CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/10
[2010] ZACC 20

In the matter between:

OFFIT ENTERPRISES (PTY) LTD	First Applicant
OFFIT FARMING ENTERPRISES (PTY) LTD	Second Applicant
and	
COEGA DEVELOPMENT CORPORATION (PTY) LTD	First Respondent
PREMIER OF THE EASTERN CAPE PROVINCE	Second Respondent
MINISTER FOR PUBLIC WORKS	Third Respondent
MINISTER FOR TRADE AND INDUSTRY	Fourth Respondent

Heard on : 3 August 2010

Decided on : 18 November 2010

JUDGMENT

SKWEYIYA J:

Introduction

[1] This matter comes before us by way of an application for leave to appeal following a judgment of the Supreme Court of Appeal[1] in which that Court confirmed the decision of the South Eastern Cape Local Division[2] (High Court) and dismissed the appeal with costs. In this Court, the applicants seek an order compelling the respondents to decide whether or not they intend to expropriate the applicants' properties.

[2] The applicants collectively own approximately 505 hectares of land within the Coega Industrial Development Zone (Coega IDZ), a major government initiative to develop a new deepwater port at Coega and a surrounding industrial area near the city of Port Elizabeth in the Eastern Cape province.[3] The applicants complain that the respondents have, by continued threats of expropriation of their land and other forms of conduct over a period of approximately nine years beginning in 2000, deprived them of their entitlement to the full use, enjoyment and exploitation of their land. The applicants argue that they have thus been deprived of their property in terms of section 25(1) of the Constitution.[4]

[1] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) (per Wallis AJA, with Harms DP, Lewis JA, Maya JA and Hurt AJA concurring).

[2] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others* 2009 (5) SA 661 (SE) (per Jansen J).

[3] Above n 1 at para 2.

[4] Section 25(1) of the Constitution states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[3] The other complaint by the applicants is that the long history of threats to expropriate their property is prejudicial in the light of the first respondent's failure to give lawful effect to them, and it was argued that the failure to take a decision is administrative action subject to review as envisaged in the Promotion of Administrative Justice Act[5] (PAJA). Furthermore, they contend that if this long process were to culminate in an expropriation of their property, the expropriation would constitute procedurally unfair administrative action in terms of section 6(2)(c) of PAJA.[6]

[4] The first applicant is Offit Enterprises (Pty) Ltd; and the second applicant is Offit Farming Enterprises (Pty) Ltd (applicants). The first respondent is the Coega Development Corporation (Pty) Ltd (to whom I refer interchangeably as the "CDC" and the "first respondent"); the second respondent is the Premier of the Eastern Cape Province (Premier); the third respondent is the Minister for Public Works; and the fourth respondent is the Minister for Trade and Industry (collectively referred to as the "respondents"). It should be noted at the outset that the first respondent is currently operating in the Coega IDZ, and has been designated to do so by the Minister for Trade and Industry.[7] The Department of Trade and Industry holds an "A" class share in the

[5] 3 of 2000. Administrative action is subject to review if there is a failure to take a decision as contemplated in section 6(2)(g) of PAJA. Section 6(2)(g) states: "A court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision."

[6] Section 6(2)(c) of PAJA states: "A court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair."

[7] The Manufacturing Development Act 187 of 1993 stipulates that the Minister for Trade and Industry is the responsible Minister, as defined in section 1. Section 10(1) of the Manufacturing Development Act states: "In order to promote and support manufacturing growth and development within the framework of the economic policy of the Republic, the [Minister for Trade and Industry] may . . . establish, amend, revoke or substitute a programme for

CDC, and it appears that the only ordinary shareholder in the CDC is the Eastern Cape Development Corporation (Pty) Ltd which holds shares on behalf of the national and provincial government. It should also be noted that it is common cause amongst the parties that only the Minister for Public Works has the power to authorise any expropriation in the Coega IDZ in terms of the Expropriation Act.[8]

[5] In the directions that were issued in setting this matter down for hearing in this Court, the parties were directed to address the following issues in written and oral argument:

i. Whether the applicants have been deprived of their property in contravention of section 25 of the Constitution;
ii. If so, by whom;
iii. What relief are the applicants entitled to?

The main focus of this judgment will thus be on the issues set out in these directions.

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manufacturing development . . . ." The Regional Industrial Development Amendment Act 22 of 1998 changed the short title of this Act from the Regional Industrial Development Act to the Manufacturing Development Act, as it is now known.

[8] 63 of 1975. Section 1 of the Expropriation Act defines the "Minister" relevant to the Act as the Minister for Public Works. Section 2(1) of the Expropriation Act states: "Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes." Section 3(1) of the Expropriation Act empowers the Minister for Public Works to expropriate immovable property on behalf of juristic persons or bodies. Section 3(2)(h) states: "The juristic persons or bodies contemplated in subsection (1) [include] any juristic person . . . established by or under any law for the promotion of any matter of public importance."

[6] Before I proceed further, there is one preliminary issue with which I must first deal: that is, what type of entity is the first respondent? This is important to determine because, although section 8(4) of the Constitution[9] and our jurisprudence[10] make it clear that the Bill of Rights applies to juristic entities, whether section 25 is applicable to private entities is less apparent. The CDC is a private company incorporated in terms of the Companies Act.[11] However, the CDC is in reality a public entity acting in the public interest; government has ownership in the company; and it complies with the definition of "organ of state" in section 239 of the Constitution.[12] The CDC is, in principle, no different from other entities in which the government has a measure of shareholding.[13] Accordingly, I am satisfied that section 25 applies to the first respondent, and no further consideration need be given to the horizontal application of section 25.

Legislative framework

[7] Section 25(1) of the Constitution contemplates the deprivation of property, and states that "[n]o one may be deprived of property except in terms of law of general

[9] Section 8(4) of the Constitution states: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[10] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 17-8.

[11] 61 of 1973.

[12] The definition of "organ of state" in section 239 of the Constitution reads, in relevant part, as follows:

> "(b) any other functionary or institution—
>
> . . .
>
> (ii) exercising a public power or performing a public function in terms of any legislation. . . ."

[13] See, for instance, *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 23.

application, and no law may permit arbitrary deprivation of property." The Coega IDZ is governed by the Manufacturing Development Act and the regulations[14] promulgated in terms of section 10 thereof. Whilst the 2000 regulations required an applicant for an IDZ operator permit to show control over the land by way of ownership, lease or option, the 2006 amended regulations are far less stringent and require only that control is shown in "the detail and manner as indicated in the guidelines".[15] It is in terms of the amended regulations that the CDC's final operator permit was issued. The guidelines provide as follows:

> "The term control of the land refers to ownership of the land by the party applying for the IDZ operator permit and includes holding of an option over the land that will allow for ownership or servitude of the land at the instance that the IDZ operator permit is granted. A *spes* for control in the near future may also qualify, but the applicant must clearly set out what the nature of that control obtained will be, as well as the likelihood of that realising."[16]

[8] The operator permit does, however, provide that the CDC must submit bi-annual reports to the Board[17] on its progress made in respect of expropriation proceedings.

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[14] Industrial Development Zone Programme, GN R1224 GG 21803, 1 December 2000 (2000 regulations); amended by the Industrial Development Zone Programme: Amendment, GN R1065 GG 29320, 27 October 2006 (amended regulations).

[15] The guidelines to which the amended regulations refer are the *Industrial Development Zone Programme Guidelines* (February 2008).

[16] Id at16.

[17] The 2000 regulations define "Board" as being the Manufacturing Development Board as provided for in the Manufacturing Development Act, established in terms of section 2 thereof. Section 2(2) of the Manufacturing Development Act stipulates the membership of the Board, and includes, inter alia, officials of the Department of Trade and Industry, the South African Revenue Service and the Department of Finance. The 2006 amended regulations delete the definition of "Board" without replacing it with another; however, both the amended regulations and the subsequent guidelines continue to make reference to the Board without more.

Provision is made in the amended regulations,[18] the guidelines[19] and the operator permit for the possibility of certain portions of land that fall within the designated area of the Coega IDZ to be excised at the decision of the Board. In particular, clause 14 of the operator permit issued to the CDC states:

> "Should the Board be of the opinion that after some period of deliberations and/or a final court order/decision (i.e. where no further appeal is available, or where a further appeal is not advisable), the CDC will not be able to obtain control of the area currently indicated as subject to expropriation proceedings, or any part thereof, the Board may recommend to the Minister to amend the Operator's permit so as to exclude that specific area or portion thereof."

To date, no application for excision has been made by the CDC.

Background to the present matter

[9] As I have already mentioned, the first respondent has been tasked with the development of the Coega IDZ. The first respondent received a provisional operator permit in February 2002, which was extended from time to time as required.[20] A final operator permit was granted to the CDC in August 2007 in terms of the amended regulations. The applicants own property falling within the designated area of the Coega

[18] Regulation 3C of the amended regulations above n 14.

[19] Above n 15 at 13-5.

[20] The CDC was awarded three provisional operator permits in terms of the 2000 regulations, in 2002, 2004 and 2006. The first two provisional operator permits were extended for periods of 12 months each as provided for in the 2000 regulations. However, the regulations stipulated that the provisional operator permits could not be extended for a period exceeding 12 months, which necessitated the granting of new provisional operator permits in 2004 and 2006. The CDC could not receive a final operator permit during this time as it was not fully in compliance with the requirements in the 2000 regulations, but this hurdle was removed by the amended regulations.

IDZ, comprising 8.1% of that area. This is the only land within the Coega IDZ over which the CDC has, as yet, been unable to obtain control.

Previous attempts at expropriation

[10] The Premier has on two previous occasions attempted to expropriate the applicants' land for the purpose of transferring it to the CDC. According to the applicants, these attempts seemingly arose at the instigation of the first respondent. However, both these attempts have been set aside, and there has to date been no actual expropriation of any of the applicants' land.

[11] The first attempt was made in February 2005, and was set aside by Ebrahim J on the basis that the Expropriation Act did not confer the authority on the Premier to expropriate property.[21] Although Ebrahim J granted leave to appeal to the Supreme Court of Appeal, the appeal was withdrawn. The Premier made a further attempt at expropriation in March 2007, this time attempting to expropriate a road running through the applicants' property. When this was challenged by the applicants, the respondents opted not to contest the application and it was set aside by Plasket J by an order of court in April 2007.[22]

[21] *Offit Enterprises (Pty) Ltd and Another v Premier of the Eastern Cape Government and Others*, Case No. 1764/05, South Eastern Cape Local Division, 31 January 2006, unreported, at para 67.

[22] *Offit Enterprises (Pty) Ltd and Another v Premier of the Eastern Cape Government and Another*, Case No. 559/07, South Eastern Cape Local Division, 19 April 2007.

[12] Whilst there is nothing wrong in law with seeking to expropriate only a portion of land, such as a road, the respondents appear to have gone about this improperly in the past. It seems to me that it was at all times open to the CDC to legitimately seek to have the applicants' land expropriated, provided that it complied with the law in its attempts to do so. There have been no attempts to expropriate since April 2007, and no application has ever been made by the CDC to the Minister for Public Works for the expropriation of the applicants' property.[23] However, it is clear that all the parties are now aware and in agreement that it is only the Minister for Public Works who is authorised to approve an application for expropriation.[24]

Conduct prior to August 2007 of which the applicants complain

[13] The applicants and the first respondent have been engaged in negotiations for the sale of the land since 2000. There are a number of instances of conduct by the CDC of which the applicants complain, which culminated in the launch of the High Court proceedings in August 2007.[25] In addition to the attempted expropriations to which I have referred above, the conduct complained of can be grouped into three categories: the spoliation of the applicants' land; the re-zoning application; and the ongoing threats of expropriation.

[23] See above n 8.

[24] Id. The Expropriation Act confers the powers stipulated in sections 2 and 3 on the Minister for Public Works.

[25] Above n 2.

[14] There have been three instances of "spoliation". In 2004, the CDC's employees erected a vibracrete fence around a gravesite on the applicants' land; in September 2006, plant and earth-moving equipment was moved onto the applicants' land, but we are told that the CDC ensured that the contractor removed the equipment and that the land be rehabilitated; that same month, a butterfly reserve was established by the CDC on the applicants' property, but the CDC tendered apologies on behalf of its employees and offered the applicants a bank guarantee to cover the costs of fencing the butterfly reserve. Whilst it is not clear what was done about the first instance complained of, it appears that the other two complaints were rectified by the first respondent in due course, and no permanent damage persisted.

[15] Regarding the re-zoning application, it is apparent that the applicants sought to have their property re-zoned from being an agricultural zone to being an industrial zone for the purpose of establishing an industrial park. From the correspondence that was placed before this Court, it appears that the CDC asked for the application not to be considered until the appeal regarding the expropriation of land had been finalised, and the required environmental documentation had been submitted. Accordingly, no decision regarding the re-zoning application was taken.

[16] The third category of conduct of which the applicants complain comprises the crux of their grievance: the repeated threats of expropriation that have been made by the CDC. As I have already indicated, the applicants and the first respondent have been involved in

negotiations for the sale of the property since 2000. However, these have been unsuccessful due to the inability of the parties to agree on the selling price, and it appears from the correspondence that what began as amicable negotiations became more strained over time as the parties failed to reach an agreement.

[17] Despite threatening to expropriate on numerous occasions, the CDC has never made an application to the Minister for Public Works for any expropriation. In June 2007, after the two attempted expropriations had been set aside, the applicants wrote to the CDC and the Premier, indicating that they intended to commence marketing the property on the open market. They indicated further that they were proceeding on the basis that the CDC and the Premier "have no further interest in pursuing the acquisition of [their] property whether by private treaty or expropriation". They advertised the property for sale in a national newspaper (20 June 2007) at a selling price of R40 million, and advertised the property as being "situated in the heart of the Coega Industrial Development Zone".

[18] In response to this advertisement, the first respondent published an advertisement in the same newspaper (26 June 2007), which read as follows:

> "In reference to the press release sent to the media on behalf of Pam Golding Properties about a 'prime Coega site available for purchase'.
> These are the facts:
> The land referred to falls within the proclaimed Industrial Development Zone (IDZ) boundary. The Coega Development Corporation (CDC) is in discussions with all land

> owners within the IDZ to acquire their land, and is offering to purchase this land at reasonable market rates. The CDC has largely succeeded with the option to purchase land, but where this option does not yield positive results, an alternative to expropriate land in order to secure the control of land over the proclaimed IDZ boundary will be taken. The CDC has resorted to the expropriation process in the past.
> The same principle applies in this case."

[19] The applicants contend that this advertisement has diminished the market value of their property, as indicated by the fact that the highest offer that they have since received has been of R30 million. It warrants mention at this juncture that the selling price sought by the applicants has considerably increased since the negotiations began, which can presumably be attributed to the developments in the area undertaken by the CDC. In 2001 the applicants were willing to accept approximately R2.2 million for the properties; in March 2003 the asking price had increased to R7 million; and by November 2003 the applicants were seeking a price of R15.5 million. In June 2007 the applicants advertised the properties for R40 million on the open market.

Change in circumstances from August 2007

[20] There is an important distinction to be drawn between what occurred prior to August 2007 and what occurred thereafter. The significance of this is that in August 2007, the first respondent received its final operator permit that was issued in terms of the amended regulations. As I have already stated, the amended regulations afforded the CDC more leeway than they had whilst operating in terms of the provisional operator permit under the 2000 regulations. Accordingly, there was no longer the stringent

requirement on the CDC regarding its control over the applicants' land, as this was removed by the amended regulations. It follows that there was no longer a pressing need for the CDC to seek to have the applicants' property expropriated, and the CDC has since taken no further steps to follow through on the published possibility of expropriation. The change in circumstances once the final operator permit was granted to the CDC had critical consequences for the argument proffered by the applicants in this Court: the source of the challenge shifted from one focussed on the "law of general application" to an argument based on "conduct" that took place outside the terms of that law. I will return to this issue in more detail below.

Proceedings before the High Court

[21] Against the backdrop of the advertisement, the applicants instituted proceedings against the respondents in the High Court in August 2007.[26] The applicants sought a declaratory order that any expropriation of the applicants' property, at the instance of any of the respondents for the benefit of the CDC, was neither permissible nor lawful; in the alternative, they sought an order compelling any of the respondents desirous of expropriating their properties to do so within a period of one month.[27]

[26] Above n 2.

[27] The relief sought by the applicants in the High Court was as follows:

> "(a) Subject to paragraph (c) hereunder, declaring that any expropriation in terms of legislation in effect as at date hereof of the Applicants' properties . . . at the instance of any of the Respondents for the benefit of the First Respondent is neither permissible nor lawful.
>
> (b) In the alternative to paragraph (a), an order compelling any one of the Respondents desirous of expropriating the properties referred to in paragraph (a) for the benefit of the

[22] The applicants justified the relief sought on the following bases: any attempt to expropriate for the benefit of the CDC could never be for a lawful purpose as the CDC was operating in the Coega IDZ unlawfully; it would not be competent for any of the respondents to attempt to expropriate in terms of either sections 2 or 3 of the Expropriation Act;[28] and that given the long history of the matter, any attempt to expropriate at such a late stage would amount to unfair administrative action in terms of PAJA.[29]

[23] In relation to unfair administrative action, the applicants submitted that any attempt to have the property expropriated, at the instance of any of the respondents, in view of the history of the matter and the impact that this has had on the value of the property, would be unlawful and unfair administrative action. Additionally, that the first respondent's failure to have the applicants' property expropriated within a reasonable period

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First Respondent to initiate a lawful expropriation process within a period of one month of date hereof;

(c) Paragraph (a) of this order shall not operate in respect of any lawful process for the expropriation of land for provincial road purposes;

(d) An order that the First Respondent pay the costs of this application and that the remaining Respondents be ordered to do so, jointly and severally with the First Respondent, only in the event that they oppose the application; and

(e) Further and/or alternative relief."

[28] See above n 8.

[29] On a separate point, the applicants argued in passing that the granting of the operator permit failed to comply with section 217(1) of the Constitution and the Preferential Procurement Policy Framework Act 5 of 2000. However, the High Court dismissed this challenge on the basis that the issuing of a permit did not constitute the contracting of goods or services for the purposes of section 217 of the Constitution, and that the Preferential Procurement Policy Framework Act consequently did not apply. The applicants also did not succeed in its challenge based on section 217 of the Constitution before the Supreme Court of Appeal.

constituted administrative action in the light of the repeated threats of expropriation levelled at the applicants. If this argument were accepted by a court, it would place the first respondent in the untenable position of being condemned either if it initiated proceedings to have the property expropriated as well as if it did nothing, as both would amount to unlawful administrative action in the view of the applicants. This argument was correctly rejected.

[24] The High Court accepted for the purpose of its judgment that the CDC's conduct amounted to an unlawful deprivation of the applicants' property. However, the High Court held that this did not entitle the applicants to the relief that was sought, and dismissed the application. The High Court rejected the applicants' argument regarding the invalidity of the operator permit, finding that it was not competent for the applicants to collaterally challenge the validity of the fourth respondent's issuance of the operator permit to the CDC. The High Court held further that the expropriation of the applicants' property for the purposes of advancing the Coega IDZ would be a lawful purpose, and that, even if the operator permit were invalid, it would not invalidate the expropriation as it would not impact on the lawful purpose of the expropriation.

Proceedings before the Supreme Court of Appeal

[25] On appeal before the Supreme Court of Appeal,[30] the applicants challenged the decision of the High Court on a number of bases, and sought the same relief that had been sought in the High Court. The grounds of appeal included, inter alia, that the High Court had failed to have sufficient regard to the ongoing deprivation suffered by the applicants; that it erred in its interpretation of the regulations and its finding that it was not competent for the applicants to challenge the validity of the operator permit issued by the Minister for Trade and Industry; that it erred in finding that there was no unfair administrative action; and that it erred in holding that even if the operator permit had been issued unlawfully, an expropriation may nonetheless be in the public interest or for a public purpose.[31]

[26] The Supreme Court of Appeal dismissed the matter, holding that an expropriation for the benefit of the CDC would be permissible in terms of both sections 2 and 3(2)(h) of the Expropriation Act,[32] and that, although the CDC's operator permit was valid, the fact that a permit may be flawed did not necessarily taint all the activities undertaken in terms of that permit.

[30] Above n 1.

[31] See a further ground of appeal raised by the applicants, above n 29.

[32] Above n 8.

[27] In addressing the unfair administrative action argument, the Supreme Court of Appeal held that the failure to expropriate did not amount to administrative action as it did not constitute a deprivation of property in terms of section 25(1) of the Constitution. In reaching this conclusion, the Supreme Court of Appeal relied, almost exclusively, on the *Reflect-All*[33] judgment of this Court. The Supreme Court of Appeal held further that the failure to decide to expropriate did not amount to a "failure to take a decision" in terms of section 6(2)(g) of PAJA. The "insuperable bar", as Wallis AJA described it, was that:

> "[T]he administrative action sought to be condemned is action that can only occur in the future. In other words, we are asked to condemn as unfair something that has not yet happened and may not ever happen, and, if it does happen, may take place in a different legislative and economic environment. For all we know, if expropriation is decided upon in the future, the process will be a model of administrative fairness, with the [applicants] being given every opportunity to make representations, to claim adequate compensation and the like."[34]

[28] In refusing the relief sought by the applicants, the Supreme Court of Appeal held that the fact that an authority having powers of expropriation recognises the possibility that it may exercise those powers at some future stage does not entitle anyone to compel it to do so. The Supreme Court of Appeal dismissed the appeal with costs.

[33] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*).

[34] Above n 1 at para 44.

Nature of the proceedings before this Court

[29] The application for leave to appeal to this Court was directed against, firstly, the findings of the Supreme Court of Appeal regarding the unconstitutional deprivation of the applicants' property in terms of section 25(1) of the Constitution, and secondly, that the granting of the operator permit by the Minister for Trade and Industry did not comply with section 217(1) of the Constitution as required.[35] In an effort to bring clarity to the matter when setting it down for hearing, this Court distilled the issues raised by the applicants and directed the parties to address specifically the question of whether there had been an unconstitutional deprivation of property in terms of section 25 of the Constitution. The first stage of the enquiry is to determine whether the applicants have been deprived of their property. Only if this question is answered in the affirmative does it become necessary to determine whether the deprivation is unconstitutional.[36]

[35] See above n 29.

[36] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*First National Bank*) at para 46, this Court laid down the stages in a section 25 property analysis:

> "(a) Does that which is taken away . . . amount to 'property' for purpose of s 25?
>
> (b) Has there been a deprivation of such property by the Commissioner?
>
> (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
>
> (d) If not, is such deprivation justified under s 36 of the Constitution?
>
> (e) If it is, does it amount to expropriation for purpose of s 25(2)?
>
> (f) If so, does the deprivation comply with the requirements of s 25(2)(a) and (b)?
>
> (g) If not, is the expropriation justified under s 36?"

Submissions of the parties before this Court

[30] In argument, the applicants made it clear that the source of their challenge was the conduct of which they complain, in that the deprivation occurred outside of any law or legal provision. The applicants no longer challenge the validity of the operator permit. Instead, their cause of action is based squarely on the first part of section 25(1) of the Constitution which states that "[n]o one may be deprived of property except in terms of law of general application", with the focus being on the conduct of the respondents. It was argued that the cumulative effect of the respondents' conduct amounted to a deprivation of the full use, enjoyment and exploitation of their land. The applicants challenge the Supreme Court of Appeal's reliance on the *Reflect-All* judgment,[37] distinguishing it on the basis that it did not deal with the conduct of organs of state that had already resulted in deprivation for a considerable period of time.

[31] Before this Court, the applicants have abandoned the main relief that was sought in the High Court. They now seek only the alternative relief in the form of a mandamus compelling the first respondent to take a decision within a specified period as to whether it intends to expropriate the applicants' property or not.

[32] It is apparent that there has never been any request for the expropriation of the applicants' property before the Minister for Public Works, and the first respondent submitted that it has no current intention to expropriate the land. However, if the first

[37] *Reflect-All* above n 33.

respondent does want the land expropriated in the future for its benefit, it will have to make an application to the Minister for Public Works.

[33] The first respondent argues that there has been no deprivation of property, and that none of its actions amounts to a substantial interference or limitation of the applicants' use and enjoyment of their property. In addition, it is argued that there is no evidence that the applicants' business operations have been destroyed, nor can the CDC be held solely responsible for the difficulties experienced by the applicants in alienating their land. In view of my finding in this judgment, it is not necessary to deal with the alleged involvement of the Premier or the Ministers for Public Works and for Trade and Industry.

Should the application for leave to appeal be granted?

[34] It is by now trite that when considering whether to grant an application for leave to appeal, this Court will need to determine whether a constitutional issue has been raised and whether it is in the interests of justice for leave to be granted. It is clear in this matter that there is a constitutional issue that is engaged; however, the interests of justice determination warrants further consideration.

[35] In this Court, what the applicants initially sought to do was to establish an infringement of section 25 in order to prove broader infringements of other rights, in particular the right to just administrative action. In order to decide whether leave to appeal should be granted in this case, the specific question that must be determined is

whether it is in the interests of justice for this Court to grant leave where the cause of action has morphed into something quite different from that which was originally raised by the applicants.

[36] In principle, there is nothing wrong with relying on more than one right to establish a claim. In order for our rights-based constitutional democracy to thrive, the collection of rights and protections in the Bill of Rights may be seen as being interrelated and interdependent. Before this Court, the applicants only peripherally addressed the intersection of property law and administrative law, probably because of the directions issued by this Court and the applicants' abandonment of the main relief that had been sought in the High Court and the Supreme Court of Appeal. Although we were told at the hearing that they did not discard all reliance on administrative action, the applicants saw the matter as having "crystallised" into a section 25(1) challenge. Importantly, the question of deprivation has been fully ventilated, and I am persuaded that it is in the interests of justice for leave to appeal to be granted.

What constitutes a deprivation for the purpose of section 25(1) of the Constitution?

[37] Before this Court can decide whether there has been an infringement of section 25(1) of the Constitution, it must first establish that there has been a deprivation of property. As I have already explained, if there is no deprivation, then it is unnecessary to consider the requirements of section 25(1) with which the deprivation must comply.

[38] In *First National Bank*, it was stated that "[i]n a certain sense *any interference* with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[38] This notion was expanded upon in *Mkontwana*,[39] which stated that:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation . . . . [A]t the very least, *substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation*."[40]

[39] I am in agreement with the *Mkontwana* judgment that there must at least be "substantial interference" in order to warrant consideration by this Court in this matter of whether there has been an unconstitutional infringement of section 25(1). Indeed, the applicants argued the matter on the basis that the respondents' conduct amounted to substantial interference with their property.

[40] *First National Bank*, *Mkontwana* and *Reflect-All* dealt with the validity of laws that allowed the deprivation of property in certain circumstances. The present matter is different for two critical reasons. First, the challenge before us is targeted at the conduct of the respondents, not the legislation; and second, the bulk of the challenge comprises

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[38] *First National Bank* above n 36 at para 57. (Emphasis added.)

[39] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*).

[40] Id at para 32. (Emphasis added.)

threatened rather than actual conduct. However, despite these differences, the relevant legal principles remain pertinent. It is inappropriate to postulate precise rules to determine what amounts to substantial interference, and the enquiry must be context-specific.

[41] Our jurisprudence is clear that the physical taking of property is not required to constitute a deprivation, and it suffices for one or more of the entitlements of ownership to be impacted upon.[41] Whilst direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement. A court must give consideration to the extent to which the use and enjoyment of the land has been diminished. As stated by the Appellate Division in a different context, "[s]ubstantial interference is a matter of duration and degree."[42]

Has there been a deprivation of property in the present matter?

[42] The crux of the issue is whether the series of conduct of which the applicants complain has deprived the applicants of the full use and enjoyment of their property to such an extent that it amounts to a deprivation. I am not troubled by the applicants' individual complaints of the attempted expropriations, which have already been set aside; or the instances of spoliation, which appear to have been rectified; or the re-zoning application, which appears to have simply been a request to postpone making a decision

[41] *First National Bank* above n 36 at para 57; *Mkontwana* above n 39 at para 32.

[42] *The Treasure Chest v Tambuti Enterprises (Pty.) Ltd.* 1975 (2) SA 738 (A) at 748H.

until after the court proceedings had been finalised. Although the cumulative effect of these coupled with the ongoing threats of expropriation made by the CDC have certainly been of some annoyance to the applicants, in my view this does not amount to a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment".[43]

[43] It is by now clear that the threats of expropriation were made by the CDC which has no power to expropriate, and which has yet to make any application for expropriation to the empowered functionary. It does, however, appear that the CDC did always intend to approach the appropriate authority prior to the change in requirements in August 2007. Furthermore, these threats relate only to a potential future occurrence, for which the CDC and the other respondents would still need to comply with the legal and administrative requirements for a valid expropriation if the threats were ever to come to fruition. Moreover, the content of the advertisement, whilst possibly ill-conceived, was in my view information that the applicants would have been required to disclose to any potential buyer in the course of negotiating the selling price. Apart from the unsubstantiated assertion that they have suffered a diminution in market value, there is no other negative impact apart from uncertainty. In any event, we are now told that the first respondent has no current intention to expropriate the applicants' land.

[43] *Mkontwana* above n 39 at para 32.

[44] The nature of the complaint does not hold water when compared to what was held to constitute a deprivation by this Court. There has been no deprivation of property as there was in *FNB*, *Mkontwana* and *Reflect-All*. There may perhaps be instances in the future where the effect of threats of expropriation is so egregious that it may amount to a deprivation for the purpose of section 25(1), but that is not so in the case before us. Much of what the applicants challenge is nothing more than forceful bargaining, in which the applicants have willingly participated on occasion.

[45] As I have already pointed out, once the final permit was issued in terms of the 2006 amended regulations, it became clear that the applicants had to change tack and challenge the "conduct" of the CDC rather than the underlying law in terms of which that conduct took place. As soon as the attack on the provisional operator permit fell away, the conduct of the CDC in seeking to acquire the land before August 2007 becomes justified, albeit that it was misconceived in failing to approach the appropriate authority. Following the issue of the final operator permit in August 2007, there is nothing further to support the applicants' argument that they have been deprived of their property. Prior to August 2007, the CDC had to acquire the applicants' land by way of, inter alia, expropriation, and I have no doubt that the CDC fully intended to have the land expropriated in order to avoid having its provisional operator permit revoked. However, in terms of the final operator permit under the amended regulations, this is no longer the case.

[46] To my mind, the conduct the applicants complained of is not what was envisaged by the protection afforded in the property clause of the Constitution. One must not forget that property rights are not absolute.[44] It is inevitable that, with a scheme like the Coega IDZ, landowners in the designated area will be affected. In this case, however, at no time has that scheme disabled the applicants from using or exploiting their land. The applicants are still free to sell, develop, or make reasonable use of their land. In argument, the applicants were unable to sustain the contention that there was bad faith or abuse of power on the part of the first respondent. It is, for this reason, unnecessary to enquire into the relevance of these considerations in this Court's evaluation. Additionally, there is no reason that the first respondent should be barred from making an application for the expropriation of the applicants' property in the future if it so requires for the benefit of the development of the Coega IDZ, provided that it does so lawfully. Accordingly, the appeal falls to be dismissed.

Costs

[47] It seems to me that this is essentially a private commercial law dispute over land, which has become unnecessarily barbed because of the souring of the relationship between the applicants and the first respondent as a result of their failure to reach an agreeable price for the sale of the applicants' property. In view of the order that I make in this case, I find it appropriate that the applicants should bear the costs of the litigation before this Court.

[44] *Reflect-All* above n 33 at para 33.

Order

[48] In the result, the following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The applicants are ordered to pay the costs of the respondents, including the costs of two counsel.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J and Yacoob J concur in the judgment of Skweyiya J.

For the Applicants:	Advocate RG Buchanan SC and Advocate SC Rorke instructed by Rushmere Noach Inc.
For the First Respondent:	Advocate MR Madlanga SC, Advocate N Bawa and Advocate N Mayosi instructed by Fairbridges.
For the Second and Third Respondents:	Advocate SJ Grobler SC and Advocate BJ Pienaar SC instructed by the State Attorney, Port Elizabeth.
For the Fourth Respondent:	Advocate AE Bham SC and Advocate T Motau instructed by the State Attorney, Port Elizabeth.