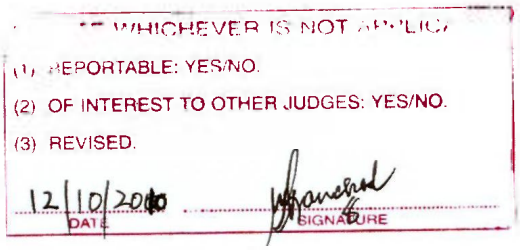
IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 12 October 2010

CASE NO: 11375/08



In the matter between:

ERF 16 BRYNTIRION (PTY) LTD **Applicant**

and

THE MINISTER OF PUBLIC WORKS **Respondent**

JUDGMENT

RANCHOD, J

[1] The applicant in this matter seeks an order:

1.1 reviewing and setting aside the decision of the respondent taken on 03 January 2008 to expropriate the applicant's immovable property, Erf 16 Bryntirion, Registration Division J.R. , Gauteng, held in terms of deed of transfer No. 25169/1995;

1.2 declaring the notice of expropriation annexed to the application as annexure "FA27" to be invalid and of no force or effect; and

1.3 ordering the respondent to pay the costs of the application.

[2] In its founding affidavit the applicant sets out some fourteen grounds of review. However, they essentially can be reduced to three categories, namely, that the expropriation-

2.1 was not for a "*public purpose*" as contemplated by the Expropriation Act 63 of 1975 ("The Act")

2.2 was procedurally unfair; and

2.3 was not justified by the reasons given by the respondent

THE FACTS

[3] It is necessary to set out the facts in some detail to gain a proper perspective of the matter.

[4] During 1993, Erf 16 Bryntirion ("the property") which is situated in Dumbarton Road, Pretoria was bought by a purchaser from the then government shortly before the first democratic elections.

[5] During 1997 the applicant purchased the property, which had been advertised for sale in the open market. At the time it was zoned for government use. The applicant renovated and extended the house on the property. During 1999 the applicant successfully applied to the Pretoria City Council for the rezoning of the property for use as a guest house. However, it has since then only been used as a family home.

[6] Over a period of years, the applicant was approached by various estate agents acting on behalf of Embassies and other foreign organizations, inquiring whether the applicant is prepared to sell the property. In each case the applicant advised that he is not interested in selling the property. During September 2005 the Department of Public Works ("the Department") notified the applicant in writing of its intention to purchase the property at market value. The respondent (who is the responsible Minister for the department) furnished the following reason for the intended purchase -

> *"As the Government is intending to upgrade the estate, your property is situated on the main entrance to the Bryntirion Estate and if not purchased will have a detrimental impact on the security planning for the estate as a whole."*

It will be noted that during this first communication the respondent indicated that the reason for the intended purchase of the property was for the greater security of the Bryntirion Estate.

[7] The Bryntirion Estate comprises the residence of the President of the country, the Presidential guest house and houses of some cabinet ministers. The applicant's property is the only private property which is situated adjacent to the estate. An issue was made of the fact that the respondent referred to the applicant's property as being within the Bryntirion Estate whereas the applicant contended that it did not form part of it. In my view, nothing much hinges on this; what is clear is that although the property falls within an entire block of which the Bryntirion Estate is the major part, the applicant's property is the only private property that falls within that block which is referred to as the Brynterion Estate. In fact the respondent in the aforesaid letter stated:

> *"The intention to purchase your property is being informed by the fact that all properties within the estate boundaries are Government owned except for one*

land parcel viz Erf 16 Bryntirion which is owned by your company Erf 16 Bryntirion (Pty) Ltd."

[8] In response to this letter, the applicant took the attitude that it had *"absolutely no intention of selling the property"*. The applicant further stated in the letter that it was willing to co-operate with the Department of Public Works to ensure that the security of the Bryntirion Estate is not compromised.

[9] On 22 September 2005, the Department again addressed a letter to the applicant's attorneys appealing to it to reconsider its position. It also requested a meeting in order to explain to the applicant the reasons for the Department's proposed acquisition of the property.

[10] In a letter dated 29 September 2005 the applicant's attorneys rejected this request of the respondent and stated that the property was of *"great monumental and sentimental value"* to the applicant and not one which the applicant would like to relegate to a commercial transaction.

[11] In a letter dated 26 January 2006, the regional manager of the Department wrote to the applicant's attorneys and referred to previous communication between the parties and said -

"the department has taken all relevant considerations [into account] in arriving at a decision to expropriate the aforesaid property".

The applicant was afforded 21 days to make representations and be heard before the property was finally expropriated. In subsequent correspondence between the parties the applicant took issue with the fact that the Regional Manager of the Department had

said that a *"decision"* was taken by "the Department" to expropriate when the applicant had not at that stage been afforded an opportunity to be heard. I will revert to this later on in this judgment.

[12] In a letter dated 08 February 2006, to the Department, the applicant's attorneys notified it of the applicant's objection to the expropriation of the property and made a detailed request for information in order to afford the applicant an opportunity to make representations in that regard.

[13] In a letter dated 9 February 2006 the Department undertook to compile and forward the documentation requested by the applicant's attorneys. However, in spite of this undertaking by the Department, the respondent, that is, the Minister of Public Works informed the applicant in a letter dated 4 August 2006 that the request for information was premature. The respondent goes on to mention that the Government's intention was to enhance the security planning for the Bryntirion Estate as a whole and that the acquisition of the applicant's property would be for a public purpose and in the public interest. The respondent further says -

> *"In the event a decision is made to acquire your property, your interests may be affected.*
>
> *You are therefore granted an opportunity in terms of section 3 of the Promotion of Access to Justice Act 3 of 2000 ("PAJA") to respond in writing to our department as to why your property should not be acquired for public purposes and in the public interest.*
>
> *Kindly send your representation within 14 days from the date of receipt of this letter to our department."*

[14] The applicant's attorneys then addressed a further letter, dated 13 September 2006, to the respondent. In this letter the applicant complained that there was a clear conflict between the statement in the letter of 26 January 2006 that the administrative Head of the Department of Public Works had arrived at a decision to expropriate the property and the statement in the respondent's letter of 4 August 2006 that no decision to expropriate the property had been taken. Also that the Department had not complied with its duty in terms of section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and that it was under those circumstances impossible for the applicant to make meaningful representations regarding the intended expropriation of the property. It was also pointed out that despite the undertaking by the Regional Manager of the Department in his letter of 9 February 2006 to provide the information requested by the applicant, such information was now being refused. The request for the required information was then again repeated.

[15] In a letter dated 10 October 2006 the Acting Director General of the Department set out to explain the alleged contradiction between the department's letter of 26 June 2006 and the Minister's letter of 4 August 2006. The letter stated -

> *"As you are aware, the decision to expropriate rests with the Minister. Once such decision is taken, the law requires the Minister to write a formal letter of expropriation in terms of the relevant provisions of the Expropriation Act 63 of 1975. The Department is entitled to formulate a view in such matters, which view is then communicated to the Minister by way of advice.*
>
> *The Department has communicated with your client and yourselves with a view to addressing your concerns ahead of the Minister's consideration of this matter. The*

Department has accordingly given its view and decision on the matter. This will be communicated to the Minister.

The reasons for the intended expropriation are clearly outlined in the Minister's letter of 4 August 2006 addressed to your client. For the record we reiterate:

1. Your client's property is the only private property within the Bryntirion Estate;

2. The positioning of your client's property on the Estate makes it impossible to cordon off the entire Estate for effective security measures; and

3. The Government intends to upgrade the Estate with a view to, amongst others, enhancing the security planning for the Estate as a whole."

[16] The Acting Director-General then proceeded to furnish answers to the questions posed earlier by the applicant's attorneys but withheld certain information which, he said, would compromise matters of security. Information was not provided in relation to questions concerning -

- the plans to upgrade the estate
- alternative entrances to the Estate
- copies of the master plan to develop the Bryntirion Estate
- and the fate of applicant's property after expropriation.

The applicant was then given seven days after receipt of the letter to file representations with regard to the proposed expropriation.

[17] In a letter dated 2 November 2006 the applicant's attorneys informed the Acting Director-General that his letter dated 10 October 2006 was "disingenuous". However, the applicant's attorneys proceeded to make what they stated to be "*preliminary*

representations as to why the property should not be expropriated". Applicant's attorneys further contended that the refusal to provide the requested information was contrary to PAJA which "does not permit a refusal of relevant information on the grounds of confidentiality".

[18] I pause here to mention that the refusal by the respondent to disclose certain information on the grounds of security concerns was the subject of a separate interlocutory application by the applicant. That application was dismissed with costs by Seriti J. I will revert to that presently.

[19] In the preliminary representations that the applicant made it stated that –

- the expropriation was not in the public interest or for a public purpose;
- that no proper and rational consideration had been given to alternatives to expropriation;
- that security of the Bryntirion Estate will not be more effective or better managed by including the applicant's property in the Estate;
- that in the ten years that the applicant occupied the property with the State as it's neighbour on all sides except for the street front there were no suggestions that the applicant's presence had constituted a security risk or impediment to the security of the adjoining properties by the government officials;
- that there were no real threats to the security or residents of Bryntirion Estate which was any greater than the security risk to residence in the adjoining residential areas of Pretoria has manifested and which reasonably requires

government ministers and officials to be segregated in a security estate from persons resident in the adjoining areas;

- that the Department's refusal to disclose what would happen to the property after expropriation indicated that it was not a *bona fide* expropriation in the public interest or for a public purpose; and
- that the applicant's property had been excluded from the proposed consolidation plan of the Bryntirion Presidential Estate as prepared by consultants Metro Plan. This indicated, said the applicant, that exclusion of the applicant's property was a viable alternative. This is a central pillar of the applicant's argument as is apparent from the applicant's counsel's heads of argument and in the submissions made during the hearing of the matter.

[20] The applicant submits that the building of high walls around the applicant's property would address the security concerns of the respondent. This was dealt with by the respondent Minister in her answering affidavit in the following terms -

> *"21.2 The fact that it might be possible to construct a perimeter fence or wall around the Bryntirion Estate without including the [applicant's] property does not address the security concerns that would be created thereby. It is clear from the correspondence from [consultants] Delport Du Preez and Associates dated 24 October 2005, which forms part of the Record, that the inability to cordon off the entire Estate will raise a number of security issues including:*
>
> > *21.2.1 In accordance with the proposed master plan for the Bryntirion Estate, the new entrance for vehicles and pedestrians will be in Colroyn Road and all traffic will have to pass the applicant's property to reach the entrance or to leave the Estate;*

21.2.2 Due to the physical positioning of the buildings on the applicant's property in relation to the new entrance point, it offers the prime possibility of-

21.2.2.1 setting up of surveillance equipment on the applicant's property to monitor all traffic movements in and out of the Bryntirion Estate as well as of security methods, timing, etc. without the knowledge of estate security personnel;

21.2.2.2 housing of unwanted persons on the premises who may intend to commit acts of sabotage;

21.2.2.3 setting up a control point from which threatening acts such as ambushes and physical attacks could be launched onto the Estate; and

21.2.2.4 Setting up of equipment to jam communications to the Estate.

21.2.3 The applicant's property forms part of the Bryntirion Estate itself. It is in a different position to that of a house across the street. A public street can be monitored by roving patrol officers and security cameras and any suspicious activity can easily be picked up. In case of the applicant's property, Nassau Street would be closed for normal traffic and the aim of the electronic security system of the Bryntirion Estate would be to monitor the perimeter of the Estate and the monitoring of Nassau Street would not be as important as the monitoring of a public street. This may result in unwanted activity going on unnoticed.

21.2.4 The exclusion of the applicant's property from the Bryntirion Estate would result in a number of small deviations in the perimeter fence to include Oliver Tambo House and exclude the applicant's property. This would lead to the disadvantage that clean site lines of the perimeter cannot be maintained.

21.2.5 The Department and I did consider alternatives to the expropriation of the applicant's property. However, for the reasons set out above, I considered that the security risks were such that the alternative of constructing the perimeter fence in such a way as to enclose the Bryntirion Estate but to exclude the applicant's property posed too much of a security risk. I stress that although the ultimate decision to expropriate was mine alone, I had the advantage of expert security advice which I took into account."

[21] In a communication dated 13 February 2007 titled "NOTICE OF ADMINISTRATIVE ACTION" and addressed to the director of the applicant Mr Aboo Baker personally, the respondent informed the applicant that she had to make a decision concerning the proposed expropriation of the property. She drew attention to the provisions of PAJA and particularly the right to request reasons should a decision to expropriate be taken. The applicant was then given twenty one days to comment in writing, after which the respondent would make a "*final decision with regard to expropriation of the property*". The letter also went on to state that the notice was not an expropriation notice.

[22] In a letter dated 13 March 2007 the applicant's attorneys responded to the Minister's letter of 13 February 2007. Despite complaining about a lack of information,

the applicant made further representations as to why the property should not be expropriated. In the letter reference is also made to the applicant's letter of 2 November 2006 and the respondent's failure to respond to that letter. The applicant's attorney states –

> "*Your failure to respond to that letter or to place in issue any of the matters stated in our letter is accepted by our client as an acknowledgement by you of the correctness of everything which is stated in that letter. In the event of our client instituting review proceedings in respect of any administrative action which you may take relating to the expropriation of Erf 16 Bryntirion Estate, our client will rely upon your admission and acceptance of the correctness of what was recorded in that letter.*"

[23] On 15 May 2007, the Director-General addressed a letter to the applicant's attorneys in response to their letter of 13 March 2007. It dealt, inter alia, with the Department's failure to respond to the previous letter of 2 November 2006 and explained that a response was in fact drafted by the State Attorney but not forwarded timeously to the applicant's attorneys. A copy of the intended response was enclosed. In that letter it was denied that the decision to expropriate was a foregone conclusion. The applicant, however, refused to accept the explanation by the Director-General as to the reason why the applicant's attorneys had not received a response to the letter dated 2 November 2006 and accused the Department of *ex post facto* fabrication aimed at attempting to avoid the consequences of a failure to respond to the letter.

[24] The respondent has furnished an explanation under oath which the applicant has not gainsaid other than by way of a bare denial. In my view, the applicant's contention

that a failure to respond to its letter constituted an "*admission and acceptance of the correctness of what was recorded in that letter*" is not tenable. The respondent had invited comments or representations on the proposed expropriation before making a decision. The making of the decision would constitute the response. Hence any failure to respond to statements made by the applicant prior to the decision cannot constitute an acceptance of those statements.

[25] During June 2007 the respondent took the decision to expropriate the property. However, she did not immediately communicate this decision to the applicant but in stead wrote a letter dated 26 June 2007 to the applicant in which she gave notice of her intention to have a valuer obtain access to the property to conduct an evaluation. This was presumably to determine the amount of compensation to be paid to the applicant on expropriation.

[26] In August 2007, the applicant's attorney's reminded the respondent of applicant's previous complaints but nevertheless went on to acknowledge that there was no clear right to deny the valuer access to the property.

[27] In September 2007 the Director-General of the Department responded to the applicant's attorney's letter and informed the applicant that it had been afforded ample opportunity to make representations and that it had been given sufficient disclosure of the facts as is permissible in the circumstances with due regard to the future security of the estate.

[28] On 3 January 2008, the Minister signed a notice of expropriation which was delivered to the applicant on 7 January 2008. Compensation in the amount of R7, 620,800.00 was offered.

[29] It is this notice of expropriation which forms the subject of the present review proceedings launched by the applicant on 27 February 2008.

THE REVIEW PROCEEDINGS

[30] After launching the review proceedings the applicant, in terms of Rule 53(1)(b), requested the record of the proceedings sought to be reviewed and set aside.

[31] The respondent furnished the applicant's attorneys with an edited record of the proceedings on 12 August 2008. The record did not include three legal opinions obtained by the respondent. It did include an edited version of a report titled *"Department of Public Works, Bryntirion Estate, Preliminary Design Report on the Security and Electronic Systems"* (*"the Bryntirion Report"*). The edited version excluded what the respondent regarded as highly sensitive security information. The respondent, prior to despatching the Bryntirion Report to the applicant's attorneys, had first forwarded it together with certain consultants' reports to the then Minister for Intelligence Services and it was the latter who was responsible for editing the report.

[32] The respondent stated that her decision to expropriate the property was based on a consideration of three categories of documents –

32.1 Three legal opinions;

32.2 Correspondence between the applicant and the Department detailing the initial offer to purchase and the move towards the expropriation; and

32.3 Five consultants' reports including the Bryntirion Report.

The Minister further stated that her decision was based on a consideration of the record in its entirety.

[33] The applicant was of the view that since respondent's decision to expropriate was based on all three categories of documents it had a procedural and constitutional right to have access to all those documents and not just a part or edited version thereof before deciding whether to file a supplementary founding affidavit and whether to amend the terms of the notice of motion of the review application. The applicant said appropriate arrangements could be made between the parties to protect the alleged secrecy and sensitivity of the information and to ensure that the unedited report does not become part of the public record.

[34] The respondent refused to waive her reliance on legal privilege insofar as the three legal opinions were concerned and she was also not prepared to waive her objection to the disclosure of the edited portion of the Bryntirion Report, on the basis of National Security.

[35] The applicant thereafter applied in terms of rule 30A of the Uniform Rules of Court for a full and complete version of the record requested in terms of Rule 53. That application was dismissed by SERITI J on 17 June 2009. The applicant then proceeded to file its supplementary affidavit in terms of Rule 53(4) in which it, *inter alia*, expressly stated that:

> *"The applicant does not acquiesce in the judgment of SERITI J. Should the main review application eventually be decided against the applicant, its rights are*

reserved to raise the incompleteness of the record filed in terms of Rule 53 during appeal proceedings".

The applicant has not instituted any appeal proceedings against the judgment of Seriti J. but attempted to re-argue the matter in the review proceedings before me and lengthy submissions – both in the written heads of argument and during the hearing – were made in this regard . This, in my view, is not permissible and I will therefore disregard those submissions. What the applicant ought to have done if it was dissatisfied with the judgment of Seriti J. was to launch appeal proceedings, which it failed to do, and not await the outcome of these review proceedings. As matters stand, the judgment of Seriti J. stands unchallenged and I must take note of the judgment.

THE APPLICABLE LAW

[36] The Constitution provides that everyone has the right to lawful, reasonable and procedurally fair administrative action,[1] and everyone whose rights have been affected by administrative action has the right to be given written reasons. These constitutional rights have been given effect to in PAJA. The Constitution also provides for expropriation of property.[2]

[37] Section 3 of PAJA provides:

"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

[1] Section 33(1) of the Constitution.
[2] Section 25. Property: 1 – No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2 – property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner or payment of which have either been agreed to by those affected or decided or approved by a court.

(2) (a) A fair administrative procedure depends on the circumstances of each case.[3]

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection(4) must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5."

[38] Reasonable and timeous notice is to be given to enable the person concerned to gather information and to prepare and submit his or her representations.[4] Adequate notice includes the duty to provide the person concerned with the essential information which motivates the impending action.[5] What is sufficient information will depend upon the circumstances of each case but will in any event include all adverse information and

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[3] See **Turner v Jockey Club of South Africa** 1974 (3) SA 633 (A) at 646D – E; **Du Preez & Another v Truth and Reconciliation Commission** 1997 (3) SA 204 (A) at 231G- 232E; **Nortje & 'n Ander v Minister van Korrektiewe Dienste** 2001 (3) SA 472 (SCA) at para 17.

[4] **Rose-Innes Judicial Review 158. Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture & Another** 1980 (3) SA 476 (T) at 486F-G; **Premier, Eastern Cape & Others v Cekeshe & Another** 1999 (3) SA 56 (TK) at 93J-94A.

[5] **Cekeshe & Others v Premier, Eastern Cape & Others** 1998 (4) SA 935 (TK) at 962D.

policy considerations on which a decision may be based[6] as well as the approach to be followed[7].

[39] The respondent says she acted in terms of the Expropriation Act 63 of 1975 when she took the decision to expropriate applicant's property. In her answering affidavit the respondent admits that her decision to expropriate the applicant's property was also an administrative action as defined in PAJA.

THE REASONS FOR THE EXPROPRIATION

[40] A common thread that runs through the letters written by both the Department and the respondent to the applicant and its attorneys is that the reasons for the expropriation are primarily based on security concerns for the Brytirion Estate. The Bryntirion Estate is comprised of the Presidential Residence, the Presidential Guest House and houses of other cabinet ministers.

[41] Counsel for the applicant submitted that the respondent's reasons are in fact not reasons but merely opinions and conclusions. That submission is in my view not tenable. The respondent and her department were provided with several reports including one from the National Intelligence Agency, the South African Police Services and other consultants. It is those reports that contain the opinions and conclusions. The reports spell out the security concerns relating to the Bryntirion Estate. The respondent

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[6] **Loxton v Kenhardt Liquor Licensing Board** 1942 AD 275 at 315; **Scheibe v Rustenburg Liquor Licensing Board** 1948 (3) SA 154 (T) at 162 – 163; **Moepi v Minister of Bantu Education and Development** 1965 (1) SA 533 (T) at 536; **Turner v Jockey Club of South Africa** (supra) at 651A-D; **Maharaj v Chairman of the Liquor Board** 1997 (1) SA 273 (N) at 277H – J; **Cekeshe and Others v Premier, Eastern Cape & Others** (supra) at 963E; **Barkhuizen NO v Independent Communications Authority of South Africa & Another** [2002] 1 All SA 649 (E) at paras. 45 – 51; **Du Bois v Stompdrift-Kamanassie Besproeiingsraad** 2002 (5) SA 186 (C); **RHI Joint Venture v Minister of Roads & Public Works & Others** 2003 (5) BCLR 544 (CK) at paras 37 to 38 .

[7] **Farjas (Pty) Ltd & Another v Regional Land Claim Commissioner, Kwa-Zulu Natal** 1998 (2) SA 900 (LCC) at para 29.

gives those security concerns as a reason for the decision to expropriate the applicant's property.

[42] The security concerns are described in the Bryntirion Report. The report gives considerable detail of various potential threats including theft of assets, sabotage, perimeter security and access control.

[43] As I said earlier, although the applicant advances some fourteen grounds of review in the founding affidavit, they are essentially variations of three broad themes, namely, that the expropriation;

43.1 was not for a "public purpose" as contemplated by the Act;

43.2 was not justified by the reasons given by the respondent; and

43.3 was procedurally unfair.

THE INCIDENCE OF ONUS

[44] In application proceedings for review, the applicant bears the onus of establishing the ground of review[8] even if the onus in respect of a particular issue lies with the respondent.

[45] The applicant's counsel submitted in their heads of argument that the respondent bears the onus to convince the court that a departure from the requirements of sections 3(2)(b) of PAJA was reasonable and justifiable in the circumstances and that the respondent had failed to do so. For the reasons that follow, I am of the view that the respondent does not bear such onus as, in my view she did not depart from the requirements of PAJA.

[46] It should be noted that a court will not interfere on review where an administrative authority has committed an irregularity unless the complaining party has been prejudiced[9].

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[8] **Johannesburg Local Road Transportation Board and others v David Morton Transport (Pty) Limited** 1976 (1) SA 887 (A) at 895 A-G; **Administrator, Transvaal and Others v Theletsane and Others** 1991 (2) SA 192 (A) at 196 C-E and 197 E-G; **Government of the Province of KwaZulu-Natal and Another v Ngwane** 1996 (4) SA 943 (A) at 949 A-D and 949 J

[47] It has also been held that the subject of an administrative action "*. . . was not entitled to a perfect process, free of innocent errors, and . . . the administrative subject could not expect to be immunized from all prejudicial consequences flowing from such errors.*"[10]

THE DECISION TO EXPROPRIATE

[48] The requirements for a valid expropriation are that it –

48.1 must be for a 'public purpose' and must not be for an ulterior purpose;

48.2 must comply with the procedural requirements set out in the Act; and

48.3 must be the product of a *bona fide* exercise of discretion and not arbitrary or irrational.[11]

[49] In a case decided before the new Constitutional era it was held that there was no obligation to afford an owner a hearing before expropriation of his property.[12] The question was recently left open in *Buffalo City Municipality v Gauss and another* 2005 *(4) SA 495 (SCA) at para 10.* In *Offit Enterprises (Pty) Ltd and another v Coega Development Corporation (Pty) Ltd and others [2010] ZASCA 1 (15 February 2010) at para 43,* the decision to expropriate was regarded as "administrative action" for purposes of PAJA. As I said earlier the respondent accepts that the decision to expropriate the applicant's property was administrative action as defined by PAJA.

[50] From the detailed setting out of the background facts in this case it is clear that the respondent's department consistently invited the applicant to make representations, which the applicant did and all of which respondent says were taken into account in reaching the decision. In this regard it should be borne in mind that evaluation of whether expropriation is necessary lies with the expropriating authority.[13]

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[9] **South African Veterinary Council and Another v Veterinary Defence Association** 2003 (4) SA 546 (SCA) at paras 35 and 40.

[10] **Logbro Properties CC v Bedderson NO and Others** 2003 (2) SA 460 (SCA) at para 17. See also: **Telematrix (Pty) Limited t/a Matrix Vehicle Tracking v Advertising Standards Authority** SA 2006 (1) SA 461 (SCA) at para 19.

[11] **Durban City Council v Jailani Café** 1978 (1) SA 151 (D) at 153; **Brodway Mansions (Pty) Limited v Pretoria City Council** 1955 (1) SA 517 (A) at 522 B-D; **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC)

[12] **Pretoria City Council v Modimola** 1966 (3) SA 250 (A)

[13] **Offit Enterprises (PTY) Limited (*supra*)** at para 48, footnote 24.

[51] The applicant takes issue with the respondent's view that it would be impossible to cordon off the entire estate for effective security measures unless the applicant's property was included in the estate. The applicant says that if regard is had to the consolidation plan annexed to annexure "FA7" to the founding affidavit, the proposed consolidation of the erf, that is the Bryntirion Estate excludes the applicant's property. In my view, that does not avail the applicant. It is clear that the consultants who drew up the consolidation plan, that is Metro Plan, who are town and regional planners, had drawn up this consolidation plan in the context of a proposed closure of Nassau Street and did not consider security issues.

[52] Another contention raised by the applicant is that a perimeter boundary wall has already been erected around the applicant's property and the property has a street front on Dumbarton Road. Applicant further submits that a further perimeter fence or wall could quite feasibly be erected around the consolidated erf of Bryntirion Residential Estate without including the applicant's property in the new security perimeter.

[53] The applicant further submits that the respondent's contention that security would be better managed by including the applicant's property within the Bryntirion Estate is not convincing. In this regard applicant's counsel submitted that properties across the street from the applicant's property would then also pose a security risk and he posed the question: where does one draw the line? In my view, that argument does not advance the applicant's case any further. There is clearly a distinction between a property immediately adjacent to the Bryntirion Estate and properties across the road. I accept respondent's submission that properties across the road can be monitored for example, by patrolling the street which would not be the case in respect of a property immediately adjacent to the Bryntirion Estate.[14]

[54] In any event, the fact that there other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for "public purpose"[15]. I will

[14] See 21.2.3 at para 20 supra.
[15] **Fourie v Minister van Lande** 1970 (4) SA 165 (O) at 169 D-E and 176 F-G; **Administrator Transvaal and Another v J Van Streepen (Kempton Park) (Pty) Limited** 1990 (4) SA 644 (A) at 657 C-F.

revert to the aspect of public purpose presently. Suffice to say that the constitutional court has held[16] that:

> *"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognizing the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

[55] It is also entirely permissible for the expropriating authority to have regard to financial considerations such as avoidance of paying higher compensation or to minimize costs in the public interest provided that the decision is taken in good faith. The authority is entitled to "*take an overall view of all the practical and economic*

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[16] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 48.*

implications of the project as a whole in deciding what would best serve the public interest".[17]

WAS THE DECISION RATIONAL?

[56] The applicant contends that the decision to expropriate was also irrational. To succeed on this ground the applicant must show that the decision in question serves "*no legitimate governmental purpose'*.[18]

[57] The circumstances in which a statute or conduct will be characterized as irrational are extremely narrow. The Constitutional Court has recently stated:

> *'As this Court observed in Pharmaceutical Manufacturers, a court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way. Unless it can be shown that the objective is arbitrary, capricious or manifests naked preferences, 'it is irrelevant to this enquiry whether the scheme chosen by the Legislature could be improved in one respect or another'."*[19]

Because of the difficulty of establishing irrationality, the vast majority of attempts to impugn statutes for irrationality have failed.[20] In my view, the decision to expropriate had a rational purpose relating legitimate security concerns.

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[17] **Administrator, Transvaal and others v J Van Streepen (Kempton Park) (Pty) limited** *(supra)* at 659 C-F; 660 E and 661 E-F; **Broadway Mansions (Pty) Limited v Pretoria City Council** 1955 (1) SA 517 (A) at 522 D-F; **L F Boshoff Investments (Pty) Limited v Cape Town Municiplity** 1969 (2) SA 256 (C) at 271-2

[18] **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others** *(supra)* at para 24; **Van der Merwe v RAF (Women's Legal Centre Trust as *amicus curiae)*** 2006 (4) SA 230 (CC) at para 48.

[19] **Proverty Alleviation Network and others v President of the RSA and others** [2010] ZACC 5, 24 February 2010 at para 71

[20] **Poverty Alleviation Network and Others v President of the RSA and Others** *(supra)* at para 76; **Weare and Another v Ndebele NO and Others** 2009 (1) SA 600 (CC); **Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others** 2008 (5) SA 171 (CC) at para 115; **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC) at para 100; **United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as *amici curiae*)** (No 2) 2003 (1) SA 495 (CC) at paras 69, 70 and 74; **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) paras 26 to 27 and 31 to 33; **Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)** 1999 (2) SA 1 (CC) para 17; **S v Lawrence; S v Negal; S v Solberg** 1997 (4) SA 1176 (CC) at para 70; **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) at paras 39 to 40.

WHETHER THE EXPROPRIATION IS FOR A PUBLIC PURPOSE

[58] I Turn then to the question whether the expropriation is for a public purpose.

[59] It has already been held that an expropriation of land bordering on the official residence of the Prime Minister in order to obtain for him a greater measure of security and privacy is an expropriation for "public purposes".[21] Although this case was decided with reference to Proclamation 5 of 1902 (T), as amended, it has been cited with approval in cases dealing with the present Act.[22] These decisions in turn, in the context of the expression "public purposes" have been cited with approval by the Supreme Court of Appeal in the Offit Enterprises case.[23] The principles emerging from this case may be summarized as follows:

59.1 *"Section 2(1) of the Expropriation Act gives the Minister the power to expropriate 'any property for public purposes'. As the Constitution provides in Section 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."*[24]

59.2 *"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'."*[25]

59.3 *"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*

[21] **Slabbert v Minister Van Lande** 1963 (3) SA 620 (T)
[22] White **Rocks Farm (Pty) Limited and Others v Minister of Community Development** 1984 (3) SA 785 (N) at 793 D; **Fourie v Minister van Lande** *(supra)* at 170 B, 173 B and 173 H – 174 D.
[23] **Offit Enterprises (Pty) Limited and Another v Coega Development Corporation (PTY) Limited and Others** at para 14, footnote 6
[24] Offit Enterprises (supra) at para 11.
[25] Offit Enterprises (supra) at para 14.

as it would be if the municipality or province has 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."[26]

59.4 *"It is helpful in this regard to consider the position in other jurisdictions. In the United States the power of eminent domain can be exercised only for a public purpose and not for purely private purposes. ... However the US Supreme Court has held that it may be exercised to enable a run-down area to be redeveloped by private entrepreneurs. In an even more far-reaching decision that has resonance in this country, in the light of Section 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. 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. The effect of this decision 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. The European Court of Human Rights has followed the same path."*[27]

It follows, therefore, in my view, that the expropriation in the present case manifestly falls within the requirements of the Act. It is an expropriation for "public purposes'.

WHETHER THE DECISION TO EXPROPRIATE WAS JUSTIFIABLE

[60] From the lengthy exchange of correspondence between the applicant and its attorneys and the respondent there was never been any doubt about the reasons for the expropriation, that is, that it was required for security reasons. This is apparent from the first letter addressed by the respondent's Department and consistently thereafter. The

[26] Offit Enterprises (supra) at para 15.
[27] Offit Enterprises (supra) para 16.

applicant was furnished with the edited Bryntirion Report. The report contains, inter alia, information such as vulnerable points on the estate, issues relating to access to the estate, the situation of the closed circuit television/cameras to monitor the estate and so forth. Sensitive information in this regard was edited. However, in my view, the unedited portions of the report clearly indicate the security concerns and the decision taken by the respondent in the circumstances is justified. I may mention in this regard that the applicant has not contradicted the respondent's submissions in this regard in reply. The best that the applicant has set out in its case is that the security concerns could be met without the expropriation. In *Koyabe vMinister for Home Affairs 2010 (4) SA 327 CC* it was held, at 350 para [63]:

> *"Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case."* (Footnotes omitted.)

The respondent, in my view has set out sufficient reasons to justify the decision to expropriate the property.

WAS THE EXPROPRIATION PROCEDURALLY FAIR?

[61] The respondent has quite correctly submitted that the decision to expropriate must be procedurally fair. In this regard the applicant was invited to make representations on four separate occasions, that is, 26 January 2006, 4 August 2006, 10 October 2006 and 13 February 2007. The applicant in fact made representations on two separate occasions, that is, 2 November 2006 and 13 March 2007.

[62] Applicant's counsel in my view correctly, conceded that fairness is context specific and that the duty to provide information extends only to essential information. In the written heads of argument applicant's counsel further stated that a decision-maker "*must indicate what the main considerations for the contemplated action are / or the substance or gist of the allegations against him or her*". Applicant's counsel therefore recognized that there are circumstances in which information may be legitimately withheld. The question is whether that was the case in this matter before me. In this regard the security concerns are legitimate in the context of withholding portions of the report. In the application before Seriti J the applicant unsuccessfully attempted to argue

that it is entitled to all the information that served before the Minister, including opinions protected by legal professional privilege and the unedited Bryntirion Report. As I stated already the applicant failed in that regard.

[63] In all the circumstances I am of the view that the applicant has not made out a case for the relief sought.

[64] I make the following order:

The application is dismissed with costs including the costs consequent upon the employment of two counsel.

N RANCHOD
JUDGE OF THE NORTH GAUTENG HIGH COURT

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