In the matter between:

KOHLER BRICKS (PTY) LTD

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

THE CHAIRPERSON OF THE GENERAL APPEALS

COMMITTEE OF THE CITY OF CAPE TOWN

Second

Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant, which is the owner of certain immovable property in the Viissershok area outside Cape Town, has applied for the review and setting aside of a decision by the City of Cape Town to expropriate part of its land. The review and setting aside of the decision to reject the applicant's appeal against the expropriation in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 was also sought, but the applicant's counsel, Mr *Breitenbach* SC, correctly acknowledged that it would be unnecessary to consider that part of the application if the decision to expropriate were set aside. In that eventuality, the appeal committee's decision would automatically be rendered of no effect.

[2] The principal grounds upon which the expropriation was challenged were that it was procedurally unfair in that the decision was made without the applicant having been afforded prior notice of the intended action and an opportunity to make representations in the manner contemplated by s 3(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and that the decision-maker took the decision to expropriate without having taken relevant considerations into account. It was common ground between the parties that the City's decision to expropriate the land constituted 'administrative action' as defined in PAJA.

[3] An outline of the pertinent factual context is necessary to give an understanding of the applicant's complaint.

[4] The expropriated property is situated in close proximity to a large landfill site that has for some years now been used for the daily disposal of approximately one quarter of the solid waste that is generated by the City's inhabitants. The waste is transported there daily by train from a sorting facility at Athlone. The carriage of the waste occurs pursuant to a contractual arrangement between the City and Transnet. The siding at which the waste is offloaded and part of the railway line approach to it is situated on the applicant's property. The affected part of the applicant's land has been leased by Transnet from the applicant in terms of a succession of lease agreements concluded periodically between them over the years since 1995. The last of those leases lapsed by effluxion of time on 31 December 2016.

[5] The City has invested a considerable sum in the infrastructure that has been put in place at the siding to facilitate the off-loading of the waste containers transported there by rail. The facility has moreover recently been enlarged in order to accommodate the reception of an increased daily load of waste. Railing the waste to the facility is reportedly the most practical and economical method of transport. The alternative of road transport would not only be much more expensive in terms of direct cost, but would also add materially to Cape

Town's notorious traffic congestion and carry an additional indirect cost in the form of extra wear and tear to the roads on affected road routes. The evidence suggests that it is anticipated that the lifetime of the landfill will extend into the 2030's.

[6] Transnet showed itself to be remiss in timeously attending to the periodic renewal of the lease of the property. It also ceased to pay rental in respect of its occupation of the land when the various leases expired. It nevertheless continued, without interruption, to use the property for the purposes of its contract with the City during the intervals when it was effectively in unlawful occupation of the applicant's land. The applicant was driven by this on two occasions to institute proceedings to interdict Transnet from using the land after the latter had failed to renew the lease arrangements. The interdict proceedings, which on each occasion were instituted without notice to the City, were clearly directed (ultimately successfully) at compelling Transnet to conclude a new lease. Associated threats by the applicant to pull up the railway line over its land because no lease was in place were never implemented.

[7] Perhaps unsurprisingly in the context of the periodically problematic contractual relationship between Transnet and the applicant, and also its own experiences with the reportedly haphazard management by Transnet of its leasehold responsibilities, the City gave the applicant notice in April 2016 of its intention to acquire part of the applicant's land for the purposes of the railway line. The notice was titled '*Proposed Expropriation of a Portion of Portion 2 of Cape Farm No. 152*'. It advised that at that '*early stage the extent of the land required [had] not been determined*'. The notice was clearly of a preliminary nature, and did not call upon the applicant to make any representations it might wish to do in respect of the proposed course of action.

[8] During the second half of 2016, and as the date of the expiry of the lease then in place approached, negotiations commenced between Transnet and the applicant concerning the conclusion of a further replacement lease. These negotiations commenced against the background of the anticipated rezoning of the applicant's land from agricultural to 'risk industrial' pursuant to a land use and development application submitted earlier by the applicant to the relevant authorities. The applicant had already obtained the environmental authorisation necessary for the approval of the rezoning, and the planning approval was expected to follow virtually as a matter of course. The anticipated rezoning of the property was considered by the applicant to have the effect of considerably enhancing its value. The apprehension by the applicant that its property had increased in value led it to open the

negotiations for the new lease by demanding a hugely increased (approximately tenfold) rental.

[9] On 19 October 2016, an attorney representing the City contacted Mr Evans, an attorney acting on behalf of the applicant, to advise that in the face of the impending end of the lease of the applicant's property to Transnet the City wished to purchase the property. After taking instructions, Evans responded on 25 October that, whether by a renewal of the lease to Transnet or the sale of the property to the City, the applicant required the issue to be resolved before the current lease expired at the end of the year. Evans advised that if no resolution had been achieved by then, the applicant would '*consider removing the rails on its land and selling the land to a third party purchaser*'. It was indicated that the applicant considered that the approximately 2,5ha property was worth approximately R51 million, excluding VAT, and that the applicant would also be willing in the alternative to selling it at that price to consider letting it to the City for ten years at a commencement rental of R3 million per annum, excluding VAT, escalating annually by eight per cent.

[10] The City did not follow up on the applicant's opening gambit, notwithstanding a prodding email to its attorney from Mr Evans on 3 November 2016 highlighting the approach of the year's end and pointing out that there would '*still be a lot to do*' assuming the City and the applicant were able to reach an agreement. In the meantime discussions about a renewed lease proceeded between the applicant and Transnet. It was apparent that the parties to those negotiations found themselves very far apart. The City was kept apprised by Transnet of the state of its negotiations with the applicant, and was prepared at one stage to subsidise an increased rental offer by the former.

[11] On 9 December 2016, the City's attorney wrote to the applicant's attorney advising that there were various issues concerning the possible purchase or lease of the property that were under consideration by different departments within the City, and that discussions were ongoing internally as the position it should take. The City's attorney's letter went on to enquire, having regard to the fact that the lease to Transnet would be expiring in three weeks, whether the applicant would be prepared to allow the waste removal to continue pending the conclusion of negotiations, '*even if ... for a limited period of say three months*'. By email from its attorney to the City's attorney sent on 13 December 2013, the applicant quite brusquely refused to accede to the City's request and pressed it for a response to the aforementioned proposals made by Mr Evans on its behalf on 25 October.

[12] It appeared to the City's officials that it was most unlikely, in the context of what seemed to them, and to Transnet, to be the applicant's extravagant expectations, that an agreement could be reached concerning the renewal of the lease. Transnet had also informed the City that it was not willing to expropriate the land, but considered that the City would, in its view, be well advised to do so. It was accordingly determined to recommend to the acting executive mayor that a decision should be made in terms of s 3(2) of the City of Cape Town: Immovable Property By-Law, 2014, read with the Expropriation Act 63 of 1975, to expropriate the property. Section 3(2) of the by-law provides: '*Subject to the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975) the City may expropriate immovable property and rights in immovable property or may temporarily take the right to use immovable property*'. The municipal officials' recommendation was incorporated in a written report to the mayor that appears to have been drawn up on or about 14 December 2016. The report was circulated to, and endorsed by, a number of officials in the relevant administrative departments of the City, including the city manager. Judged by the dates of their signatures, it would appear that it reached the city manager on 20 December 2016 and the acting mayor on 22 December.

[13] Against the factual background sketched above, the essence of the motivation was that the City required urgently to secure the continued use of the siding so as to ensure that there was no disruption to an essential component of the municipal waste disposal system when the Transnet lease expired at the end of the month. In this regard the report drew attention to the threat by the applicant to remove the rail line at the end of the month should a new agreement not be in place by then. It stated that ending the use of the offloading facility at the railway siding would result in an accumulation of waste in parts of the City with an attendant risk to public health. In short, the report unambiguously presented a situation of potential emergency that called to be addressed by urgent measures. The acting mayor signified his acceptance of the recommendation, thereby making the decision that the applicant's property should be expropriated, sometime during 22 December 2016. Notices of expropriation as provided for in terms of the Expropriation Act were consequently served on the applicant on 23 January 2017.

[14] In my judgment, the situation of potential emergency posited in the report to the acting mayor was reasonably stated by the responsible officials in the factual context in which they acted as at 14 December 2016. The position was changed, however, by an exchange of correspondence between the parties' attorneys on 19 December 2016. The

exchange was triggered by a letter from the City's attorney that was written in response to applicant's above-mentioned rebuff of 13 December to the City's request for a three month period of indulgence to finalise substituted arrangements for the use of the railway line and siding after the expiry of the lease to Transnet.

[15] On 19 December 2016 the City's attorney wrote to the applicant's attorney pointing out that it was exactly because the City was not party to the subsisting lease that was about to expire that it found itself in an invidious position as to how to deal with the threat to the City's waste disposal system should the use of the Vissershok siding and railway line be terminated. The City's attorney's letter continued *'The City has given due consideration to your client's proposal of 25 October 2016. Our instructions are that the proposal is unacceptable. The parties are too far apart. The City is also not prepared to negotiate price on the assumption that your client's rezoning application to risk industrial will be successful. The City will continue to consider the various options available to it and revert in due course'*. There was no mention that a process towards expropriation of the property had actually been set in train five days earlier. The applicant contends that the non-disclosure is indicative of bad faith on the part of the City or its attorney, but in my view there is insufficient detail in the evidence as to who in the chain knew what at the relevant time to make a finding to that effect.

[16] The applicant's attorney replied to the lastmentioned letter by email later the same day. The reply went as follows in material part:

Our client instructs that it is currently in negotiations with Transnet regarding the land in question. It will permit Transnet to continue operating over its land until 28 February 2017. Should it fail to enter into an agreement with Transnet by the aforementioned date, it will enter into negotiations with [the City].

I trust that this will provide [the City] with the comfort it requires at least for the first two months of next year. I look forward to hearing from you again once the City has, as you have suggested, considered the various options available to it. In the meantime all our client's rights are reserved.

[17] In my judgment, the letter from the applicant's attorneys defused the situation of emergency described in the officials' aforementioned motivational report to the acting executive mayor. It moved the critical date by which the recommended decision to expropriate or any alternative arrangement had to be made from 31 December 2016 to 28 February 2017. This change of circumstances had a material bearing on the appropriate procedural approach to be adopted in respect of any decision to expropriate the applicant's

property. Any decision-maker involved in taking administrative action is required to make the decision concerned with regard not only to its substantive import and effect, but also with conscientious regard to the consideration of the affected parties' constitutional right to procedural fairness. An integral approach is required.

[18] Section 3 of PAJA entrenches the constitutional right of everyone in terms of s 33(1) of the Constitution to administrative action that is procedurally fair. The provision acknowledges that procedural fairness in a given case is always dependent on the circumstances of the matter. Section 3(2), however, provides for what might be regarded as a default position that should be departed from by administrative decision-makers only to the extent that circumstances might make it appropriate to do so. Section 3(2) provides as follows

- (2) (a) A fair administrative procedure depends on the circumstances of each case.
- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and
 - (v) adequate notice of the right to request reasons in terms of section 5.

Subsections 3(4) and (5) provide:

- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
 - (i) the objects of the empowering provision;
 - (ii) the nature and purpose of, and the need to take, the administrative action;
 - (iii) the likely effect of the administrative action;
 - (iv) the urgency of taking the administrative action or the urgency of the matter; and
 - (v) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

[19] In his written argument, counsel for the City, Mr *de Jager*, appeared to contend that in the given circumstances it was sufficient for the City to rely only on the procedures set forth in the Expropriation Act. That seemed to me to be an invocation, albeit without express

reference to the provision, of s 3(5) of PAJA. I am not persuaded that there is any merit in the contention; certainly not on the peculiar facts of the current matter. As pointed out by the City's counsel, the Expropriation Act does not make provision for the making of representations by the expropriatee prior to the service of an effective notice of expropriation. The effect is illustrated by the facts of the current case, in which the first that the applicant came to know of the expropriation was when notices of expropriation were served on it on 23 January 2017. The effect of such service was to transfer ownership in the affected land to the City forthwith because the date of expropriation stated in the notices was also 23 January 2017 (see s 7 of the Expropriation Act). Even if the procedures provided in the Expropriation Act could be used in lieu of those provided in terms of s 3 of PAJA, as to which I make no finding, they would have to be applied in a manner that gave effect to the applicant's right to procedural fairness. In the current matter the applicant alleges that had it been given the opportunity to make representations it would have argued that 'less invasive' means than outright expropriation were reasonably available to address the public purpose need to which the decision in question was directed. The service upon it of notices of expropriation that had immediate effect unfairly deprived it of the opportunity to do so.

[20] It is not clear on the evidence whether the content of the applicant's attorney's email of 19 December 2016 was communicated to the city manager or the acting executive mayor before the decision to expropriate was made on 22 December. It obviously should have been, and there is no explanation offered as to why it was not. If the email had been put before the acting mayor before he made the impugned decision, I would have expected the City's answering papers to have included an affidavit by the acting mayor explaining why he had nevertheless proceeded as if there were a critical deadline of 31 December still to be addressed, and why he had not considered it appropriate that the breathing space afforded should not be used to follow a notice procedure in line with s 3(2) of PAJA. I consider that the most probable inference to be drawn in the circumstances is that the email did not come to decision-maker's attention before he took the administrative action. But whether that was actually the case does not matter. For if the decision were made without regard to the information in the email it would follow that the decision was taken in a manner materially distinguishable from the procedure contemplated in terms of s 3(2) of PAJA because a very relevant consideration was not taken into account (s 6(2)(e)(iii) of PAJA); and if it were taken with knowledge of the email, then it was procedurally unfair because the applicant was unreasonably denied the opportunity to make representations (s 6(2)(c) of PAJA). Allowing

the applicant a reasonable opportunity to make representations could easily have been accommodated in the period between 19 December and 28 February.

[21] It was held by the appeal court in *Erf 16 Brynterion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) at para. 16 that ‘[i]t is for the expropriating authority to decide how best to achieve its object. The evaluation of whether an expropriation is expedient or necessary lies with the expropriating authority. The facts that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a “public purpose”. Apprehending that the dictum might be construed to suggest that there was nothing that the applicant might be able to effectively put up by way of representations and that affording him an opportunity would be pointless in the circumstances, Mr *Breitenbach* stated during argument that it had been subjected to stringent criticism by some commentators. I have not found it necessary to read the criticism and do not think that what the court held in the quoted passage can properly be interpreted as purporting to give a warrant to expropriating authorities to act unreasonably. The import of the dictum in any event does not appear to me to detract from an expropriatee’s right, in ordinary circumstances, when it is practicable that it be permitted to do so, to make representations before its property is taken. The expropriating authority would ordinarily be bound, in terms of constitutional principles, to have regard to such representations in its ‘evaluation of whether an expropriation is expedient or necessary’.

[22] For the reasons given in paragraph [20] above, the review must succeed and the impugned decision must be set aside and the matter remitted to the City for reconsideration. It would not be just and equitable, nor in the public interest, however, for this outcome to expose the City’s waste disposal system to disruption while the necessary reconsideration takes place. The order to be made will therefore be formulated, in terms of s 8 of PAJA, so as to preserve the City’s ability in the interim to continue to use the railway line and siding facilities as it has been doing.

[23] The applicant sought in its papers costs against the City on the scale as between attorney and client. Mr *Breitenbach* did not press for such an order in his oral argument. I am not persuaded that it would be appropriate. While the City was remiss, I do have some sympathy for the position in which it found itself in the context of the applicant’s hardnosed

negotiating tactics. Costs will follow the result in the ordinary course, and in accordance with *Biowatch* principles.¹

[24] The following order will issue:

1. The decision of the City of Cape Town made on 22 December 2016 to expropriate the applicant's property measuring approximately 26 822,48 m² in total extent on portions of Portions 2 and 3 of Farm 152, Frankendale, respectively, is reviewed and set aside.
2. The question of whether the said properties should be expropriated by the City is remitted for consideration by the City afresh, and to that end, the City is directed, should it intend to pursue the possibility of expropriating the properties, to give notice in writing of its intention to the applicant within ten days of the date of this order, and in such notice to notify the applicant that it is afforded not less than 21 calendar days from the delivery of such notice within which to make such representations concerning the proposed action as it may be advised to do.
3. Pending the final determination of any process of expropriation, should the City give notice as provided for in terms of paragraph 2 of this order, the applicant shall, unless otherwise authorised by order of this Court or by agreement with the City, refrain from taking any measures to interrupt or interfere with the current use of the said property by the City and its contractors for the purposes of solid waste removal to the landfill facility site at Vissershok.
4. The City shall pay the applicant's costs of suit.

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

¹ See *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14, 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 especially at para. 23.

APPEARANCES

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