



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 914/10

In the matter between:

ERF 16 BRYNTIRION (PTY) LTD

Appellant

and

MINISTER OF PUBLIC WORKS

Respondent

Neutral citation: *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (914/10)
[2011] ZASCA 246 (1 December 2011)

Coram: LEWIS, SNYDERS AND THERON JJA

Heard: 22 November 2011

Delivered: 1 December 2011

Summary: Administrative law – Promotion of Administrative Justice Act 3 of 2000 – rationality – procedural compliance. Expropriation - Expropriation Act 63 of 1975 – information required to make representations.

ORDER

On appeal from: North Gauteng High Court, Pretoria, (Ranchod J sitting as a court of first instance):

The appeal is dismissed with costs, including costs of two counsel where so employed.

JUDGMENT

THERON JA (LEWIS AND SNYDERS JJA concurring)

[1] On 3 January 2008, the respondent, the Minister of Public Works (the Minister), issued a notice reflecting her decision to expropriate Erf 16 Bryntirion (the property), being immovable property owned by the appellant, Erf 16 Bryntirion (Pty) Ltd (Bryntirion), and situated within the Bryntirion Estate which incorporates the Presidential Residence, the Presidential Guesthouse and the houses of cabinet ministers. Bryntirion instituted proceedings in the North Gauteng High Court, Pretoria, for an order, inter alia, reviewing and setting aside the Minister's decision. The court below (Ranchod J) dismissed the application. Bryntirion, with the leave of the court below, appeals to this court against the dismissal of the application.

[2] During September 2005, the Department of Public Works (the department) approached Bryntirion with an offer to purchase the property. The letter recording the offer stated the reason for the intended purchase as follows:

'The intention to purchase your property has been informed by the fact that all properties within the estate boundaries are government owned except for the one land parcel viz. Erf

16 Bryntirion which is owned by your company Erf 16 Bryntirion Pty LTD.

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.'

Bryntirion, through its attorneys, advised the department that it had no intention of selling the property. On 22 September 2005, the department again addressed a letter to Bryntirion, asking it to reconsider its position and requesting a meeting of the parties in order to discuss the reasons for the proposed acquisition of the property by the department. Bryntirion did not take the department up on this suggestion.

[3] During October 2005, notice was given to Bryntirion of the intention of the City of Tshwane Metropolitan Municipality to close Nassau Street (a street running through Bryntirion Estate) and to consolidate a number of erven and the internal road network to form the Bryntirion Presidential Estate. In terms of a letter dated 26 January 2006, the department advised Bryntirion that it had 21 days to make representations and be heard before the property was 'finally expropriated'. On 8 February 2006, Bryntirion advised the department that it intended to object to the expropriation and requested certain information to enable it to make representations. After initially agreeing to furnish the information requested by Bryntirion, the Minister, by letter dated 4 August 2006, advised Bryntirion that its request for information was premature in that a decision had not yet been made to expropriate the property. In the same letter, the Minister set out the purpose of the intended expropriation:

'You are well aware that the property ... lies within the proximity of the residential complex for Senior Government Officials including Ministers. The Government intends to upgrade the estate with a view to, amongst others, enhancing the security planning for the estate as a whole. The property to be acquired in giving effect to this objective will be so acquired for public purpose and in the public interest.

...

You are therefore granted an opportunity in terms of Section 3 of 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 representations within 14 days from the date of receipt of this letter to our Department.'

[4] In terms of a letter dated 13 September 2006, Bryntirion's attorneys repeated their request for certain information in order to enable Bryntirion to make representations and further stated that there appeared to be a contradiction as to whether or not a decision had already been taken to expropriate the property. The department, in its response dated 10 October 2007, set out the reasons for the intended expropriation in the following terms:

- '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.'

The letter proceeded to furnish answers to some of the questions posed while withholding information which, in the view of the department, would compromise matters of security. Information was withheld in relation to, inter alia, the plans to upgrade the Estate, alternative entrances to the Estate and the fate of the property after expropriation. Bryntirion was also called upon to file representations, if any, within seven days of receipt of the letter.

[5] By letter dated 2 November 2006, Bryntirion's attorneys set out 'preliminary representations' as to why the property should not be expropriated. These included:

'The expropriation is not in the public interest or for a public purpose.

The expropriation is not urgent.

No proper and rational consideration has been given to the alternatives to expropriation.

The Bryntirion Estate can be constituted without inclusion of our client's property, and our client's property can therefore not be said to be the only private dwelling within the estate.

Security will not be more effective or better managed by inclusion of our client's property in the estate.

...

The consolidated plan of the proposed consolidated erf in Bryntirion Presidential Estate as prepared by Metroplan excludes our client's property as part of the consolidated erf.

...

Our client has occupied the property for ten years with the State as his neighbour on all sides, except on the street front with Dumbarton Road. Our client's presence has at no previous time been suggested to constitute a security risk or an impediment to the effective security of the adjoining properties occupied by Government officials.

No real threat to the security of residents of Bryntirion Estate which is any greater than the security risk to residents in the adjoining residential areas in 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.'

[6] On 13 February 2007, the Minister advised Bryntirion, in writing, that she was required to make a decision regarding the proposed expropriation of the property. Relevant portions of her letter state:

'Purpose of Expropriation

2.1 The property in respect of which I have to make the aforementioned decision, is required for inclusion into the Government residential complex for members of Cabinet. It is the only property within the complex under private ownership.

2.2 The acquisition of the property is intended to effect adequate security measures within the complex.

3 Upon expropriation, the property will form part of the Government complex to which it is presently immediately adjacent.

4 You will be entitled to compensation in respect of the property to be expropriated.

...

5.3 You are hereby afforded the opportunity to comment, in writing, within 21 days of delivery of this letter to you'

[7] On 13 March 2007, Bryntirion's attorneys made representations as to why the property should not be expropriated. These representations were substantially similar to the representations made on 2 November 2006, set out in para 5 above. There was further correspondence between the parties around the issue of

expropriation of the property. On 3 January 2008, the Minister signed a notice of expropriation which was delivered to Bryntirion on 7 January 2008. Compensation in the amount of R7 620 800 was offered to Bryntirion.

[8] Bryntirion instituted review proceedings on 27 February 2008 in terms of Uniform Rule 53. On 12 August 2008, the Minister delivered a record of what she had considered before she took the decision to expropriate the property. It was common cause that the documents that were placed before the Minister to enable her to make a decision regarding the property consisted of legal opinions, correspondence between the department and Bryntirion's attorneys and consultants' reports. The Minister did not include the legal opinions in the record on the grounds that they were privileged and included only an edited version of a consultant's report titled 'Department of Public Works, Bryntirion Estate Preliminary Design Report on the Security Electronic Systems' (the Bryntirion Report). The Minister refused to make full disclosure of the Bryntirion Report on the grounds of state security. Pursuant to the Minister's refusal to make available the three legal opinions and the full Bryntirion Report, Bryntirion applied to court, in terms of Uniform Rule 30A, for an order directing her to deliver these documents. This application was dismissed by the high court (Seriti J) on 17 June 2009.

[9] Section 2 of the Expropriation Act 63 of 1975 empowers the Minister to expropriate any property for 'public purposes' subject to the obligation to pay compensation. For present purposes, the requirements for a valid expropriation are that it must be for a 'public purpose', comply with the procedural requirements set out in the Expropriation Act, be the product of a *bona fide* exercise of discretion and not arbitrary or irrational and it must not be for an ulterior purpose.¹

[10] Bryntirion argued that the decision to expropriate was irrational. In order to succeed, it must demonstrate that the decision served 'no legitimate governmental

¹ *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A) at 522B-D. *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the RSA & others* 2000 (2) SA 674 (CC).

purpose'.² There is, in my view, no basis upon which it could be found that the decision to expropriate was irrational. The evidence clearly demonstrates that the expropriation had a rational purpose relating to legitimate security concerns. It has been held that expropriation of land bordering on the official residence of the Prime Minister in order to obtain a greater measure of security and privacy for him is an expropriation for 'public purposes'.³ The expropriation in the present case was clearly for 'public purposes'. In fact, it was not contended otherwise by Bryntirion.

[11] It was argued that the decision of the Minister in expropriating the property was taken because irrelevant considerations were taken into account and relevant considerations were not considered. It was further contended, in support of this argument, that incorrect facts regarding the new entrance to the proposed Estate, were placed before the Minister. The Minister, in her answering affidavit, said the following about the new entrance:

'21.2 The fact that it might be possible to construct a perimeter fence or wall around the Bryntirion estate without including the property does not address the security concerns that would be created thereby. It is clear from the correspondence from Delport Du Preez & 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 new proposed master plan for the Bryntirion estate, the new main 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 leave the estate; ...'.

The allegation by the Minister that the new main entrance would be in Colroyn Road was clearly based on incorrect facts having been placed before her. In any event, the main reason for the expropriation of the property was that it could fall within the Estate so that security concerns could be effectively addressed. The fact that the Minister may have been given incorrect information as to where the main entrance to the Estate would be situated is irrelevant.

² *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the RSA & others* 2000 (2) SA 674 (CC) para 24.

³ *Slabbert v Minister Van Lande* 1963 (3) SA 620 (T).

[12] It was common cause that the Minister's decision to expropriate the property was 'administrative action' as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and which materially and adversely affected Bryntirion's rights. Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.⁴ In order to give effect to the right to procedurally fair administrative action, an administrator must, inter alia, give the affected person notice of the nature and purpose of the proposed administrative action and an opportunity to make representations.⁵ Fair administrative procedure depends on the circumstances of each case.⁶ Adequate notice includes the duty to provide the affected person with the essential information which motivates the impending action, and must indicate what the main considerations for the contemplated action are in order to enable the affected person to prepare a response.⁷

[13] It was contended that Bryntirion was not given sufficient information in order to make meaningful representations as to why the property should not be expropriated. It was further contended that Bryntirion was not given adequate notice of the nature and purpose of the proposed administrative action, nor was it given a reasonable opportunity to make representations in regard to the proposed expropriation. The effect of this, so the argument went, was to render the expropriation process procedurally unfair.

[14] From the very first communication to Bryntirion, and consistently thereafter, it was advised that the ultimate purpose of the expropriation was to make the Bryntirion Estate a single geographic unit. Bryntirion was told that the property was the only privately owned property within the Estate, that the government intended cordoning off the entire Estate in order to enhance security and that this could only effectively be achieved if the property was to form part of the Estate. This was set

⁴ Section 3(1) of PAJA.

⁵ Section 3(2)(b) of PAJA.

⁶ *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) para 17.

⁷ *Du Preez* at 234I.

out in the various communications referred to in paras 2, 3, 4 and 6 above. Bryntirion was left in no doubt that the reason for the expropriation related to the establishment of a secure estate. Bryntirion was invited to make representations on four occasions. Representations were in fact made on two occasions. It is clear from the representations made by Bryntirion that it had been given sufficient information regarding the underlying reasons for and the purpose of the expropriation. Bryntirion has never been in any doubt about the reasons for the expropriation. It did not need to know precisely what measures would be taken. In these circumstances, it cannot be said that the procedure adopted was unfair.

[15] The high watermark of Bryntirion's case was that the security concerns could be met without the expropriation. It had suggested, *inter alia*, that a perimeter fence could quite easily be erected around the Estate without including the property in the new security perimeter. It was also argued that the security concerns raised by the Minister with regard to the property could be raised against all the residences on the western side of Dumbarton Road.

[16] It is for the expropriating authority to decide how best to achieve its purpose.⁸ The evaluation of whether an expropriation is expedient or necessary lies with the expropriating authority.⁹ The fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a 'public purpose'.¹⁰

[17] The appeal is dismissed with costs, including costs of two counsel where so employed.

⁸ *White Rocks Farm (Pty) Ltd & others v Minister of Community Development* 1984 (3) SA 785 (N) at 792.

⁹ *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation (Pty) Limited & others* 2010 (4) SA 242 (SCA) para 48 fn 24.

¹⁰ *Fourie v Minister van Lande* 1970 (4) SA 165 (O) at 169D-E and 176F-G. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 48.

L V THERON
JUDGE OF APPEAL

Appearances:

Appellant:

N G D Maritz SC

Instructed by Michelle Horn Attorneys, Pretoria

Naudés Attorneys, Bloemfontein

Respondent:

M Sikhakhane

Instructed by State Attorney, Pretoria

State Attorney, Bloemfontein