THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 200/2019

In the matter between:

STAUFEN INVESTMENTS (PTY) LTD **APPELLANT**

and

THE MINISTER OF PUBLIC WORKS **FIRST RESPONDENT**
ESKOM HOLDINGS SOC LTD **SECOND RESPONDENT**
REGISTRAR OF DEEDS, CAPE TOWN **THIRD RESPONDENT**

Neutral citation: *Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings SOC Ltd & Registrar of Deeds, Cape Town* [2020] ZASCA 18 (25 March 2020)

Coram: CACHALIA, SWAIN and NICHOLLS JJA and LEDWABA and KOEN AJJA

Heard: 28 February 2020

Delivered: 25 March 2020

Summary: Immovable property – expropriation of servitudes – administrative law – private property owned by appellant unlawfully occupied by second respondent - first respondent lawfully approving expropriation of servitude rights – second respondent's occupation no longer unlawful – Promotion of Administrative Justice Act 3 of 2000 – appellant's review of first respondent's expropriation decision dismissed – decision procedurally fair and unbiased.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Revelas J sitting as a court of first instance):

(a) Save insofar as the order of the high court is varied, as set out in paragraph (b) below, the appeal is dismissed.

(b) Paragraph 1 of the order of the high court is amended, paragraph 2 thereof is set aside, and paragraphs 3 and 4 are renumbered, resulting in the order of the high court, as amended, reading as follows:

'1 The application to review the first respondent's decision of 30 September 2016 expropriating certain rights over the farm Nooitgedacht, is dismissed.

2 The applicant is directed to pay 80% of the costs of the application including the costs of two counsel;

3 The applicant is directed to pay the reserved costs of 19 September 2017, including the costs of two counsel.'

(c) The appellant is directed to pay the first and second respondents' costs of the appeal, including the costs of two counsel where employed.

JUDGMENT

Koen AJA: (Cachalia, Swain and Nicholls JJA and Ledwaba AJA concurring):

[1] The issue in this appeal is whether the first respondent's decision of 30 September 2016 (the decision), to expropriate certain servitudes over the appellant's farm 'Nooitgedacht' in favour of Eskom Holdings Soc Ltd (Eskom), is lawful. The parts of the decision, material to this appeal, provide as follows:

'Further to my letter dated 09 December 2015 and the Minister of Energy's recommendations contained in her letter dated 04 February 2016, I wish to confirm that as requested by Eskom Holdings's SOC Limited I have approved that the following servitudes (the total extent of which appear more fully in SG Diagram No 1232/2014 dated 21 January 2015) across land

being part of the Farm Nooitgedacht 664, Uitenhage Registration Division, Eastern Cape Province, held under Title Deed T 27811/2014 and owned by Staufen Investments (Pty) Ltd -

(1) An electrical sub-station, in extent 1,0000 Hectare;

(2) The right to convey electricity over the property by means of 132 kV and 22 KV overhead power lines; and

(3) A right of way (access road) 6 meters wide.

. . .

Once just and equitable compensation[1] for the property rights has been determined, a notice of expropriation will be served on the property owner and all affected parties.'

[2] The appellant unsuccessfully sought to review the decision in the Eastern Cape High Court, Port Elizabeth (the high court). The high court granted the following order:

'1. The application to review the first respondent's decision to expropriate the substation area on the farm Nooitgedacht, one hectare in extent, is dismissed.

2. The first respondent's expropriation decision aforesaid is amended by the addition of the following to its decision as conveyed to the second respondent (Eskom):

"(4)The right to convey electricity over the property by means of 132 kv and 22 kv overhead power lines is limited to the existing power lines and no power lines may be erected in addition thereto, if such power lines will traverse the applicant's property beyond the parameters of the electrical substation area, 10 0000 square meters in extent.

(5)The electrical substation area may not be expanded upon beyond the parameters of the existing 10 000 square meter area."

3. The applicant is to pay 80% of the costs of the application, including the costs of two counsel;

4. The applicant is to pay the reserved costs of 19 September 2017, including the costs of two counsel.'

[3] The high court granted the appellant leave to appeal against its order. The appellant maintains that the high court erred as:

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[1] The final determination of the compensation payable pursuant to a lawful expropriation, is not a condition precedent to a decision to expropriate being otherwise final – *Hafferjee and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) para 33.

(a) the expropriation decision was taken for an improper and unlawful purpose, and in bad faith;
(b) the description of what was to be expropriated was unclear;
(c) the expropriation decision contravened s 6 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA);
(d) the expropriation decision was procedurally unfair;
(e) the facts material to the circumstances in which the expropriation decision was given, gave rise to a reasonable apprehension of bias;
(f) the amendment of the expropriation decision by the court a quo was irregular.[2]

Background

[4] The land known as portion 4 of the Farm 119 Nelson Mandela Bay Municipality, Division of Uitenhage, Eastern Cape Province (portion 4), was previously owned by Mr Archibald Fenton Hitge and registered in his name in terms of Deed of Transfer T77935/91. On 23 November 1992 a portion thereof, in extent 42,0879 hectares, was excised from portion 4, renamed as 'portion 5 (a portion of portion 4) of the Farm no 119' (portion 5), and transferred into the name of the Republic of South Africa[3] in terms of Deed of Transfer 74981/92, leaving Mr Hitge with the ownership of 'the remainder of portion 4'.

[5] On 11 September 1997 Mr Hitge concluded a notarial deed of servitude with Eskom. This deed granted to Eskom and its successors in title and assigns, the perpetual right to a right of way (6 meters wide) over the remainder of portion 4; the perpetual right to a part of portion 4 not exceeding 1240 square meters for the purpose of erecting an electrical substation; and an exclusive perpetual right to lead electricity over portion 4. The notarial deed was subsequently registered

[2] The founding affidavit raised a plethora of grounds of review. The grounds stated in paragraph 3 above were, in the main, the arguments persisted with before this court.
[3] It was suggested that portion 5 was expropriated.

in the Deeds registry on 4 September 1998 designated as K884/98S. An endorsement was appended simultaneously, in accordance with standard Deed's registry practice, against title deed T77935/91, being the holding title in respect of the remainder of portion 4. The endorsement identified the notarial deed of servitude by its number, namely 'K884/98S', and recorded that it created a right of way six meters wide in favour of Eskom. It however made no mention of the right to erect an electrical substation, or the right to lead electricity over the land.

[6] Towards the end of September 1997[4] Eskom, as it was entitled to do in accordance with the terms of the notarial deed, commenced the construction of an electrical substation on the remainder of portion 4. During 1999 the remainder of portion 4 was subdivided further by excising an area measuring 44,8915 hectares in extent, which was renamed 'portion 7 (a portion of portion 4) of the Farm 119' (portion 7), as identified on SG diagram 5558/1998.[5] Portion 7 is the subdivision, previously part of the remainder of portion 4, on which the substation had been erected, over which the right of way (6 meters wide) was exercised, and which was traversed by the incoming and outgoing overhead power lines. None of these servitudes was depicted on the sub-divisional SG diagram 5558/1998.

[7] On 23 July 1999, portion 7 was consolidated with portion 4 of the Farm Nooitgedagt No 118 adjoining it, to form the Farm 664, in extent 249,3714 hectares, as reflected on the consolidation SG diagram 5561/1998. This is the property referred to in the first respondent's decision as Nooitgedacht.[6] The Certificate of Consolidated Title,[7] which gave effect to that consolidation

[4] The appellant accepted that construction of the infrastructure commenced at the earliest from then.
[5] The remainder of the original portion 4 was consolidated with other land adjoining it to form the Farm 663 in extent 195,714 hectares, which is apparently known as Hitgeheim. It does not feature in the appeal.
[6] Described as the Farm 664, Nelson Mandela Metropolitan Municipality, Division Uitenhage, Eastern Cape Province as depicted on SG diagram 5561/1998.
[7] Certificate of Consolidated Title T 58088/99 dated 23 July 1999.

reflected as a condition of title, as far as the component thereof previously known as portion 7 was concerned, provided that:

'By Notarial Deed of Servitude No. K884/98S the withinmentioned property, 44,88915 hectares in extent, is subject to a servitude right of way 6 (six) meters wide, in favour of ESKOM, as will more fully appear from the said Notarial Deed.'

As with the endorsement appended by the Deeds Office previously to the parent deed, that was the only servitude carried forward as a title condition. The other two servitudes created in the notarial deed were again not recorded in the title conditions. They were also not depicted on the SG diagram 5561/1998 depicting the consolidation.[8]

[8] Portion 5, the first subdivision excised from portion 4, adjoins Nooitgedacht in the east. It was described by the appellant as being 'a stone's throw away' from the electrical substation on Nooitgedacht. Approximately 50% of portion 5 is used by the Department of Water and Sanitation and the Nelson Mandela Bay Municipality for the Nooitgedacht Water Treatment Plant. The remaining 50% comprises undeveloped bushveld.

[9] Nooitgedacht was subsequently sold at a sale in execution on 20 May 2005 to Mr Waldemar Burger Grundling. On 22 June 2005 he sold it to Mr Jan Jakobus Lewies Lingenfelder, who in turn sold it to Amber Bay Investments 34 (Pty) Ltd[9] (Amber Bay) on 23 June 2007. Amber Bay sold it to the appellant on 20 January 2014, transfer of ownership being effected in the appellant's name on 3 June 2014. In each title deed giving effect to these successive transfers, only the right of way servitude created in the notarial deed, described as set out in 7 above, was

[8] The Certificate of Consolidated Title also included a title condition recording that by Deed of Cession of Servitude K723/1999S the same component of Nooitgedacht was subject to a perpetual servitude to lead an overhead power supply (power line servitude) 10 meters wide, the middle line of which servitude is depicted by the line NPQ on SG diagram no 5561/1998 annexed thereto. That condition did not however state in whose favour it operated.

[9] Subsequently converted to Amber Bay Investments 34 CC.

carried forward as a title condition. Neither of the other two servitudes in the notarial deed in favour of Eskom was recorded in any of the conditions of title.

[10] Mr Wallace Barnes, the deponent to the founding affidavit in the review, is a director of both Amber Bay and the appellant. By the time the appellant purchased Nooitgedacht in 2014, the substation had existed on that farm, specifically the component thereof previously known as portion 7, for some 17 years. The substation had however expanded beyond the area originally provided for in the notarial deed, and came to occupy approximately 10 000 m² (1 ha) of Nooitgedacht. There was a 132 kV overhead power line providing electricity to it running from the south east, there were various 22 kV high-voltage overhead power lines exiting the substation and leading electricity away from it to end consumers down the line, and there was a right of way six meters wide, providing access for employees of Eskom to the substation. A comparison of the configuration of Nooitgedacht on the aerial photographs annexed by the appellant to the founding affidavit showing the substation, the overhead power lines and the right of way, with Surveyor General's diagram SG 5561/1998 relating to the consolidation, and SG diagram SG 1232/2014 with reference to which the decision to expropriate the servitudes was granted, confirms that the substation, the overhead lines and the right of way are all on, and lead over, the component portion previously known as portion 7 (of 4).

[11] After Amber Bay had purchased Nooitgedacht, Mr Barnes raised the issue of Eskom's entitlement to occupy and conduct the substation on Nooitgedacht. It was then discovered that Eskom's entitlement to the substation was tenuous, if not non-existent. Whatever rights it had enjoyed in respect of the substation and power lines in terms of the notarial deed were personal in nature, arising from its relationship with Mr Hitge, which some subsequent owners may have acquiesced in, but not Amber Bay and the appellant. As the rights to erect the substation and

to lead the overhead power lines over Nooitgedacht had never been registered against the title deeds, they did not constitute enforceable real rights. That these rights never became enforceable was due to the title deed of Mr Hitge not having been properly endorsed initially, and the subsequent deeds of transfer having perpetuated that omission.

[12] That the area occupied by the substation had grown,[10] together with the presence of the overhead high voltage lines and the right of way used by Eskom, was known to Amber Bay and Mr Barnes, from at least the time that ownership of Nooitgedacht was transferred to Amber Bay on 11 October 2007. The parties accepted as common cause, that the substation and the overhead power cables across Nooitgedacht were erected unlawfully.[11]

[13] The appellant alleged that the continued unlawful operation of the substation on Nooitgedacht impacted negatively on its farming activities, inter alia as the substation was situated in the middle of the part of the farm that could be farmed intensively by cultivating crops.[12] It further complained that the location of the substation had resulted in increased vehicular and pedestrian traffic with an attendant increased security risk. In addition, the land below the power lines had become sterilised by their presence, limiting pecan nut cultivation. The installation had also become aesthetically unattractive as building rubble was dumped in the area, and the perimeter fence was not maintained properly.[13]

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[10] The substation is close to ten times larger than the 1 240 square meter substation contemplated in the Notarial Deed. The Appellant alleged that Eskom continued with the further development of the substation even after it had obtained transfer of the property into its name.

[11] The appellant maintained that Eskom also had accepted that its right of way six meters wide across was unlawful and required to be regularised. IF correct, that stance was legally incorrect.

[12] This comprised approximately 14% of Nooitgedacht, the remaining 86% comprising natural valley and bushveld suitable for game farming. If that assessment is correct, then the respondents point out that the substation would occupy one ha of the 14% (34ha), which would be only 2,9% of the high quality prime agricultural land.

[13] On the respondents' version, which prevails, the latter allegations are denied.

[14] On 13 August 2014 the appellant demanded that Eskom cease its unlawful occupation. It proposed that to normalise the situation Eskom should compensate it for the area occupied, that the area and overhead power lines be properly identified in a servitude diagram, that an access route with a gate be maintained, and that proper servitudes be registered. An alternative solution suggested was for Eskom to relocate the substation and entire infrastructure to portion 5.[14] Eskom demurred maintaining that it would take six years to relocate the substation, that it would cost in excess of R120 million[15] to do so, and that such relocation would result in an interruption of electricity supply to various consumers.

[15] When the negotiations reached an impasse, the appellant demanded that Eskom vacate Nooitgedacht within a reasonable period. This demand was not complied with. The appellant then launched an application to evict Eskom from Nooitgedacht, which was opposed.

[16] After the eviction application was launched, Eskom launched its application for expropriation dated 2 December 2014 (the application). The rights to be expropriated were described in the application as:

'A servitude for a substation over 8,812 ha of land, and to convey electricity by means of 132 kV and 22 kV lines across land, and a right of way 6 m wide across land being part of . . . the Farm Nooitgedacht . . .'

The application further specified that Eskom required:

'. . . the registration of an extended servitude area for the Nooitgedacht substation and the regularising of the existing servitudinal rights in respect of a portion of the sub-station; a servitude to convey electricity for an existing 132 kV line; a servitude to convey electricity for

[14] Although Eskom is an organ of state, being state owned, its personality is distinct from that of the state and it would be required to purchase land owned by the state from the state.
[15] In 2014 monetary terms. This estimate was essentially not disputed in reply.

the existing 22 kV network on the Property and to regularise the rights in respect of a right of way 6 metres wide. A draft diagram, which will be submitted to the Surveyor General for approval, is attached hereto and marked Annexure 1.'

The draft diagram, annexure 1, referred to 8 'electric power line servitudes', seven being 18 meters wide and one to the south east of the substation being 31 meters wide.

[17] The appellant delivered comprehensive written objections to Eskom's expropriation application on 9 March 2015. No comments were received from the Regional Land Claims Commissioner or the Director-General Land Affairs. Eskom thereafter prepared its reply to the appellant's objections. It did not provide the appellant with a copy thereof. The expropriation application and all the subsequent responses were thereafter lodged with the first respondent on 24 April 2015.

[18] The eviction application concluded with an order being granted by consent on 30 April 2015. Paragraph 1 of the order provided that Eskom would terminate its occupation of the substation area of approximately 1 hectare on Nooitgedacht, vacate the property and rehabilitate the area.[16] The order also provided:

'2. That the implementation of the Order in 1 above is suspended pending the finalisation of the procedures referred to below. Should the First Respondent's application for expropriation (and any legal proceedings arising therefrom) fail then the Order in 1 above will become operative immediately. Should the First Respondent's application for expropriation (and any legal proceedings arising therefrom) be successful, then this Order will fall away.

3. That the First Respondent is required to pursue its application for expropriation[17] and secure a decision in respect thereof within a period of six months from the date of the Order in 1 above, save that the First Respondent will on reasonable cause shown, be entitled to approach this Honourable Court for an extension of that period.

[16] These orders were all contained in paragraph 1 of the consent order.
[17] That is the application then already in existence.

4. That upon a decision in respect of the First Respondent's application for expropriation being given, either party will be entitled to pursue any further legal proceedings which may arise therefrom. Both parties undertake in pursuing such legal proceedings to act promptly and not in any way to delay the institution of such proceedings.'

[19] The six month period provided for in the consent order was subsequently extended on two occasions. Eskom also had to launch an application to compel the first respondent to take a decision in respect of its application for expropriation. During the evaluation of Eskom's application, correspondence was exchanged between the department of the first respondent and that of the Ministry of Energy, which the appellant complained it was not privy to. However, some of the correspondence was annexed to the answering papers in the eviction application, which the appellant complained contained inaccurate statements. But these statements were not material. The appellant also complained that the first respondent had waited unduly for the Minister of Minerals and Energy to respond, that the first respondent then considered the response from the Ministry of Energy without having given the appellant an opportunity to respond thereto, and that documents were submitted under threat of a court action.

[20] The processing of the application initially followed an abridged business process, which the department of the first respondent used as a guideline in processing these kinds of applications. This abridged process was however later abandoned by the first respondent.

[21] An internal memorandum was also prepared in the department of the first respondent by one of the employees, Mr Mahalingum Govender, which contained a recommendation to the first respondent as to what the outcome of Eskom's application should be. The appellant complained that Mr Govender had been under the mistaken impression that the expropriation had already been approved

and merely required implementation, which the appellant suggested made Mr Govender biased and which would have improperly influenced his recommendations and the views of other officials in the department on whose advice the first respondent might have acted.

[22] On 30 September 2016 the first respondent communicated his decision approving the expropriation with reference to SG Diagram No 1232/2014, to Eskom.

Legislative framework

[23] All expropriations occur against the background of s 25 of the Constitution. The provisions relevant to this appeal read as follows:

'(1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of a law of general application-

(a) for a public purpose or the public interest; and

(b) subject to compensation . . .

(3) . . .

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.'

(emphasis added)

[24] Section 2(1) of the Expropriation Act[18] (the Expropriation Act) provides that '(s)ubject to the provisions of this Act the [first respondent] may, . . expropriate any property for public purposes . . .', defined[19] as 'as including . . .

[18] Expropriation Act 63 of 1975.
[19] Section 1 of the Expropriation Act.

any purposes connected with the administration of the provisions of any law by an organ of State.'

S 3 empowers the first respondent to expropriate immovable property on behalf of certain juristic persons in the following terms:

'(1) If a juristic person… satisfies the Minister[20] charged with the administration of the law mentioned in connection therewith that it reasonably requires any particular immovable property for the attainment of its objects and that it is unable to acquire it on reasonable terms, the Minister[21] may, at the request of the first-mentioned Minister, . . . expropriate such immovable property on behalf of that juristic person or body as if it were required for public purposes.

(2) The juristic persons . . .contemplated in subsection (1) are . . .

(h) any juristic person . . . established by or under any law for the promotion of any matter of public importance.

(3) If the Minister expropriates any immovable property on behalf of a juristic person or body in terms of subsection (1), such juristic person or body shall become the owner thereof on the date of expropriation in question.'

(emphasis added)

[25] Section 26(1) of the Electricity Regulation Act[22] (the Electricity Act) under the heading 'Expropriation' provides that:

'(1) The State may, in order to facilitate the achievement of the objectives of this Act, expropriate land, or any right in, over or in respect of land, on behalf of a licensee[23] in accordance with section 25 of the Constitution and section 2 of the Expropriation Act, 1975 (Act No 63 of 1975).

(2) The Minister must describe the procedure to be followed in giving effect to subsection (1).

(3) The State may exercise the powers contemplated in subsection (1) only if –

[20] That will be the Minister of Energy Affairs, who is responsible for the administration of the Electricity Regulation Act 4 of 2006.
[21] The first respondent.
[22] Act 4 of 2006.
[23] Eskom is a licensee as defined in section 1 of the Electricity Act.

(a) a licensee is unable to acquire land or a right in, over or in respect of such land by agreement with the owner; and

(b) the land or any right in, over or in respect of such land is reasonably required by a licensee for facilities which will enhance the electricity infrastructure in the national interest.' (emphasis added)

Section 2 describes the objects of the Electricity Act to:

'(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

(e) promote the use of diverse energy sources and energy efficiency;

(f) promote competitiveness and customer and end user choice; and

(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.'

[26] Regulation 2 of the Electricity Regulations for Expropriation[24] prescribes the procedure to be followed by a licensee who requires the state to expropriate land on its behalf. The procedure requires the licensee to apply in writing to the first respondent to expropriate the land or any right in, over or in respect of the land. Regulation 2(2) provides that:

'The application contemplated in sub regulation (1) must contain the following:

(a) a full description of the land or right in, over or in respect of land to be expropriated on behalf of the licensee;

(b) the reasons and motivation why the licensee reasonably requires the said land or right in, over or in respect of land with a full description of the facilities for or in connection with which the said land or right in, over or in respect of land is so required by the licensee;

[24] Electricity Regulations for Expropriation, GN R147, GG30754, 8 February 2008.

(c) full reasons why the said facilities will enhance the electricity infrastructure in the national interest;

(d) …

(e) …

(f) …

(g) …

(h) the practical alternatives which are open to the licensee if such land or the right in, over or in respect of land is not expropriated …'

As there was no complaint that the application submitted to the first respondent did not comply with the remaining sub-regulations of regulation 2, the provisions of this sub-regulation are not considered in this judgment.

[27] The appellant argued that the first respondent did not apply his mind properly to the matter as he had indicated in his reasons that he acted in terms of s 26 of the Electricity Act, but in his answering affidavit had relied on s 3 of the Expropriation Act instead. This argument is without substance. The various legislative provisions are inter-related. The Electricity Act requires a request to initiate the process. The first respondent clearly had to act within the parameters of the entire legislative regime, that is, all the statutory provisions which applied. He understood his powers. The important issue was that his decision had to have a legal foundation, which it did.

What was reviewed by the high court?

[28] The decision of 30 September 2016 sought to be reviewed entailed the expropriation of the electric substation area, the right to convey electricity over the property, and a right of way. The relief claimed in the notice of motion in the review was for the first respondent's decision dated 30 September 2016 to be reviewed and set aside.' The high court order, in express terms, however dismissed the review in respect of the 'substation area' only. The appeal was nevertheless correctly approached by the parties on the basis that what was

dismissed, was the review contemplated in the notice of motion, that is, the expropriation of servitudes not only for the substation area, but also for the overhead power lines and the right of way. That clearly was what the high court intended in dismissing the application.[25] Paragraph 1 of the high court order should therefore be amended to make this clear.

[29] The grant of rights, allegedly ancillary to the servitudes which had been expropriated in the decision of 30 September 2016, alluded to by the first respondent in his reasons for his decision[26] when those were requested, were not the subject of the review, and accordingly did not arise for consideration before the high court or before this court. These 'rights' were not referred to in the first respondent's decision, and their status remains uncertain. Consequently, the appellant's argument on appeal, that these rights went beyond what was required to regularise Eskom's encroachment on Nooitgedacht and hence violated its right to procedural and substantive fairness, need not be considered.

Was the expropriation decision taken for an improper or unlawful purpose?

[30] This was the primary attack on the first respondent's decision, both in the review before the high court and in this court.[27] Applications for expropriation usually precede the occupation of the property sought to be expropriated. The first respondent's decision to expropriate was however in respect of a portion of property already used unlawfully by Eskom. The expropriation therefore had as its purpose to regularise Eskom's unlawful use of part of Nooitgedacht, instead

[25] If the intention was different then there was no need for paragraph 2 of the order.

[26] These additional 'rights' were contained in paragraph 3 of the first respondent's reasons dated 4 February 2017 and included all kinds of ancillary rights, some of which may in any event be implied by law as incidental to the three categories of servitudes granted in the decision of 30 September 2016, but others possibly going wider.

[27] The appellant advanced, what it termed 'the Second respondent's modus operandi' argument, that Eskom seemed to resort to a practice of occupying land without ensuring that it has security of tenure, and when the unlawfulness of its occupation is challenged then it falls back on expropriation to secure its position. The difficulty with that argument was that Eskom had not been proved to have acted other than bona fide in relation to its occupation of Nooitgedacht. It falls beyond the scope of this judgment to evaluate other possible similar instances. The public interest, not good faith, is the decisive consideration.

of permitting it to occupy the property. The appellant argued that the unlawful use by Eskom could not be 'regularised' by another organ of state, the first respondent, by expropriation, as to do so would not constitute a 'public purpose' or be in the 'public interest', being the only objects which the Electricity Act sought to facilitate. Instead, it would seek to condone or legalise Eskom's unlawful occupation. Specifically, the complaint was that the application fell short of the requirements of regulation 2(2)(*b*)[28] as the reasons and motivation did not mention Eskom's unlawful occupation.

[31] No authority was cited for the novel proposition that an expropriation could not occur, if there was a pre-existing unlawful use and occupation. And I am aware of none. The sole consideration is whether the expropriation is for a public purpose, or in the public interest. The expression 'public purposes' is a broad one. It has been held to include matters where the whole population, or the local public are affected and not only matters pertaining to the State or the Government.[29] It is not in dispute that the substation on Nooitgedacht[30] serves the local public by providing electricity, to amongst others, residential communities and townships, the town of Addo, the Sundays River Valley, several farms including citrus farms in the surrounding area, and the National Addo Elephant Park, an important tourist attraction.

[32] The application to expropriate was clearly for a 'public purpose' or in the 'public interest',[31] namely the provision of electricity. This purpose was served by the substation continuously since its construction in 1997. It should continue serving that public purpose. The fact that there was an ancillary purpose, to

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[28] See paragraph 26 above.
[29] *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Limited* 1990 (4) SA 644 (A) 656-657.
[30] Nooitgedacht is situated approximately 10 kilometers north west of the town Addo.
[31] *Fourie v Minister van Lande en 'n ander* 1970 (4) SA 165 (O) 169 D-E and 176 F-G; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

regularise the pre-existing unlawful use and occupation, cannot detract from its main purpose, which was to continue to supply electricity to the public through the substation for which a definite need was established.

[33] The expropriation would result in Eskom acquiring servitude rights in respect of certain aspects[32] of the appellant's dominium[33] in Nooitgedacht, which as a matter of law vested in it, but as a matter of fact were used by Eskom. In that respect too, the expropriation would serve the public interest and purpose, as it would 'enhance the electricity infrastructure in the national interest.'[34]

[34] It cannot be disputed, having regard to the terms of the notarial deed, as the first respondent had concluded, that Eskom bona fide but erroneously believed that it had initially acquired real rights. It, in fact, had only acquired personal rights, or limited real rights, in respect of the right of way. Eskom had not deliberately occupied the property unlawfully. It conducted its operations on the property in the bona fide belief that it had a legal entitlement to do so. It was allowed to use the property, by the various predecessors in title to Amber Bay and the appellant, in the mistaken belief that it was entitled to do so. All the owners since Mr Hitge, Amber Bay and the appellant duly represented by Mr Barnes, were aware of the presence of the substation installation on Nooitgedacht. They acquired ownership of the land in each instance aware of the substation, the overhead lines leading to and from it, and the access route to the substation. They accepted transfer of ownership in each instance aware that the substation and power lines detracted from their rights of ownership.

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[32] Notably the right to possession, use and enjoyment of those portions of the property occupied by the substation, or traversed by the overhead power lines and the right of way.
[33] Thus detracting from the appellant's dominium of Nooitgedacht – Schwedhelm v Hauman 1947 (1) SA 127 (E).
[34] The word 'enhance' is defined in the *South African Concise Oxford Dictionary* (2002) as improving 'the quality, value or extent of…' There can be no doubt that the expropriation would have that effect.

[35] With this knowledge the appellant accepted in the consent order in the eviction application, that this oversight, would be addressed by appropriate servitudes being considered for expropriation. If expropriation followed, compensation would address the prejudice to the appellant, whilst Eskom's tenure would be secured, its eviction would be averted, and the electricity supply to the public would continue uninterrupted in the public interest.

[36] Expropriation was correctly contemplated as a remedy to regularise the position. The appellant's subsequent argument that it was legally incompetent to regularise this 'unlawful' position, was without legal substance.

Was the description of what was to be expropriated clear?

[37] Regulation 2(2)(a) requires that Eskom's application had to contain a 'full description' of the land or right it wished to acquire. The appellant's complaints were:

(a) the expropriation application referred to a servitude for the substation 'over 8,812 hectares of land', whereas the Surveyor General's diagram annexed to the application indicated that the area required for the substation was 1ha, the approximate area actually occupied by the substation;

(b) although the application stated that Eskom required servitudes 'to convey electricity by means of 132 kV and 22 kV lines across land', it was not stated how many lines were required and exactly what these rights would entail;

(c) the high court's qualification, in paragraph 2 of its order, introduced further uncertainty by confining the overhead power lines servitudes to those in existence, which could present difficulties on registration thereof, as the registrar of deeds would have no knowledge, in the event of a dispute, as to which power lines were in existence.

[38] What was reviewed before the high court was not Eskom's expropriation application, but the first respondent's decision. The decision described the servitudes to be expropriated with express reference to SG diagram No 1232/2014 dated 21 January 2015, a copy of which was provided to the appellant's attorneys.[35]

[39] Reading the decision with the diagram referred to therein, which formed an integral part thereof, the substation was identified as a servitude area '1,0000 hectare in extent', with reference to specific co-ordinates reflected on the SG diagram. The reference to 8,812 ha in Eskom's application was clearly an error, which was correctly recognised as such by the first respondent. This resulted in the decision to expropriate being granted with reference to the extent as per the Surveyor Generals dimensions, which accorded with the factual position on the ground, even on the appellant's version.

[40] The 'right to convey electricity over the property by means of 132kV and 22 kV overhead power lines', was similarly described, as regards location and width, with reference to the servitudes depicted on and described 'more fully in SG Diagram No 1232/2014' identified by determinable co-ordinates. That made the overhead power lines objectively determinable, and left no room for uncertainty. It is not surprising that these servitudes, approved by the first respondent, correspond in number and position to those identified by Mr Barnes in the founding affidavit in the review, as being in existence when the decision was made.[36]

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[35] The appellant alleged that SG diagram 1232/2014 was not annexed to the Expropriation decision, but accepted that it was subsequently provided to its attorneys, and that it is the same diagram. The apparent omission to have annexed the diagram is accordingly without significance as there is no dispute as to the SG diagram the Expropriation decision intended to refer to.

[36] Their location on Nooitgedacht were indicated by Mr Barnes in orange on a Google aerial photograph attached to his founding affidavit in the review. He also indicated the position of the substation and the right of way in red and green respectively on another Google photo, which showed their position in relation to the boundaries of Nooitgedacht.

[41] The appellant's title deed already contained the following condition of title:

'By Deed of Cession of Servitude K723/1999S, the within mentioned property, in extent 44,8915 hectares, is subject to that it was subject to:

I . . .

II A perpetual servitude to lead an overhead power supply (Power Line Servitude) 10 metres wide, the centre line of which is depicted by the DEF on Servitude Diagram No 7799/95 attached to the above Deed of Servitude (the middle line of which servitude is depicted by the line NPQ on Diagram SG No 5561/1998 annexed hereto).'

It appears that this power line servitude might correspond with the servitude expropriated and reflected on SG Diagram No 1232/2014 as j- K- L, save that the latter is reflected in that diagram as 18, not 10, metres wide and, in terms of the decision would operate in favour of Eskom as an identified beneficiary, whereas according to the cession, no dominant owner of the servitude was identified. I comment no further on this issue as it was not canvassed in the affidavits. To the extent that the servitude in the cession might coincide with any power line servitude expropriated in accordance with the first respondent's decision, it, being the less burdensome servitude, would lapse by merger with the servitude expropriated. The significance of this is that it might possibly affect the compensation payable pursuant to the expropriation. Any such duplication would not affect the validity of the decision.

[42] What was expropriated, was determined in the decision with cadastral accuracy. The Registrar of Deeds raised no objection to the description of what was expropriated and was to be registered in due course. The high court however erroneously added the qualification to paragraph 2 of its order. It may have been influenced by the allegations in the appellant's supplementary affidavit that there was one incoming line and five outgoing lines, which Eskom identified as the

Nanaga line,[37] the Barkly Bridge line,[38] the Addo Park line,[39] the Skilpad line,[40] and the Dunbrody line.[41] Eskom had also referred elsewhere to the incoming line, five outgoing lines and a bypass line (which probably comprised two power line servitudes depicted as c1-B1-C1-D1-E1 and F1-G1-H1 which branched from it, on SG Diagram No 1232/2014). It appears that the high court sought to clarify matters by confining the overhead lines to the lines 'in existence'. By doing so it introduced uncertainty, as on registration of the servitudes, the Registrar would query what was meant by 'in existence'. There was no need for paragraph 2 of the order which should be set aside.

[43] The appellant also submitted that the power line servitudes were contradictory and not in compliance with the regulation, as the width of the outgoing power line servitudes were to be 18 m wide, considerably more than the nine metres width referred to in the way leave agreements. This, it was argued, would result in 'substantial' portions of Nooitgedacht being covered by the servitudes, thus rendering farming activities extremely difficult if not impossible, especially as these power lines would criss-cross the farm 'Nooitgedacht randomly'.

[44] The power line servitudes however do not criss-cross the farm 'randomly', but run along specific routes identified by co-ordinates on the Surveyor General's diagram No 1232/2014. Although the appellant complained about the width of the power line servitudes, it did not allege what the actual width occupied by the existing power lines were. The second respondent's answering affidavit pointed

[37] The Nanaga line conveys electricity to all farms in the Nanaga area.
[38] The Barkly Bridge line conveys electricity to the town of Addo, the National Addo Elephant Park, and farms in the Barkly Bridge area and the Valencia Township.
[39] The Addo lone conveys electricity to citrus farmers in the Sundays River Valley and the Nomthamsanqa township.
[40] The Skilpad line conveys electricity to farmers in the Sundays River Valley (not serviced by the Addo line) and three major townships in the area namely Batsheba, Enon and Moses Mabhida.
[41] The Dunbrody line conveys electricity to farms in the directions of both Kirkwood and Uitenhage.

out that the way leave agreements provided that no structure could be erected within nine meters of the centre line of a power line. In addition, any vegetation below the power lines had to be cleared, and that Eskom had done this before the appellant or its predecessor had purchased Nooitgedacht. It is self-evident that a distance of nine meters on either side of the centre line of a power line, equates to 18 meters in width.

[45] I turn to consider the right of way, six metres wide, expropriated in terms of paragraph 3 of the decision. The start and end points (S1-S2) are identified in the decision with reference to co-ordinates on Surveyor General's diagram No 1232/2014. However, it remains a general right, to the extent that it is represented by a curved line (not identified with reference to further co-ordinates), between those points. A general right of way servitude, six metres wide, had been created by the notarial deed. That right of way was registered and carried forward as a real right in all subsequent deeds. It seems from the photographs of the actual right of way, attached to the appellant's founding affidavit, that the registered right of way might correspond with the right of way expropriated. As the purpose of the application to expropriate was to regularise what was already in existence, the intention was plainly not to create an additional separate right of way. The benefit offered by the expropriation and its description with reference to Surveyor General's diagram No 1232/2014 is that the start and end co-ordinates are now fixed. To the extent that the right of way expropriated corresponds with the right of way already extant and recorded in the title deed of the appellant, the latter will lapse by merger. At best, again, this might be a consideration affecting the quantum of any compensation payable.

Does the expropriation decision contravene s 6 of the PAJA

[46] The decision by the first respondent to approve Eskom's application for expropriation plainly constituted administrative action to which the provisions of

the PAJA applied. What constitutes fair administrative action will depend on the facts of each case.[42] Generally it would require providing any person whose rights or legitimate expectations were materially and adversely affected with adequate notice of the proposed action, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review or internal appeal and to request reasons.[43] Where, as in this instance, the first respondent was empowered in terms of the relevant legislation to follow a procedure which might differ from some of these general requirements for administrative action prescribed in the PAJA, no complaint could be raised, provided the procedure adopted, was fair.[44]

[47] The appellant raised a plethora of issues in regard to substantive and procedural fairness, which it maintained contravened s 6(2) of the PAJA. I only deal with those which are relevant to the outcome of the appeal.

[48] Before considering these grounds it is important to note that the first respondent's decision was a multi-faceted and polycentric decision[45] requiring '. . . an equilibrium to be struck between a range of competing interests and considerations and which is to be taken by a person or institution with specific expertise in that area . . .'[46] An evaluation as to whether an expropriation was expedient would necessarily lie within the domain of the expropriating authority.[47] Although not immune from judicial review[48] it was a decision to

[42] Section 3 (2)(*a*) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).
[43] Section 3 (2)(*b*) of the PAJA.
[44] Section 3(5) of the PAJA.
[45] *Offit Enterprises (Pty) Ltd and another v Coega Developmental Corporation (Pty) Ltd and Others* [2010] ZASCA 1; 2010 (4) SA 242 (SCA) 260 para 48.
[46] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 48.
[47] It is generally for the expropriating authority, in this instance the first respondent, to decide how best to achieve the purposes of the Expropriation Act - *White Rocks Farm (Pty) Ltd and Others v the Minister of Community Development* 1984 (3) SA 785 (N) at 792.
[48] *MEC for Environmental affairs & Developmental Planning v Clairison's CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA) para 18.

which the principle of ‘deference’, which required that the decision should be ‘shown respect by the courts’, applied.

[49] The appellant’s main complaints appeared to relate to the following:

(a) That the first respondent made use of a 30 step internal procedure, which subsequently was abandoned, which the appellant maintained deprived it of an appropriate public notice and comment procedure.

(b) That the appellant was not afforded a right of reply to Eskom’s reply to its objections and representations.

(c) That the appellant was not given full discovery of all documents.

(d) That the first respondent did not apply his mind independently to the application but simply followed the recommendation in the internal memorandum which was prepared by officials of the first respondent.

(e) That the first respondent’s view that the ‘alternative suitable land’ argument, entailing that the substation be relocated to portion 5, could not be sustained, was influenced by a material factual misdirection.

The abridged process

[50] The 30 step ‘abridged business process’ was explained by the first respondent to be an ‘internal mechanism’ with no legislative or regulatory status. It was a process developed to broadly embody the principles of the Constitution (in particular s 25) and the provisions of the PAJA, with it being reviewed as the legislative framework was revised. The first respondent explained that it merely served as ‘a guideline to the Department and (the first respondent) in respect of evaluating, assessing and determining an expropriation application.’ It was not a mandatory procedure and in ‘no way determinative or prescriptive’ of the first respondent’s statutory obligations. The latter would prevail over the internal guideline, and the internal procedure would not hamper the first respondent’s

obligation to consider and decide applications for expropriation, in accordance with the legal framework outlined earlier in this judgment.

[51] The specific complaint was that if the guidelines had been adhered to, an opportunity after publication for comments and objections by the public, would have followed. It was not alleged that there was any person other than the appellant, who would have an interest in objecting following publication. The procedure prescribed in terms of regulation 2(3)(*a*)[49] which required that the licensee 'publish a notice of intention to apply for the expropriation. . .', was complied with. The appellant was the only person that objected to the application and its objections and representations were considered. There was no suggestion of any prejudice suffered. Furthermore there was no suggestion that the procedure followed was otherwise unlawful or unfair.

Should the appellant have been afforded an opportunity to reply?

[52] After the appellant had lodged its representations and objections to Eskom's application to expropriate, Eskom had the right to reply to the objections of the appellant. Regulation 2(6) provides that:

'The original application must be delivered by the licensee to the Minister of Public Works after the expiry of all the time periods or extended time periods, accompanied by proof of the advertisements contemplated in subsection 3(a) and of delivery of the documentation contemplated in subsection 3(b), as well as –

(a) objections and comments;

(b) information supplied to the licensee by the Regional Land Claims Commissioner and the Director-General: Land Affairs; and

(c) the reply of the owner to the application;

[49] Regulation 2(3)(*a*) required that the licensee 'publish a notice of intention to apply for the expropriation in English and in another official language commonly used in the area in which the property is situated, once in the government Gazette and simultaneously therewith or not more than one week thereafter, once in the said languages in two newspapers of different languages circulating in the area in which the property is situated'.

if any, received by the licensee within the time periods or extended time periods set therefore, and the licensee may include such comment or reply as it may deem necessary to such objections, comments, information and the reply of the owner.' (emphasis added)

The reply by Eskom was thus expressly provided for.

[53] There was no express right accorded to the appellant to reply to Eskom's reply. Neither does the PAJA recognise such a right of reply. At best, considerations of fairness might require a further reply, if for example, new facts had been raised in Eskom's reply. In the absence of new facts being raised the appellant could not insist on a further reply, otherwise the process would become endlessly protracted.[50] The reply by Eskom did not contain any new material but was simply a response to the objections raised by the appellant.[51] There were no other compelling circumstances present in this matter which required the appellant to be afforded a right of reply.

Discovery of documents

[54] The appellant complained that copies of Eskom's reply, the cover letter to the application from Eskom to the first respondent, the 'summary of the matter' provided by Eskom to the Minister of Energy, and the Minister of Energy's comments and recommendations, were not provided to it.

[55] There are no provisions in the Expropriation regulations providing that copies of these documents had to be furnished to the appellant. The principles of natural justice and the right to be heard, do not include a right to discovery of all

[50] In *Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 44 it was held that no new matter had been established which would have required a further right of reply, and that the process of allegation, answer, reply and rejoinder could have gone on without end.

[51] In *Huisman v Minister of Local Government, Housing and Works (House of Assembly)* 1996 (1) SA 836 (A) at 845-846 it was held that it was only where new facts had been placed before the Minister, that there would be a right to counter them.

documents as an automatic feature. It has been held that the 'right to know' does not mean to be given 'chapter and verse'.[52]

[56] The appellant maintained that had it been provided with access to this documentation it would have had the opportunity to assess whether new information or averments were demonstrably false, to which it could have responded. The appellant however had a full opportunity to set out its objections and contentions, which it did. Its notice of objection set out extensively the grounds upon which it objected to the application for expropriation. It was not suggested that there were additional grounds or facts, which should have been considered or taken into account, by the first respondent. The complaint was accordingly without merit.

Whether the first respondent simply adopted the recommendation in the internal memorandum and did not apply his mind to the application?

[57] The first respondent appointed Mr Govender in his department to 'manage the processing of the expropriation'. Mr Govender, being under the erroneous impression that the Minister of Energy had 'authorised the expropriation', sought to work collaboratively with Eskom 'to process and execute the expropriation'. He inter alia also prepared a report for the first respondent's consideration.

[58] Having regard to the various line functions in the department of the first respondent, it was only reasonable and a matter of sound administrative practice that an internal memorandum would be prepared by officials of the first respondent commenting on the application and the submissions advanced to assist the first respondent in his decision. The memorandum correctly cautioned that

[52] *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 (3) SA 228 (C) at 235B.

‘(o)nly the (first respondent) is empowered by Section 2 of the Expropriation Act to make a decision on Eskom’s application’.

[59] The first respondent was acquainted with the matter prior to receipt of the internal memorandum. Given the unique nature of the application, the first respondent had attended various meetings and briefing sessions with relevant officials of his department, to obtain clarity in respect of the relevant legal and factual issues raised by the application. Regardless of the contents of the internal memorandum, the first respondent properly and personally considered the application, which included the appellant’s detailed representations and objections in their entirety. No basis was advanced for rejecting his statement that the decision was his and his alone, or for finding that he was improperly influenced or did not apply his mind fully to the issue he had to decide.

The alternative suitable land argument[53]

[60] The first respondent had concluded that a relocation of the entire substation installation to portion 5 was not a viable alternative because of the substantial costs involved and the interruption in electricity supply that would result. The appellant argued that the first respondent’s reliance on an interruption of electricity supply, constituted a material misdirection of fact, as the appellant had always tendered to allow Eskom time to facilitate such a relocation, which would avoid ‘severely detrimental’ interruptions.

[61] The appellant pointed to Eskom’s application for expropriation in which it was stated that ‘a prolonged outage . . . (would) be detrimental to the consumers in the area’, as if a prolonged outage was a given fact. It also referred to the letter

[53] This was raised by the appellant in the context of regulation 2(2)(*h*) as a practical alternative open to Eskom if the rights in, over or in respect of Nooitgedacht were not expropriated. This discussion encompasses what the appellant named it’s ‘Black-out in the valley’ argument.

from Eskom's chairman dated 11 November 2015 to the first respondent, which likewise had referred to the substation supplying electricity to 'the town of Addo and Sundaysriver Valley and citrus farms in the surrounding area . . . (and that a) prolonged outage for the existing line will be severely detrimental to the customers in the said areas'. It pointed out that a letter from the Minister of Energy to the first respondent dated 4 February 2016 was to similar effect in commenting that a 'prolonged outage . . .will be severely detrimental to the consumers in the area'. The appellant argued that these comments created the incorrect impression and that Eskom's comment that 'the eviction order does not provide for any option that Eskom may continue operating the infrastructure until it has built a new sub-station and related infrastructure' was wrong. It pointed to the allegation in its replying affidavit that '(if) Eskom plan properly, there should not be any interruptions in the supply of electricity . . .' and referred to it being possible for extensions of time to be granted in the terms of the court order, albeit that these were extensions of time for the processing of the expropriation application.

[62] Properly construed, these statements all simply recorded that a prolonged outage would be detrimental, which would be factually correct. The internal memorandum prepared in the first respondent's department however did motivate for an approval of the application by stating that 'Demolition of the substation will cause a prolonged outage of electricity which will be severely detrimental to the customers in the said area'. It was contended that this statement amounted to 'a material misdirection of fact' which Eskom failed to point out to the first respondent. According to the founding affidavit it seems that the more correct position was that the appellant did draw attention to this misdirection but that the appellant's complaint more specifically was that '. . . the First Respondent clearly had no regard thereto'.

[63] The appellant's tender to allow Eskom sufficient time to relocate the infrastructure might reduce the duration of an interruption in the electricity supply during the relocation process, thus avoiding an interruption of 'severely detrimental' proportions or 'prolonged' duration. Nevertheless, as a matter of practical reality, some interruptions would be inevitable during the relocation process. That would also be consistent with the probabilities and what one would reasonably expect. Indeed, the version of the first respondent and Eskom, which must prevail in regard to any factual dispute on this issue,[54] was that a relocation to portion 5 would disrupt the electricity supply.

[64] But even if the duration of any interruptions might have been overstated, an interruption in the supply was not the only, or dispositive consideration which caused the first respondent to reject the option of relocation in favour of expropriating the servitudes on Nooitgedacht. The first respondent in his answering affidavit stated that:

'The fact that the Applicant may have offered the Second Respondent "sufficient time to relocate its infrastructure", is but one factor that I considered. There was obviously the costs associated with such relocation that also had to be considered.'

The first respondent's decision against relocation was correctly and decisively, informed by the substantial costs which would be incurred to relocate an existing installation, to within 'a stones' throw' from where it was already operating effectively. To demolish and rebuild the substation and related infrastructure would take six years and cost over R120 million, even if built in the immediate vicinity. To the extent that there might be a dispute as to the actual costs of relocation, Eskom's version would prevail.[55]

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[54] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[55] In the opinion of George Frederick Ferreira, an electrical engineer, expressed in an affidavit apparently filed in support of an application for an extension of the time allowed by the court order in the eviction application, Eskom's 'estimate that the cost of construction of a substation of this nature would be in the order of R120,000,000 is reasonably accurate'.

[65] To have opted for a relocation at those costs, would be irrational. Such funds would be wasted and would probably better serve the public interest if applied to constructing a new substation elsewhere in an area where there may be a greater demand or, alternatively, maintaining and improving the existing infrastructure on the national electricity grid. Having regard to the deference which must be accorded to the decision of the first respondent, it was not shown that his decision fell to be impeached.

[66] In this context, the first respondent also considered that the substation and infrastructure had existed on the property prior to the appellant's acquisition thereof and that the appellant must, accordingly, at all times, have been aware of the existence thereof and that the land on which it encroached, could not be used for farming.

Eskom's summary to the Minister of Energy

[67] In addition, the appellant also complained that Eskom, contrary to the peremptory provisions of regulation 2(7) of the Expropriation Regulations, provided the Minister of Energy, (with whom it contended Eskom had a direct relationship and to whom it was accountable as a state monopoly for the provision of bulk electricity), with a summary of the matter without providing the appellant with an opportunity to comment on the summary.

[68] Regulation 2(7) provides that:

'The licensee must deliver a copy of the application and accompanying documents contemplated in sub-regulation (6) to the Minister [of Energy] within seven days of the delivery of the application to the Minister of Public Works and the Minister [of Energy] may within 21 days of the delivery thereof, or such extended period as the Minister may, in his or her discretion, allow, comment upon the said application and documents to the Minister of Public Works.'

The regulation does not contain a peremptory requirement that the summary had to be provided to the appellant. The appellant complained that the summary was based solely on the version of Eskom, that it contained inaccurate or incomplete assertions, and that Eskom made no attempt to draw attention to material disputes raised by the appellant, or to refer to the appellant's version at all.

[69] What had in fact occurred was that after an extended delay, during which the first respondent had not taken a decision whilst awaiting a request from the Minister of Energy, the latter requested the first respondent to expropriate the property 'as requested by Eskom'.

[70] This request, the appellant argued, indicated that the Minister of Energy had merely parroted the submissions of Eskom, made no reference to the appellant's submissions at all, and did not analyse and engage with the contrary positions of the parties. From this the appellant sought to infer that the submission of the Minister of Energy was entirely one-sided, offered no analysis of the competing facts, accordingly provided nothing new, and that this influenced the decision of the first respondent.

[71] That inference was not justified. The first respondent had the appellant's detailed objections before him and he considered these with reference to the application by Eskom in reaching his decision.

Perceived bias

[72] The appellant contended that there was a reasonable apprehension of bias on the part of the first respondent and his officials, based on certain views expressed by one of his senior officials, Mr Govender, in relation to the procedure

followed,[56] in relation to the expropriation decision,[57] and the entire process.[58] Internal correspondence exchanged contained proposals in regard to Eskom's application which were circulated to at least twelve other officials in the department of the first respondent, including the majority of those who ultimately recommended to the first respondent that he should approve the expropriation. The appellant also referred to the fact that Eskom was required during February 2016 to launch court proceedings against the first respondent, and alleged that this exerted pressure on the first respondent to approve the application.

[73] Whatever possible bias might have been displayed by Mr Govender because of his erroneous understanding of the true position, was unintended. The issue was moreover not whether the first respondent's officials were biased, but whether the first respondent could reasonably be perceived to be biased. If his officials were biased and he simply adopted their recommendations then he could at best be guilty of not deciding the matter himself, but that would not make him biased. Although the first respondent no doubt would have consulted with Mr Govender and the other officials, Mr Govender's erroneous understanding ultimately was of no significance, as the unequivocal evidence of the first respondent was that the expropriation decision was solely his.

[74] The appellant also alleged that the chairperson of Eskom, by addressing a personal letter to the first respondent during November 2015 demanding that he make a decision but also incorporating representations dealing with the expropriation application, created 'institutional pressure' between very senior

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[56] Hence contending that the expropriation decision was procedurally unfair in terms of s 6(2)(*c*) of the PAJA.
[57] Accordingly that s 6(2)(*a*)(iii) of the PAJA was applicable.
[58] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 692-3; *President of the Republic of South Africa & Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) paras 35-38 and 45-48.

representatives of the state. It submitted that an objective assessment of these facts supported the conclusion that Eskom, the Minister of Energy, and the first respondent did not follow an objective at arms-length process. This left at least a reasonable suspicion that the entire process followed by the first respondent and his final decision, were biased and the expropriation decision procedurally unfair.

[75] The high court correctly concluded that these complaints did not support an inference of bias, as the correspondence was only about pressing the first respondent to make a decision. The appellant's argument that the learned judge in reaching that conclusion failed to assess whether a reasonable, objective and informed person would on those facts reasonably have apprehended that the first respondent did not bring an impartial mind to bear in considering the expropriation application, was without merit.

[76] Whatever views were held and promoted by officials in his Department, including Mr Govender, these did not necessarily reflect the views of the first respondent in the final decision. The final decision was solely that of the first respondent after taking into account the contents of the application for expropriation and the detailed objections, comprising some 700 pages, raised thereto by the appellant. Given these facts, it cannot be concluded that the expropriation decision was tainted.

The amendment of the expropriation decision

[77] The 'amendment' to the expropriation decision effected by the high court in paragraph 2 of its order should not have been granted, for reasons set forth earlier in this judgment. It accordingly falls to be set aside. The argument of the appellant in this respect, and specifically the effect of s 8 of the PAJA, accordingly need not be considered.

Costs

[78] Although the order of the high court will be varied by the deletion of paragraph 2, the respondents were substantially successful in the appeal. There is no reason why the appellant should not be directed to pay the costs of the first and second respondents. All the parties employed two counsel. The employment of two counsel was justified having regard to the complexity and nature of the matter. The costs awarded will accordingly include the costs of two counsel, where employed.

Order

[79] The following order is granted:

(a) Save insofar as the order of the high court is varied, as set out in paragraph (b) below, the appeal is dismissed.

(b) Paragraph 1 of the order of the high court is amended, paragraph 2 thereof is set aside, and paragraphs 3 and 4 are renumbered, resulting in the order of the high court, as amended, reading as follows:

> '1. The application to review the first respondent's decision of 30 September 2016 expropriating certain rights over the farm Nooitgedacht, is dismissed.
>
> 2. The applicant is directed to pay 80% of the costs of the application including the costs of two counsel;
>
> 3. The applicant is directed to pay the reserved costs of 19 September 2017, including the costs of two counsel.'

(c) The appellant is directed to pay the first and second respondents' costs of the appeal, including the costs of two counsel where employed.

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P A Koen
Acting Judge Of Appeal

APPEARANCES

For appellant:	E A S Ford SC and J G Richards
Instructed by:	Schoeman Oosthuizen Inc
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For first respondent:	R G Buchanan SC and G Gajjar
Instructed by:	State Attorney, Port Elizabeth
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For second respondent:	S C Rorke SC and K.D. Williams
Instructed by:	Smith Tabata Inc
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