THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case no: 09/09

In the matter between:

OFFIT ENTERPRISES (PTY) LTD **First Appellant**

OFFIT FARMING ENTERPRISES (PTY) LTD **Second Appellant**

and

COEGA DEVELOPMENT CORPORATION PTY) LTD **First Respondent**

PREMIER OF THE EASTERN CAPE GOVERNMENT **Second Respondent**

MINISTER OF PUBLIC WORKS **Third Respondent**

MINISTER OF TRADE AND INDUSTRY **Fourth Respondent**

Neutral citation: *Offit Enterprises v Coega Development Corporation* (9/09) [2010] ZASCA 1(15 February 2010)

Coram: HARMS DP, LEWIS, MAYA JJA, HURT and WALLIS AJJA

Heard: **3 November 2009**

Delivered: **15 February 2010**

Summary: Expropriation – when for a public purpose or in the public

interest – whether threat of constitutes unfair administrative action – whether issue of permit to operate Industrial Development Zone invalid – whether affects validity of potential expropriation – section 217(1) of Constitution – whether landowner can obtain order compelling authority to expropriate land.

ORDER

On appeal from: South Eastern Cape Local Division of the High Court (Jansen J sitting as court of first instance):
The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

WALLIS AJA (DP, LEWIS, MAYA JJA andHURT AJA concurring):

INTRODUCTION
[1] This is a somewhat schizophrenic case about expropriation in which the appellants seek, in the first instance, an order declaring that any expropriation in terms of current legislation of three properties owned by them, and falling within the Coega Industrial Development Zone (‘the Coega IDZ’), is neither permissible nor lawful and, in the alternative, an order compelling any one of the respondents desirous of expropriating the properties to initiate expropriation proceedings within one month of the

court's order. The court below[1] refused both orders and the appellants appeal with its leave.

[2] The Coega IDZ is a major government initiative to develop a new deepwater port at Coega and a surrounding industrial area in the Eastern Cape to the north of Port Elizabeth. Millions of Rand have been spent on this initiative and its benefit to the country as a whole and the Eastern Cape in particular, where poverty and unemployment are rife, is not disputed. The first respondent, Coega Development, has from the project's inception held a permit to operate the IDZ. It is a company in which the second respondent, the Eastern Cape Provincial government, has a stake together with the Department of Trade and Industry, represented in this litigation by the fourth respondent.[2]

[3] The appellants' interest is derived from the fact that between them they own three properties, in total extent 524 hectares in the heart of the IDZ. They describe these collectively as a prime freehold site positioned on the link road bisecting the IDZ and bordering on the area earmarked for the new Port Elizabeth airport. Since 2000, negotiations have taken place between them and the first respondent for the sale of the properties but these have not been successful, and on each occasion that they were resumed the asking price increased. In 2001 it was R1,35m for the hotel property and R883 750 for the remainder. The response was an offer of R1,35m for the hotel property and R669 000 for the remainder. In March 2003 the asking price had increased to R7m and by November 2003 it had risen to R15,5m. When the present proceedings were

[1] The judgment is reported as *Offit Enterprises (Pty) Ltd v Coega Development Corp (Pty) Ltd* 2009 (5) SA 661 (SE).

[2] The precise nature and status of the shares of these two arms of government in the first respondent is the subject of some debate in the papers but in my view nothing turns on this.

launched in 2007, the appellants were seeking a price of R40m on the open market.[3]

[4] From time to time during this period Coega Development indicated that it would seek to have the appellants' properties expropriated for incorporation into the Coega IDZ. We were furnished with correspondence that passed between the appellants and Coega Development over the years in which the latter indicated that it would invoke expropriation as a means of obtaining the properties. In February 2005 notice of expropriation was given by the second respondent, purporting to act in terms of the Eastern Cape Land Disposal Act 7 of 2000 and the Expropriation Act 63 of 1975. That notice was set aside by the high court. A further notice, issued by the first respondent on 15 December 2006, was likewise set aside. Thereafter nothing was done by any of the respondents in regard to expropriation although there was some skirmishing in the correspondence over fencing and the rehabilitation of the properties.

[5] On 4 June 2007 the appellants' attorneys wrote to attorneys

[3] To what extent these changes in the appellants' perception of the value of the properties were affected by the development of the Coega IDZ and hence would not be taken into account on expropriation in accordance with the *Pointe Gourde* principle (*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (PC) as discussed in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA)) is not canvassed and does not need to be considered. It is also unnecessary to examine the views recently expressed by the House of Lords on the *Pointe Gourde* principle in *Transport for London (London Underground Ltd) v Spirerose Ltd (in administration)* [2009] 4 All ER 810 (HL).

representing the first and second respondents and recorded that their clients were proceeding on the basis that the first and second respondents 'have no further interest in pursuing the acquisition of our clients' properties whether by private treaty or expropriation' and that they would commence marketing the properties. To that end a well-known firm of estate agents was appointed and on 20 June 2007 a full colour advertisement was published in Business Day offering the properties for sale at a price of R40m on the basis that they constituted a 'prime freehold development site … situated in the heart of the Coega Industrial Development Zone'.

[6] The publication of this advertisement stirred Coega Development into action. It published an advertisement in Business Day on 26 June 2007 referring to the previous advertisement and reading as follows:

'**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 this option to purchase land, but where this option does not yield positive results, an alternative to expropriate land in order to secure control of land over the proclaimed IDZ boundary will be taken. The CDC has resorted to expropriation in the past.

The same principle applies in this case.'

The appellants complain that notwithstanding this advertisement Coega

Development took no steps at all to expropriate the properties and that its advertisement had the effect of depressing the market as evidenced by an offer for R30m for the properties.

THE BASIS OF THE MAIN RELIEF

[7] Against that background the appellants launched these proceedings seeking the relief already described. They advanced three grounds in the founding affidavit in support of the main relief sought, namely a declaratory order that any expropriation for or on behalf of Coega Development would be unlawful. First it was said that any attempt to expropriate for the benefit of Coega Development could never be for a lawful purpose because, so it was claimed, it was then operating and (as matters developed) continued to operate the Coega IDZ unlawfully. This was based on an allegation that the provisional operator permits issued to Coega Development and extended from time to time under the regulations in force at the time had been unlawfully issued and extended. Second it was said that such expropriation was not competent in terms of the relevant legislation. Third it was said that given the long history of the matter any attempt to expropriate at that stage or thereafter would be administratively unfair and in breach of the appellants' constitutional right to fair administrative action.

[8] In a supplementary affidavit delivered after the amendment of the relevant regulations governing permits and the issue of a fresh permit to Coega Development, the appellants claimed that the new permit was likewise invalid and hence had not remedied the problem. As this argument was developed it became apparent that the appellants contended that there was an initial flaw in the earlier permits and that the terms of the new regulations rendered it impossible to remedy that flaw and legalise the activities of Coega Development. In addition it was contended that the issue of the new permit was invalid as being contrary to the procurement provisions of s 217 of the Constitution.

[9] The respondents accepted that only the third respondent had powers of expropriation in terms of the Expropriation Act. All of them denied any current intention to ask her to exercise her powers. In an affidavit from Mr Meyring, the Director: Property Owner Activities in the Department of Public Works, the person responsible for dealing with requests that the Minister should exercise her powers of expropriation, it was said that no such application had been made to the department in respect of the appellants' properties. On this basis the respondents contended that the declaratory relief sought in the first prayer was academic and that the court should in the exercise of its discretion not make an order. The challenge to the validity of the permits was disputed as were the contentions based on the right to fair administrative action and on s 217 of the Constitution. In regard to the validity of the permits the point was taken that none of the previous permits was set aside and that there was

no application to set aside the present permit. Accordingly, so it was argued, the principle laid down in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others*[4] applied and it was not open to the appellants to challenge the validity of the permits collaterally. It is appropriate to address these competing contentions before dealing with the alternative claim.

[10] The contention that an expropriation for the benefit of Coega Development would be unlawful has two aspects, namely that it would be for an impermissible purpose in terms of the Expropriation Act and that it would be impermissible because the activities of Coega Development are themselves unlawful because of the alleged invalidity of their permits. I will deal with each of these in turn.

THE EXPROPRIATION ACT

[11] Section 2(1) of the Expropriation Act gives the Minister the power to expropriate 'any property for public purposes'. As the Constitution provides in s 25(2)(a) that property can be expropriated for a public purpose or in the public interest the reference to 'public purposes' in the Expropriation Act must be construed as including both of these concepts in accordance with the principle that statutes must where possible be construed as consonant with the Constitution.[5] Public purposes are defined in s 1 as including 'any purposes connected with the administration of the provisions of any law by an organ of State'.

[12] In terms of s 3 the Minister is empowered to expropriate property on behalf of certain juristic persons. That power is expressed in the following terms:

'(1) If a juristic person … satisfies the Minister 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

[4] 2004 (6) SA 222 (SCA).

[5] In accordance with the approach in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) paras 26 to 37.

on reasonable terms, the Minister 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.'

[13] The appellants contend that an expropriation for the benefit of Coega Development would not be legal because (i) it could not be an expropriation for public purposes under s 2(1), and (ii) Coega Development is not a juristic person contemplated in s 3(2)(h). In my view both contentions are incorrect and an expropriation directed at securing for Coega Development the land falling within the Coega IDZ would be a lawful expropriation under these provisions of the Expropriation Act.

[14] I first deal with the provisions of s 2(1). The expression 'public purposes' is a broad one including 'things whereby the whole population or the local public are affected and not only matters pertaining to the State or the Government'.[6] In *Administrator, Transvaal v J van Streepen (Kempton Park) (Pty) Ltd*[7] this court dealt with an expropriation under a provincial ordinance that gave the power of expropriation 'for any purpose in connection with the construction or maintenance of any road'. In order to upgrade certain roads the administrator expropriated the bulk of the respondent's property so as to accommodate the relocation of a private railway line providing access to a factory in the vicinity of the road. The intention was to transfer the land to the owner of the railway line. The validity of the expropriation was challenged on the grounds that

[6] *Fourie v Minister van Lande en 'n ander* 1970 (4) SA 165 (O) at 172B-175A; W*hite Rocks Farm (Pty) Ltd and others v Minister of Community Development* 1984 (3) SA 785 (N) at 793H-I.
[7] 1990 (4) SA 644 (A).

the power to expropriate could not be used for the purpose of acquiring property and then transferring it to a private third party. Smalberger JA rejected that proposition and said:[8] 'It is a *non sequitur* that because land must be acquired in the name of the State it must be acquired for the use of the State.'

[15] The learned judge went on to draw a distinction between public purposes and the public interest and said that[9]:

'Expropriation, generally speaking, must take place for public purposes or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. *Non constat* that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case.'

It was not explained why it was said that the acquisition of land for the benefit of a third party cannot be for a public purpose.[10] It may be that this flowed from a perception of the role of the State and private participants in the public arena that is different from that current at present, where many functions hitherto regarded as public are carried out by private concerns in co-operation with state authorities. In particular many major development initiatives are undertaken between government at one of the three tiers recognised by the Constitution and private enterprise through what are called in common parlance public–private partnerships. There is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose. Thus the expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself, using the same contractors. I do not think it can be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company.

[16] It is helpful in this regard to consider the position in other jurisdictions. In the United States the power of eminent domain[11] can be exercised only for a public purpose and not for purely private purposes.

[8] At 660I.

[9] At 661C-D.

[10] Geoff Budlender, Johan Latsky and Theunis Roux, *Juta's New Land Law* (looseleaf 1998) 1-50.

[11] As expropriation is known in that country.

This is the interpretation given to the Fifth Amendment guarantee that there can be no taking of private property for public use without just compensation. However the US Supreme Court has held that it may be exercised to enable a run-down area to be redeveloped by private entrepreneurs.[12] In an even more far-reaching decision, that has resonance in this country in the light of s 25(4)(a) of the Constitution, it held that it was permissible to exercise the power in order to compel lessors to sell their leased properties to lessees in order to secure more equitable land ownership in the state of Hawaii.[13] In its most recent decision it held that the exercise of the power of eminent domain to take private property for the purposes of an urban development project was a public use even though the project was to be undertaken by a non-profit private developer and the land in issue was to be transferred to the developer.[14] The effect of these decisions is that the notion of public purposes is broadly and generously construed by the courts. The position in France, Germany, Italy and Mexico and other countries appears to be similar.[15] The European Court of Human Rights has followed the same path.[16]

[17] Reverting to the position of Coega Development, its shareholders are Eastern Cape Development Corporation (Pty) Limited, a company the shares in which are controlled by the Eastern Cape government and the Department of Trade and Industry, both of which operate squarely in the public sector. The Eastern Cape Development Corporation (Pty) Ltd is a provincial government business enterprise listed in part 3D of Schedule 3

[12] *Berman v Parker* 348 US 26 (1954).
[13] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).
[14] *Kelo v City of New London* 545 US 469 (2005). The decision has apparently prompted a number of state legislatures in the United States of America to narrow the purposes for which eminent domain may be invoked.
[15] G M Erasmus (ed) *Compensation for Expropriation: A Comparative Study* Vol 1 (1990), pp 40 (France), 86 (Germany), 107 (Italy) and 270 (Mexico).
[16] *James v United Kingdom* (1986) 8 EHRR 123.

to the Public Finance Management Act 1 of 1999. The responsibility of Coega Development to develop the Coega IDZ is of national and regional importance and the development takes place in accordance with authority given under a statute. Providing industrial development with its concomitant benefits of employment and economic growth is manifestly a public purpose and indeed a central public purpose in South Africa. The establishment of a deep-water port to accommodate changes in world shipping is vitally important in a country whose international trade is largely by sea. If the development of the Coega IDZ had been undertaken by the national or provincial government it could never have been suggested that an expropriation for the purposes of the development was not for public purposes. I fail to see why it should be any different because a company owned by government at the national and provincial level undertakes the task instead.

[18] For those reasons I am of the opinion that an expropriation of the appellants' properties for the purposes of their inclusion in the Coega IDZ would serve a public purpose and it can make no difference whether the properties are retained by the national government as the expropriating authority or transferred to Coega Development. In any event such an expropriation would plainly be in the public interest once it is accepted that it furthers the development of the Coega IDZ. That suffices to dispose of the point that an expropriation would not be permissible under s 2 of the Expropriation Act.

[19] I now turn to explain why, in my view, an expropriation would also be permissible under s 3(2)(h) of the Act, so that the property could be expropriated and transferred directly to Coega Development.

[20] There is no dispute that Coega Development is a juristic person. It was faintly argued before us that because it was originally established as a property-owning company it was not ‘established’ for the promotion of the matter of public importance in question, namely the development of the Coega IDZ. However that is an artificial meaning to give to the notion of establishment. It can surely make no difference whether a company is formed specifically for a particular purpose, or is acquired as an ‘off the shelf’ company from a firm of auditors, or is acquired from its existing shareholders as a dormant entity and its memorandum and objects altered to fit its new purpose, as happened in the present case.

[21] The next question that arises under s 3 is whether the object of Coega Development is to promote ‘a matter of public importance’. If it is the acquisition on its behalf is deemed in terms of s 3(1) to have been for ‘public purposes’. Its present purpose and function is to undertake and operate the development of the Coega IDZ, which is accepted as being an important government project. On its face therefore, and in the light of the facts set out in para 17 above, it exists ‘for the promotion of a matter of public importance’. It follows that an expropriation of property to enable it to fulfil that purpose, where that purpose cannot be attained without such expropriation, is taken to be equivalent to a public purpose and such expropriation would be legally permissible under s 3(2)(h).

THE VALIDITY OF THE IDZ PERMIT

[22] On the assumption that an expropriation would otherwise be permissible in terms of the present Expropriation Act[17] the appellants

[17] What lends a surreal air to the arguments in the present case is that a revision of the Expropriation Act to bring it in line with s 25 of the Constitution has been underway for some time and it has been announced that a new Act is to come before Parliament shortly.

contend that as – so they say – Coega Development is operating the IDZ unlawfully, because of the alleged invalidity of its permit, an otherwise permissible expropriation is rendered impermissible. I have grave doubts whether that is correct. The fact that the permit may be flawed or liable to be set aside does not seem to me to alter the fact that an expropriation would serve a public purpose and be in the public interest for the reasons I have already given. The fact that a person is conducting an activity without a lawful permit or licence does not necessarily mean that the activity is so tainted by unlawfulness that it has no legal effect. Whether it is will depend upon a consideration of a number of different matters.

[23] It is in this context that the schizophrenic nature of the case becomes apparent. The appellants intentionally refrain from seeking to set any of the operating permits aside and having them declared invalid. The reason is simple and apparent. They want the advantages flowing from the declaration of the IDZ. They therefore do not challenge the validity of the permits or address the implications of their invalidity. They want Coega Development to continue to operate the Coega IDZ, which is accepted as being in the public interest, and are content for it to do so under its present permit. On the other hand, they wish to retain their land and sell it to the highest bidder with all the advantages of it being within the Coega IDZ and none of the disadvantages. If, as they anticipate, the Coega IDZ is successful they will profit handsomely from this stance. However, I know of no warrant for such an approach and it smacks of having one’s cake and eating it.

[24] However, it is unnecessary to explore this question further since in my view there is no merit in the contention that the permit under which

Coega Development is operating the Coega IDZ is invalid. In the papers and in argument a variety of reasons were advanced in support of the contention of invalidity ranging back to the original provisional operator permits under which Coega Development commenced its activities. As I take the view that the current permit under which it is operating at present is valid it is unnecessary for me to delve into this historical material.

[25] The permit currently held by Coega Development was issued on 7 August 2007 under the revised regulations that came into operation only after the present litigation commenced.[18] It is an IDZ operator permit, defined as 'the permit granted by the Minister to a company authorising such company to develop and operate a new or existing IDZ under these Regulations'. The appellants say that this permit was not validly issued. The following regulations were relied on in support of the appellants' argument:

'16 Application for IDZ operator permit

(a) Any party interested in obtaining an IDZ operator permit shall, in the prescribed manner, submit a completed IDZ operator permit application to the Minister.
(1) In case of a new IDZ, the application for an IDZ operator permit must accompany the application for designation of an area for which the IDZ Operator permit is sought.

(2) In case of an existing IDZ, the provisions of regulation 20 regarding transfer of an IDZ Operator permit, must be complied with.

(b) An applicant for an IDZ operator permit must:
(1) show its control of the land within an existing IDZ or within the area under application designated for development as an IDZ or within a new IDZ pertinent to its application in the detail and manner as indicated in the guidelines;
20 Transfer of an IDZ operator permit
(a) An IDZ operator may transfer its interests in an IDZ to another company, provided that such a company is a holder of a valid IDZ operator permit.

[18] The regulations are promulgated in terms of the Manufacturing Development Act 187 of 1993 as the Industrial Development Zone Programme Regulations and published under GN R1224 in GG 21803 of 1 December 2000 and amended by GN R1065 in GG 29320 of 27 October 2006.

(b) For the purposes of taking transfer of the interests referred to in subsection (a), the transferee shall:

(1) Comply with the requirements contained in regulation 16 of this Regulation;
(2) Apply for an IDZ operator permit in the manner prescribed by regulation 17 of this regulation …'

[26] The appellants' argument was that since Coega Development was not seeking a permit in respect of a 'new' IDZ r 16(1) was inapplicable, and since it was likewise not seeking a 'transfer' of its existing permit r 16(2) was also inapplicable. In any event they contended that Coega Development was not the holder of a valid permit at the time it was issued with a permit under the revised regulations, as required by r 20(1). Accordingly a transfer of its existing permit would have been impermissible.

[27] These arguments cannot succeed because they depend upon the wrong regulations. The applicable regulation is r 57 containing the transitional provisions necessary because the 2006 amendment to the regulations effectively embodied a new scheme for the operation of industrial development zones. This regulation reads as follows:

'57 Transitional Provisions

(a) Any designation of an IDZ already made shall not be made void by reason of this amendment, and shall be considered to have been made in accordance with the requirements stipulated in these Regulations.

(b) Any suspension or withdrawal of a designation already made shall be considered to have been made in accordance with the requirements stipulated in these Regulations.

(c) Any increase or decrease of the total landmass of the area designated as suitable for development as an Industrial Development Zone already made shall be considered to have been made in accordance with the requirements stipulated in these Regulations.

(d) Any provisional IDZ operator permit issued in terms of the Regulations, shall remain valid and enforceable in terms of the applicable terms and conditions.
(e) The holder of an IDZ provisional permit may at any stage apply for the IDZ operator permit under this regulation and must comply with all regulations regarding the IDZ operator permit.'

[28] I have no doubt that this regulation's purpose, properly construed, was to preserve the status quo in regard to all the existing industrial development zones at the time these regulations were promulgated, of which we were informed from the Bar there were no more than three or four in the entire country. Existing designations of industrial development zones are expressly preserved so that the Coega IDZ remained in existence as if it had been constituted under the revised regulations. Existing IDZ provisional operator permits were to remain valid and enforceable. In terms of r 57(e), under which the new permit was issued, the holder of an existing provisional operator permit was entitled to apply for the issue of an IDZ operator permit. This is precisely what Coega Development did and such a permit was granted.

[29] It was argued on behalf of the appellants that the reference in r 57(d) to an existing permit remaining valid and enforceable mandated an enquiry into the validity of existing permits for the purposes of r 57(e). I do not agree. It seems to me that the clear underlying assumption of the regulations was that existing provisional operator permits were valid and

enforceable and that for future purposes under the revised regulations this should be taken to be the position. (I leave aside situations where they might have been vitiated by fraud or corruption and confine myself to situations such as the present where there may have been technical deficiencies in their issue that could possibly have rendered them susceptible to being set aside on review by an interested party.) In my view the intention of the amended regulations was to draw the curtain across any arguments there might have been over the validity of existing permits and to treat all those extant at the time of the amendments as being valid and continuing in existence. Bearing in mind the fundamental change wrought by these amended regulations it cannot have been the intention of the Minister to have a situation where there could be arguments in the future about the validity of what had been done in the past under the previous regulations. It is clear from the record that practical difficulties were known to exist with existing permits and in particular with the renewal of permits from time to time. I can think of no good reason why the Minister should have thought it desirable to preserve a situation of uncertainty that had generated the need for revised regulations in the first place.

[30] Once it is recognised that the effect of the transitional provisions was to cure any problems that might have existed at the time of their

promulgation in regard to the validity of the provisional operator permits held by existing operators the only question is whether the permit that Coega Development applied for and obtained under r 57(e) was validly issued.

[31] Only one argument was advanced in support of invalidity arising solely from the issue of the new permit under the amended regulations. It was that in terms of r 16(b)(1) it was necessary for Coega Development to show its control of the land in the existing IDZ and it had failed to do so, in part at least, because it did not control the appellants' land.[19] The contention was that the control had to exist at the time the permit was obtained and had to consist in ownership or at least long-term leasehold rights over all the property in the IDZ. In my view that is a narrow and technical argument that is inconsistent with other indications in the regulations.

[32] In the first instance I do not construe the requirement that the putative operator should 'show its control of the land within the existing IDZ' as requiring that there be actual legal control existing at the time of the application for a permit, failing which the application must fail. There is no obvious justification for such a reading. The development of an IDZ

[19] The need to comply with r 16(b)(i) flowed from the provisions of r 57(e).

is by its very nature a long-term operation. The area encompassed by an IDZ is likely to be substantial. As the development progresses changing circumstances may well dictate that its intended scope and area should alter. Why then should it be necessary for the potential operator to demonstrate from the outset that it controlled every piece of land within the proposed IDZ area? I can see no reason for that.

[33] In my view the requirement that the applicant for a permit 'show its control' means nothing more than that it indicate with appropriate clarity the manner in which control is to be obtained and exercised as the development of the IDZ proceeds. In the case of properties that it did not already own I see nothing wrong with it saying in its application that its control consisted of an intention to acquire by purchase any land it did not own and, if that could not be achieved by agreement, that it intended to approach the third respondent to exercise her powers of expropriation under the Expropriation Act so as to enable it to acquire the land. It could if necessary add that if all else failed it would ask that the area of land designated for the IDZ be altered to exclude the property in question. Of course, whether that would be regarded as adequate control would depend on the particular circumstances of the proposed development. Such an approach in relation to a key piece of land for the proposed port might have been regarded as inadequate. However the history of the Coega IDZ

suggests that this approach in relation to the appellants' properties, which have never been under the control of Coega Development, would not have occasioned difficulties.

[34] It is apparent from the record that this is precisely the basis for control that Coega Development submitted in support of its application for a permit. In doing so it was acting consistently with the guidelines that are an important component of r 16(b)(1). Those contemplated the very scenario I have sketched and the permit issued to Coega Development contained a condition that it should provide the Manufacturing Development Board, which oversees the grant of permits on behalf of the fourth respondent, with bi-annual reports on the progress made with expropriation proceedings in respect of the land not yet under its control. It also provided that if the conclusion was ultimately reached by the Board that Coega Development would not be able to obtain control of any particular portion of land it was entitled to recommend to the Minister that the land in question be excluded from the permit area.

[35] It follows that the attack on the validity of Coega Development's permit to operate the Coega IDZ fails.

FAIR ADMINISTRATIVE ACTION

[36] I turn then to the argument based on the right to fair administrative action. As I understand the argument it is advanced on the following basis. An act of expropriation constitutes administrative action in terms of PAJA.[20] In terms of s 6(2)(g) of PAJA a decision includes a failure to take a decision. The failure to take a decision in regard to the expropriation of the appellants' properties is therefore administrative action. It proceeds that in view of the history of the matter and the impact that the ongoing threat of expropriation has had on the value of these properties the appellants have *pro tanto* been deprived of property in terms of s 25(1) of the Constitution. It follows, so the argument goes, that the failure to take the decision to expropriate has not only itself been unfair and given rise to a breach of their constitutional rights, but in addition, to permit it to be taken at this stage, after all the inconvenience and financial detriment that the appellants have undergone, would itself be unfair. Hence any expropriation that took place now or hereafter would constitute unfair administrative action and an interdict should issue to prevent it.

[37] In my view both the constitutional argument based on s 25(1) of the Constitution and the syllogism leading to the conclusion that the failure to take a decision to expropriate the property is administrative action are incorrect. I will deal with each in turn.

[20] The Promotion of Administrative Justice Act 3 of 2000.

[38] I accept that the issue of the possible expropriation of the properties has been on the table since around 2000 or at least 2001 when Coega Development first obtained a provisional operator permit. I accept that there is no current plan to undertake an expropriation. However, the possibility of an expropriation in the future remains real. I also accept that this has some depressing effect on the price that the appellants could hope to receive for their properties in the open market and puts a damper on any development proposals, although it is not suggested that it otherwise prevents the appellants from using the properties for whatever purpose they deem appropriate.

[39] None of this amounts, however, to the type of substantial interference or limitation of the owners' use and enjoyment of their properties that is the hallmark of a deprivation of property under s 25(1) of the Constitution.[21] The situation of the appellants can be compared with that of the appellants in the recent decision by the Constitutional Court in *Reflect-All 1025 CC and others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government*[22] where it was held that the limitation on owners' rights occasioned by the proclamation of proposed new roads was not an expropriation or a prohibited deprivation of property, even though it had the effect of sterilising the properties affected for many years and no end was in sight.

[21] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* 2005 (1) SA 530 (CC) at [32].
[22] [2009] ZACC 24, 2009 (6) SA 391 (CC).

There was not even any clarity on whether the properties affected would in fact ever be used for new roads as times had changed and the perception of the need for such roads had altered. Nonetheless the owners could do nothing with the affected land.

[40] In giving the judgement of the court Nkabinde J said (para 33):

'The protection of the right to property is a fundamental human right, one which for decades was denied to the majority of our society. However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of land ownership, the State may regulate the use of private property in order to protect public welfare, eg planning and zoning regulation, but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all State interference but to safeguard it from illegitimate and unfair State interference.'

[41] It is regrettably so that planning decisions very often take time to implement and may be subject to alteration over time. While there is uncertainty property owners will be affected by that uncertainty and hampered in their unfettered ability to use or develop their properties as they might otherwise wish. If they are sellers they may find that buyers are put off by the uncertainty and prefer to invest elsewhere unless they can be sure of getting the property at a bargain price. However, this is a hazard attendant upon the ownership of property. It is no different in effect from a failure to foresee a shift in business patterns from the city centre to the suburbs that may leave owners of properties in the city without tenants and with properties that have markedly declined in value. It is not possible to construe such financial disadvantage as a deprivation of property where it flows from the possibility of expropriation at some stage in the future any more than the threat of a

large industrial development by a private developer, that creates similar uncertainty and has a similar adverse effect on market prices of land, would constitute a deprivation of property. In the present case the delay has hardly been undue given the nature of the Coega IDZ and it is accordingly unnecessary to explore whether the creation of such uncertainty over a very protracted period may constitute a deprivation.[23]

[42] That conclusion removes a fundamentally important plank from the appellants' argument concerning unfairness. If what has occurred does not constitute a deprivation of property for the purposes of the Constitution, what other legal ground is there for condemning the failure to take a decision to expropriate as unfair? In my view the answer is that there is none.

[43] However, that is not the only reason why this contention must fail. The two premises upon which reliance is placed, namely that the decision to expropriate constitutes administrative action and that a failure to take an administrative decision may constitute administrative action, are correct. However they do not justify the conclusion that the failure to decide to expropriate in the present case is administrative action. The reason is that where s 6(2)(g) of PAJA refers to the failure to take a decision it refers to a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues. It is directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling. As such its focus is the person who applies for an identity document, government grant, licence, permit or passport and does not receive it within an appropriate period of time and whose attempts to chivvy officialdom along are met with: 'Come back next week.' It is not directed at decisions in regard to future policy such as whether property will be expropriated. The difficulty of applying it in that context is well illustrated by the present case where the only person with the power of expropriation, the third respondent, has not even been approached in that regard much less considered or had reason to consider that possibility. To suggest that she or the officials in her department have failed to take a decision of the possibility of which they

[23] In *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 the European Court of Human Rights rejected the notion that the issue and maintaining in force of expropriation permits for 23 and 8 years respectively, accompanied by prohibition notices that prevented development for 25 and 12 years respectively was either a deprivation of property or a de facto expropriation.

were blissfully unaware until this litigation commenced cannot be correct.

[44] There is one other problem that constitutes an insuperable bar to this contention being upheld. It is that the 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 appellants being given every opportunity to make representations to claim adequate compensation and the like. We simply do not know. In my view it is not in general permissible to seek an interdict against future administrative action when the parameters of such action are so indistinct. For those reasons I reject the appellants' claim to relief based on unfair administrative action.

CONSTITUTION s 217(1)

[45] That leaves the contention based on s 217(1) of the Constitution. It reads:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

The appellants contended that the application for an IDZ operator permit by Coega Development fell within this section and accordingly, in order to comply with this section, a process had to be put in place that would have enabled third parties to apply for such permit. In my view there is no substance in that contention. The issue of an operator permit under the regulations is not a contract for the supply of goods and services but a licensing activity directed at authorizing Coega Development to carry out the task of developing the Coega IDZ. That is something wholly distinct from contracting to supply goods and services to organs of state.

[46] For those reasons, which differ somewhat from those of the court

below, it correctly dismissed the claim for relief under the first prayer.

ALTERNATIVE RELIEF

[47] That leaves the alternative prayer in terms of which the appellants sought an order that any of the respondents who wish to expropriate should make up their minds now and give effect to that decision within a month from the date of the court order. It is a claim that can be disposed of shortly.

[48] The timing of an expropriation is generally a matter within the discretion of the expropriating authority,[24] which will have to take into account the priority of the project requiring expropriation, the availability of funds and competing needs in respect of other projects in which it is engaged. Those are matters involving decisions on what Professor Hoexter has called 'polycentric issues',[25] where courts should in the proper exercise of the judicial function hesitate to intervene and particularly not with the sole view of galvanizing the decision-maker into action in the interests of one party without considering the broader picture.[26] There are cases where the timing by a local authority of the decision to expropriate has come in for criticism as being premature and directed at securing the property at a favourable price. See for example *Broadway Mansions (Pty) Ltd v Pretoria City Council*.[27] However in that instance this court held that the timing was a matter for the local authority

[24] A Gildenhuys *Onteieningsreg* 2 ed (2001), 77: Die beoordeling van die vraag of 'n onteiening wenslik of noodsaaklik is, hoort by die onteienaar.'
[25] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 pp 501 – 2.
[26] *Ekurhuleni Metropolitan Municipality v Dada NO and others* 2009 (4) SA 463 (SCA) para 10.
[27] 1955 (1) SA 517 (A) at 522D-F.

provided it did not exercise its powers for an improper purpose. In my view the same principle applies in the other direction. The fact that an authority having powers of expropriation recognizes the possibility that at some future stage it will have to exercise those powers does not entitle anyone to compel them to do so. The protection that the Constitution affords against arbitrary deprivation of property may enable a property owner to seek relief in certain situations, but as a general proposition it seems to me that the expropriating authority must be left to decide for itself when to expropriate. For a court to intervene to compel it to make that decision would trespass across the boundaries constituted by the separation of powers into the terrain of the executive.

CONCLUSION AND ORDER

[49] It follows that the appellants were not entitled to either form of relief that they sought and the application was rightly dismissed.

[50] The appeal is dismissed and the appellants are ordered to pay the costs thereof, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
ACTING JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	R G Buchanan SC (with him S C Rorke) Instructed by Rushmere Noach Inc, Port Elizabeth Webbers Attorneys Bloemfontein.
FIRST RESPONDENT:	R Madlanga SC (with him N Mayosi) Instructed by Fairbridges Attorneys, Cape Town; McIntyre & Van der Post, Bloemfontein.
2nd and 3rd RESPONDENTS:	S J Grobler SC (with him B J Pienaar) Instructed by State Attorney Port Elizabeth and Bloemfontein.
FOURTH RESPONDENT:	A E Bham SC (with him T Motau) Instructed by State Attorney Port Elizabeth and Bloemfontein.