

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4415/2008

In the matter between:

BARTSCH CONSULT (PTY) LIMITED

Applicant

and

**MAYORAL COMMITTEE OF THE
MALUTI-A-PHOFUNG MUNICIPALITY**

Respondent

HEARD ON: 3 DECEMBER 2010

JUDGMENT: EBRAHIM, J

DELIVERED ON: 4 FEBRUARY 2010

[1] 1.1 This is an application for the review and setting aside of a decision taken by the respondent on 12 December 2007 to expropriate property owned by the applicant and described as Portion 1 of Erf 985, Harrismith Extension 18, Registration Division Harrismith, Free State Province (“the property in issue”).

- 1.2 On 8 January 2008 notice of the respondent's decision was communicated to the applicant by the delivery of an expropriation notice which reads as follows:

“At the Maluti-a-Phofung Municipality MAYORAL COMMITTEE meeting held on the 12 December 2007 it was resolved to expropriate and vest in the Municipality

PORTION 1 OF ERF 985

HARRISMITH EXT 18

REGISTRATION DIVISION HARRISMITH

FREE STATE PROVINCE

THE REGISTERED OWNER BEING BARTSCH

CONSULTANCY PTY LTD

REGISTRATION NUMBER 2001 / 002421 / 07 (a sketch plan of the said property is herewith attached marked annexure 'A')

The purpose of such expropriation being for the construction of Municipal roads in the area of the Municipality and for doing all things necessary in connection with and ancillary to the construction of such roads.

The date of expropriation and possession being the 10th JANUARY 2008.

Compensation in the sum of R122 824,40 is offered as compensation in respect of the said erf.

Your attention is drawn to the provisions of section 9(1) and section 12(3)(a)(ii) of the Expropriation Act 63 of 1975 the provisions whereof you are required to acquaint yourself with.”

- 1.3 On request the respondent elaborated on the stated reasons as follows:

“The purpose as set out in the Notice of Expropriation, is for the construction of municipal roads in the area of the municipality, the main purpose being to rebuild a part of King Street in order to create a connection between King Street and the N5 which will comply with existing and future traffic requirements.”

- 1.4 It is common cause between the parties that the decision taken by the respondent was taken pursuant to the empowering provisions contained in section 2 and section 5 of the Expropriation Act, 63 of 1975. Section 2 of the Act reads as follows:

“2. Power of Minister to expropriate property for public and certain other purposes and to take the right of use property for public purposes.

- (1) Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation,

expropriate any property for public purposes or take the right to use temporarily any property for public purposes.

- (2) The power of the Minister in terms of subsection (1) or any other law to expropriate any property, shall include the power to expropriate, when any property is so expropriated, so much of any other property which, in the opinion of the Minister, is affected by such expropriation as the Minister may for any reason deem expedient.
- (3) The power of the Minister in terms of subsection (2) to expropriate property which, in the opinion of the Minister, is affected by an expropriation, shall, in the case where only a portion of a piece of land is expropriated in terms of this section, include the power to expropriate the remainder of such a piece of land if the owner so requests and satisfies the Minister that due to the said partial expropriation the said remainder has become useless to the owner, or if the Minister, after consultation with the Minister of Agriculture, is satisfied that the said remainder is or is likely to become an uneconomic farming unit.
- (4) If the Minister negotiates with an owner of property for the acquisition thereof by means of agreement

and the owner requests the Minister that the property be expropriated, the Minister may, subject to the other provisions of this Act, expropriate such property.”

Subsection 5 of the Act reads as follows:

“5. Exercise by local authority of power to expropriate property or to take the right to use property temporarily.

- (1) If a local authority has the power to expropriate property or to take the right to use property temporarily, such power may only be exercised, *mutatis mutandis*, in accordance with the provisions of this Act.
- (2) For the purposes of the application of subsection (1) any reference in this Act to the Minister and the State shall be construed as a reference to the local authority concerned.”

It is also common cause that the decision is reviewable in terms of the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 (“PAJA”).

- 1.5 The thrust of the applicant’s objections to the decision taken by the respondent and the principal basis upon

which the applicant calls upon this court to review and set aside that decision, is that, on the respondent's own version, the applicant's land will not be used for the stated reasons, but for the ulterior and unauthorised purpose of making the land available to a private land developer so as to be part of a shopping complex to be developed in Harrismith. In this sense, the applicant contends that the said purpose is not a public purpose as referred to in section 2 of the Expropriation Act, 63 of 1975 and that the expropriation notice was therefore invalid. As a second string to its bow, the applicant contends that since the re-alignment of King Street does not traverse the entire property, the respondent's purpose would be adequately served by the expropriation of one third of the applicant's property. The decision to expropriate the entire property was, according to the applicant, thus unreasonable to the extent that the stated purpose for the expropriation could not be said to be a public purpose. These are the principal issues in this matter.

[2] 2.1 I have considered these issues against the common cause background of the respondents stated duty and responsibility towards the community of Harrismith and the surrounding areas fed by the town of Harrismith, to promote and enhance the commercial and environmental health of the area, by co-operating with relevant stakeholders to facilitate socio economic development by means of healthy growth and employment and wealth creation. In this manner it is the aim of the respondent to avoid the fate suffered by many small South African towns of being commercially and economically non-viable with the attendant consequence of unemployment, poverty and social disfunctionality.

2.2 To this end it has been the aim of the respondent for the past ten years to exploit the geographical location of the town of Harrismith to best advantage, so as to create access from the National Road Systems serving the Drakensberg, Bloemfontein, Gauteng, Pretoria, Natal and the Cape which passes it at strategic points in order to attract much needed revenue offered by

tourism generally and the travelling public. In this regard the development of the area of Harrismith, which is directly accessible from this National Road System and more specifically from the major national road known as the N5 highway, in a manner which best facilitates and exposes Harrismith's position, is essential. So too is the planning and constructing of safe access points from the National Road System into such development as are approved by the respondent. Without such access and development, the passing trade represented by the tourists and the travelling public would be lost to Harrismith as a major financial resource.

2.3 With this aim in mind, the respondent embarked on a development drive in which the applicant and an entity known as the Junction Group featured as prominent stakeholders.

[3] I shall now deal with the historical background, shorn of controversy, to the specific dispute in this matter.

- 3.1 The development plan of the respondent encompassed the building of a shopping complex in the area of Harrismith situated adjacent to the N5 highway, which was to be named “The Harrismith Junction Shopping Complex”, and the re-alignment of pre-existing roads in Harrismith namely King Street and McKechnie Street so as to give access from the N5 highway to the shopping complex.
- 3.2 During March 2000 the applicant, represented by Abraham van den Hoven (“Van den Hoven”), approached the relevant authorities of the respondent in a bid to achieve the development of a site adjacent to the N5, that is the property in issue, described as Portion 1 of Erf 985, Harrismith, with the proposal which was annexed to the founding papers as “BC41”. It is clear from the applicant’s own proposal that the re-alignment of King Street of necessity required traversing the property in issue and on to the N5 highway. The applicant, at that stage, recognised that the development of the road system along the lines reflected in its proposal “BC41” was unavoidable.

3.3 During September 2002 the applicant was advised that its proposed development site (the property in issue) was too small and that it would not be approved by the respondent but that the respondent would consider giving its approval to a development on a site owned by the Junction Group. This site lay adjacent to King Street and on the opposite side of the property in issue which the applicant had sought to develop.

3.4 Pursuant to this, the applicant commenced negotiations with the owners of the Junction Group Land to procure such land in order to develop it as a shopping complex and to facilitate the access road from the N5 highway on to the development. To this end, the applicant approached Ben Deyssel (“Deyssel”), the managing director and shareholder of the Junction Group, for the purpose of purchasing the Junction Group land. This land comprised farm land on the farm Dorpsgronden, Harrismith and had been sold by the respondent to the Junction Group in terms of a Deed of Sale dated 19 May 2000 on condition that the land be developed within one year of registration of transfer of

the property into the name of the Junction Group, failing which the respondent would repossess the land at the original selling price.

3.5 During February 2003, the respondent informed Van den Hoven, on behalf of the applicant, that a final decision concerning the acquisition of the property in issue, was to be taken on 12 February 2003.

3.6 The applicant was aware that the road re-alignment of King Street over the property in issue would of necessity have to take place in the context of the proposed development of the shopping complex and that the sale of the property in issue to the applicant in order create the necessary access into the Junction Group land in respect of which the respondent was considering giving its approval to the development of the shopping complex, was an integral part of the approval for that development and the only way in which the respondent would agree to the sale of the property in issue to the applicant was on the basis that it was assured that the Junction Group land upon

which the development would be approved, would be acquired by the applicant.

3.7 However, the applicant and the Junction Group were at odds with each other regarding agreement to sell and purchase the Junction Group land. From relevant correspondence it appears that the applicant had gathered the impression from deliberations he had with Deysel, concerning the sale to him of the Junction Group land, that an agreement between them had been reached. He conveyed this in correspondence to the respondent on 4 February 2004. No written correspondence was addressed by Deysel to the applicant concerning their discussions about the land.

3.8 Prior to the respondent making a decision in regard to the applicants proposed development, which would include the sale of the property to the applicant, the chairperson of the Development Planning and Housing Port Folio committee of the respondent conducted an in-depth investigation into the development as proposed by the applicant, its effects on the community

and the necessity for the road configuration around the development. A full report was drawn up by the said chairperson for submission to the mayoral committee of the respondent, which was charged with the responsibility of making the decision as to whether or not to approve the sale of the property in issue to the applicant and the applicant's proposals in respect of the development. The report recommended the King Street re-alignment as proposed by the applicant in its proposal. The report was dated 7 April 2003 and at a meeting of the respondent on 16 April 2003, the applicant's development proposal was supported in principal. Subsequently the respondent gave its approval for the sale of the property Portion 1 of Erf 985 Harrismith ("the property in issue") ("the property") to the applicant.

3.9 On 22 July 2004 Van den Hoven addressed a letter to Deysel recording

(1) that he accepted that Deysel had refused to sell the Junction Group land to the applicant;

(2) the applicant had purchased Portion 1 of Erf 985 Harrismith from the respondent and that the applicant would not register a right of way over this property if the sale of the Junction Group land to the applicant was not effected. The applicant concluded by urging Deysel to reconsider his position.

3.10 On 23 July 2003 a Deed of Sale was concluded between the respondent and the applicant conditional upon the development by the applicant of the proposed Harrismith Junction Shopping Complex within two years of signature of the agreement failing which the respondent would repossess the land at the original sale price.

3.11 The applicant persisted with its efforts in the meantime to buy the Junction Group land but was unsuccessful ultimately, because Deysel had decided to bid for the shopping complex development along similar lines to the initial approval of the development site as proposed by the applicant; Deysel, however, would only be in a

position to develop if he was assured that the required access from the N5 highway via the King Street re-alignment was going to happen.

3.12 To stop Deysel from developing the land, Van den Hoven attempted to persuade the respondent to repossess the Junction Group land and on 7 September 2004 he wrote to the respondent on this basis, saying that the Junction Group had not complied with its obligations in terms of the Deed of Sale to develop the land and that therefore the land ought to be returned to the respondent. Accordingly a deadlock in regard to the re-alignment and the shopping complex development was reached which was detrimental to the community of Harrismith.

3.13 On 30 March 2007, a meeting with the respondent was held for the purposes of deciding whether or not to approve the re-alignment of King Street. The recommendation of the municipal manager was that the re-alignment be approved and it was understood that in order for the development of the area to

proceed, the applicant's property had to be reclaimed. On the basis of legal opinion obtained by the respondent, it was of the view that the attempt to repossess the applicant's property in the normal way on the grounds of non-compliance with the conditions of sale, would involve a further and lengthy delay in the development process. The respondent at that stage was also relying on a cost contribution of R1,5 million from the South African National Roads Agency Ltd (SANRAL) for the construction of the re-alignment of King Street, which commitment was limited in duration to the end of SANRAL's 2008/2009 financial year which ended 31 March 2009.

3.14 On 12 December 2007, the respondent resolved the deadlock in regard to the development of the area by taking a decision to expropriate the applicant's property.

3.15 No development of the area as proposed has commenced to date nor has any construction of the re-alignment commenced.

[4] 4.1 Prior to addressing the issues in this matter, it is necessary to ascertain what is meant by the phrase “public purposes” in the context of the provisions of the Expropriation Act, 63/1975. A useful exposé of the historical judicial interpretation of the phrase was given by Steyn AJ in **FOURIE v MINISTER VAN LANDE EN ‘N ANDER** 1970 (4) SA 165 (O) at 170E – 175. The learned judge concluded that it was the intention of the legislature that the phrase should bear the same meaning as its established interpretation and that it should be understood in the broad sense as referring to things affecting the entire population of the local public and not only to things concerning the State or the Government. In coming to this conclusion one of the authorities relied on by Steyn AJ was **RONDEBOSCH MUNICIPAL COUNCIL v TRUSTEES OF THE WESTERN PROVINCE AGRICULTURAL SOCIETY** 1911 AD 271 where at 283 – 284 Innes JA held:

“The word ‘public’ is one of wide significance, and it may have several meanings, between some of which, in spite of their

common origin, there are very real differences. In a broad sense it is commonly applied to things which pertain to or affect the people of a country or a local community. The expressions 'public opinion', 'public road', 'public place', 'public hall', are instances of the use of the word in that general way. On the other hand, it is frequently employed in a more restricted sense to denote matters which pertain not to the people directly but to the State or the Government which represents the people. Thus the public accounts signify the Government accounts; public revenue and public lands denote the revenue and the lands of the State; and the public service means the Government Service. Hence, as it seems to me, public purposes may either be all purposes which pertain to and benefit the public in contradistinction to private individuals, or they may be those more restricted purposes which relate to the State, and the Government of the country, - that is, governmental purposes."

And, at page 286, after analysing the evidence, he goes on:

"Under all the circumstances, I have come to the conclusion that the expression 'public purposes' in this section must be confined to such purposes as are constitutionally required and created by the Government of the country, and may, therefore, be termed Governmental purposes. It seems unnecessary to attempt to define the limit of such purposes; but it does not follow that they should be confined to purposes exercised through persons or

bodies under the direct control or in the immediate service of the State.”

4.2 With the advent of the new constitutional democracy in South Africa, property owners were accorded protective rights by the enactment of section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”), which prohibited arbitrary deprivation and expropriation of their property. Section 25(1) provides that no person may be deprived of his or her property except in terms of a law of general application. The Expropriation Act 63 of 1975 is such a law. Section 25(2) of the Constitution provides that property may only be expropriated for a public purpose or in the public interest subject to payment of compensation.

4.3 The Expropriation Act, 63 1975 limits the power to expropriate to public purposes while section 25(2) of the Constitution extends that power to incorporate expropriation in the public interest. In as much as the provisions of the Expropriation Act may be viewed as

being inconsistent with those of section 25(2) of the Constitution, the Act must be interpreted by “reading” in the contrary provisions in the Constitution so that the correct legal position at present is that the relevant statutory requirements for a valid expropriation in terms of the Constitution and the Expropriation Act is that the expropriation must be for a public purpose or in the public interest.

- [5] 5.1 I turn now to an analysis of the evidence in the present matter in the context of these established legal principles in order to determine the issues in this case, which is whether the expropriation was for an ulterior, unauthorised and unreasonable purpose as opposed to being for a public purpose. Mr. Bester, on behalf of the applicant, referred me to the authority of **HAMABAL FRAMJEE v SECRETARY OF STATE FOR INDIA** 1914 ILR 39 Bombay 279 (I) where the following was stated:

“The argument for the appellants is really based upon the view that there cannot be a ‘public purpose’ in taking land if that land

when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Bachelor J where he says ... in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed the particular interest of individuals, is directly and vitally concerned.” (My underlining.)

He argues that the present matter is one in point where the respondent based its decision to expropriate on the particular interest of a third party, being the Junction Group, to develop the Harrismith Junction Shopping Complex and in doing so to utilise the applicant’s land for its own benefit. It seems to me that Mr. Bester seeks to place a sinister emphasis on this aspect of the case for obvious reasons. In as much as it has always been the respondent’s case that the necessary access through the re-aligned King Street to the shopping complex to be developed was very much an objective in deciding to expropriate the applicant’s property, the applicant had no quarrel with it when he was pursuing attempts to acquire the Junction Group land in order to

develop the shopping complex on that land himself. Be that as it may, I see the matter somewhat differently and as akin to the circumstances dealt with by the Appeal Court in the matter of **ADMINISTRATOR, TRANSVAAL, AND ANOTHER v J VAN STREEPEN (KEMPTON PARK) (PTY) LTD** 1990 (4) SA 644 (A) where Smalberger JA dealt, *inter alia*, with the legal position regarding expropriations for the use and benefit of a third party. The facts of that matter were briefly that the first appellant, the Administrator of the Transvaal, had, under notice, declared the existence of a public provincial road being road 51 which encroached upon the eastern boundary of the respondent's property. The second appellant, a private company, owned a private railway line connecting one of its factories at which products of national and strategic importance were manufactured, with its source of raw materials. The line traversed road 51 in two places via level crossings. In order to relieve congestion at the intersection of road 51 and road P91-1, both roads were to be upgraded and a new interchange was to be constructed. Second appellant's

railway line was to be relocated to the western edge of road 51 to eliminate the level crossings. The retention of the railway line was central to the planning of any new roads. Part of the respondent's property encroached upon by road 51, included an area to be located within the road configuration, to accommodate the new railway line. The respondent challenged the first appellant's right to declare a broadened road reserve to accommodate second appellant's railway line on his property and at the same time the second appellant required from the first appellant an undertaking that it would enjoy the same unrestricted rights on the new line that he had enjoyed on the old existing line. Fearing extensive financial losses if the respondent's challenge was successful, and the road construction delayed, the first appellant expropriated respondent's property intending to transfer the property to the second appellant. The railway lines had already been constructed on the respondent's property. The respondent objected to the validity of the expropriation notice on the basis that the first respondent was not empowered to expropriate the respondent's land in

order to establish a railway line, that the first and second appellant were trespassing on respondent's land and that the purpose of the expropriation notice had been to legitimise such trespass. It was argued that the empowering provisions in the relevant Ordinance did not authorise the road construction and more particularly, it could not be interpreted so as to confer upon the Administrator the power to acquire the land of one person (the respondent) in order to transfer it to another (the second appellant) for the latter's use and benefit. Smalberger JA held, *inter alia*,

- (1) that it was apparent from the history of the matter that when road 51 had been declared one of the underlying purposes of the declarator was the accommodation within the road reserve of the second appellant's railway line and that the real purpose of the expropriation notice was not to legalise a trespass but to accommodate the railway line.
- (2) The relevant road Ordinance provided for two separate and distinct set of circumstances in

which the first appellant might acquire land: he might do so

- (a) for the construction and maintenance of a road (the primary purpose) or
 - (b) for any purpose in connection with the construction or maintenance of any road (the secondary purpose) and that a valid distinction could be drawn between the opinion formed by the first respondent with regard to the acquisition of the respondent's property for the primary purpose and his decision to acquire that land in connection with that primary purpose, that is for the secondary purpose.
- (3) that the words "or for any purpose in connection with the construction and maintenance of any road" in the empowering Ordinance resulted in the widening of the first appellant's power to acquire land in terms of that Ordinance so as to enable the construction of roads to be effected in the most efficient way, in the public interest.

- (4) It was a necessary inference that the legislature had intended the expression to have a relative wide meaning, bearing in mind the planning and construction of a road involved consideration of policy in regard to the regulation of traffic, economic considerations and the benefit of the public generally, i.e. the construction must have been reasonably expedient.
- (5) The test of expediency would be satisfied if the purpose for which the first appellant's power of expropriation had been inextricably associated with the construction of road 51 or had been an integral incident of the construction of the road or had been causally connected with the construction of the road.
- (6) Expropriation, generally speaking, had to take place for public purposes or in the public interest and although expropriation for the benefit of a third party cannot be for public purposes, it can however be in the public interest. What is in the public interest would have to be determined with

reference to the overall practical and economic considerations of the particular project.

- (7) An expropriation for public purpose which also benefits the third party, is valid.

5.2 It was conceded in oral argument by counsel for the respondent that the respondent required the applicant's land for the purposes of the road re-alignment in order to create the necessary access from the N5 highway to the shopping complex development on the Junction Group land. As such the property was, to the knowledge of the applicant, an integral part of the development. That access to the Junction Group land existed from a pre-existing road namely Du Plessis Street in Harrismith was of no moment as it did not facilitate easy access to the shopping complex, to tourists and the travelling public on the N5 highway. The applicant was aware of this and with this in mind had placed its own bid with the respondent to be at the helm of the development of the shopping complex on the Junction Group land. In the context of the Smalberger dictum in the **VAN STREEPEN**-case, it is

clear that while the primary purpose of the expropriation of the applicant's land was the road configuration, that is the re-alignment of King Street and the construction of the interchange at the King Street/McKechnie Street, N5 junction, the secondary purpose of the expropriation was the development of a shopping complex on land adjacent to this interchange. The respondent had envisaged and was committed to the creation of a commercially viable shopping complex on land in Harrismith adjacent to the N5 highway, to which the public of Harrismith and the public at large would have access, in order to enhance the economy of the town of Harrismith. To do this, it had decided to upgrade and re-align King Street so as to create an interchange with McKechnie Street and the N5 highway which in its opinion based on expert advice from a firm of consultants called Techworld, which provided a written report on its investigation into the matter forming annexure "BC21" the applicant's founding papers, would enhance traffic safety by improving safe distances at the proposed interchange, and would allow access to the proposed junction

shopping complex. This situation is on all fours with that in **VAN STREEPEN** save that construction of the interchange and shopping complex has not been accomplished to date. Nevertheless, a valid distinction can be drawn between the respondent's primary purpose in expropriating the applicant's land and the secondary purpose for doing so because the respondent's expropriation notice provides for two separate and distinct circumstances in which it might acquire the applicant's land, namely for the primary purpose of the construction of the municipal roads in the area of the municipality, that is for the re-alignment of King Street and for the secondary purpose of doing all things necessary "in connection with and ancillary to the construction of such road", namely for the utilisation of the applicant's land for the development of a shopping complex adjacent to the new road interchange, to be developed. The expression doing all things "necessary in connection with and ancillary to the construction of such road" denoted that which was reasonably expedient in relation to the construction of the proposed re-alignment of King Street. The creation

of an access road from the N5 highway to the shopping complex on the Junction Group land was inextricably linked and part and parcel of the re-alignment. Accordingly there can be no doubt of the expropriation of the applicant's land having been effected for a public purpose. The same however cannot be said for the development of the shopping complex for though it was causally connected to the respondent's decision to expropriate the applicant's land because the applicant's land was to be utilised by the Junction Group for the purposes of building the shopping complex together with its own land, the act of dispossessing the applicant for the benefit of a third party (the Junction Group) can never be characterised as a public purpose. However, it could qualify as a valid act of expropriation if it could be brought within the realms of an act performed in the public interest. On the facts of this case there is no doubt in my mind that the shopping complex development was a development to be erected for the benefit of the public of Harrismith because, once developed, it would provide strategic economic advantages to the

Harrismith community in the form of greater financial returns thereby creating a healthier and wealthier environment for the public of Harrismith. The clear intention of the respondent in promoting and pursuing the shopping complex development was to stimulate the economy of Harrismith. Accordingly and in respect of the secondary purpose for which the applicant's land was expropriated. I find that the expropriation was validly done, in the public interest, for a *bona fide* and lawful purpose.

- [6] In the light of the evidence I am also of the view that there is no basis for holding that the respondent's decision to expropriate the applicant's property was so unreasonable that the purpose therefore cannot be said to be a public purpose. I refer in this regard to Mr. Bester's submissions that only two thirds of the applicant's property, and a substantial portion at that, was not required by the respondent for the purpose of the re-alignment, that it ought not to have been expropriated and that on this basis alone the expropriation should be set aside because the bulk of the land was not required for public purposes. He argued

that the true reason for the expropriation was a financial one, namely the generation of income for the Junction Group from the development of a shopping complex utilising the applicant's land. This argument confuses motive and purpose and therefore cannot be sustained. I have already demonstrated in this judgment why I have found that the respondent's purpose in expropriating the applicant's land was a public one. The means by way which that is achieved may or may not be a financial one. In this particular matter financial consideration certainly did play a part in motivating both the applicant and the Junction Group to bid for the development. Ultimately the respondent's decision to expropriate was also motivated by the desire to avoid the extensive financial costs involved in obtaining the transfer of the applicant's property back into its name, but that does not detract from the fact that the overall reason for the expropriation was for the benefit of the public of Harrismith. The financial considerations merely motivated the respondent to choose expropriation rather than the costly route of cancelling the sale agreement and repossessing the applicant's land. But the main reason why the applicant's contentions must fail, is

because once it is established that the expropriation is a *bona fide* one for a public purpose the motives behind the actions of the respondent are irrelevant to the question whether the power of expropriation had been validly exercised. See **L.F. BOSHOFF INVESTMENTS (PTY) LTD v CAPE TOWN MUNICIPALITY** 1969 (2) SA 256 (C) at 270C; **OLIFANTSVLEI TOWNSHIP LTD v GROUP AREAS DEVELOPMENT BOARD** 1964 (3) SA 611 (T); **BROADWAY MANSIONS (PTY) LTD v PRETORIA CITY COUNCIL** 1955 (1) SA 517 (AD). In the **BROADWAY-** case the applicant applied for an order setting aside the expropriation of his property on the grounds that the power of expropriation had been exercised by the responded municipality for an improper purpose. Van den Heever JA stated:

“It was contended that respondent determined to expropriate appellant’s property as and when it did, not because the property was then required for road construction purposes, but solely to prevent the appellant from building on the property so as to avoid payment of high compensation as and when it determined to proceed with the scheme. Respondent alleges that it is about to put the project into execution in sections.

However I can find nothing in Ordinance 60 of 1903 to suggest that a municipality may not be provident or may exercise its powers of expropriation only to provide for immediate requirements in maintaining a balance between the needs of a municipality and the environability of property rights. This aspect will no doubt be taken into consideration by the administrator under section 6(3) in judging the propriety of the proposed undertaking and giving his sanction with or without modifications or withholding it but it cannot constrict the purposes for which the power may be exercised.”

In **HUMPHRIES AND LAMMAS v THE TOWN COUNCIL OF BLOEMFONTEIN** 1905 ORC at p. 90 the facts of the case were that as a result of a great flood disaster in 1904 there was a serious loss of life and property in Bloemfontein. The disaster was blamed on the insufficiency of the natural spruit to carry off heavy rainfall and the town council proposed to undertake works for the purpose of widening, straightening and bridging the water course running through the city by expropriating a portion of an erf belonging to the plaintiffs under the empowering provisions of Ordinance 21 of 1904. The plaintiff challenged the expropriation on the basis that a larger portion than was necessary for the

proposed works had been expropriated. The city engineer in evidence testified that the expropriation was absolutely necessary and the court held that it was bound to give effect to the clear meaning of the empowering Ordinance unless the plaintiffs could show that the city engineer's evidence was not given as a *bona fide* opinion and that the land was in reality not required. In passing judgment the learned Judge relied heavily on the *ratio decidendi* in the leading English case of **STOCKTON AND DARLINGTON RAILWAY COMPANY v BROWN** 9 H.HL at p. 246 which was that extraordinary powers are given to the persons and/or entities endowed with the power to expropriate and made it clear, moreover, that they are the judges of works they require unless it is proven that they are not acting *bona fide*. Lack of *bona fides* can be proved in one of two ways; either by proving that the land is to be used for an ulterior collateral purpose or that the alleged purpose is so absurd that it cannot possibly be *bona fide*. In **PRETORIA CITY COUNCIL v MODIMOLA** 1966 (3) SA 250 (A) at 263G – H Botha JA said this:

“In the absence of a provision prescribing a *quasi-judicial* enquiry as a pre-requisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act ... Where unqualified authority is conferred for the expropriation of land required for public purposes, an opinion by the expropriating authority, if fairly and honestly come to, that particular land is required for such purposes, is all that is required for a valid expropriation of that land.”

Consequently the only requirements for a valid act of expropriation under legislation referred to in the **MODIMOLA**-case, as well as in this case where the empowering provision was the law of general application, are:

- (1) It should comply with the machinery laid down in the relevant legislation;
- (2) It should expropriate for the purpose there laid down and not for any alternative purpose;
- (3) It should be done honestly or *bona fide*.

See also **THEUNISSEN TOWN COUNCIL v DU PLESSIS**

1954 (4) SA 419 (O) at 424C where Van Blerk J held:

“Verder is namens respondent gewag daarvan gemaak dat die Raad in werklikheid nie die onteinde grond nodig het nie; dit is nie duidelik of dit aangevoer slegs as a faktor om die *mala fides* van die Raad te bewys nie, dan wel of dit ‘n selfstandige beswaar is nie; indien laasgenoemde die geval is dan dink ek nie dat die beswaar gegrond is nie want dit is vir die Raad alleen om te besluit of die grond benodig word of nie; en as die besluit dat die grond benodig word vir die waterwerke *bona fide* geneem is dan is dit nie aanvegbaar nie.”

- [7] Turning to the specifics of the present matter, it was conceded by Mr. Bester that the onus is on the applicant to prove that the applicant’s land was not required for the stated purpose and that that onus is not one which is easily discharged since the expropriation itself is a purely administrative act. See **SORRELL v MILNERTON MUNICIPALITY** 1980 (4) SA 660 (C) at 665B. Although it was not submitted by Mr. Bester that the respondent did not require the land for the purpose of the road re-alignment, his challenge was to the fact that there was an ulterior purpose connected to the re-alignment being in the form of the respondent’s approval for the development of the shopping

complex on the applicant's land by the Junction Group. In the absence of incontrovertible proof from the applicant, discharging the onus upon it that the respondent was *mala fide* and not *bona fide* in expropriating applicant's land, I am driven to the conclusion, on the basis of what was said by the court in the **MODIMOLA**-case, the **THEUNISSEN**-case and the **HUMPHRIES AND LAMMAS** decision that there is no basis for holding that the respondent's decision to expropriate the whole of the applicant's property was unreasonable.

- [8] Finally, it is worth remembering that the fact that the applicant and the Junction Group were both competitors for the same development and, as is clear from the papers, crossed swords at times, this is of no moment in deciding the *bona fides* of the respondent. On the papers before me the applicant has referred to many matters which he regards as being relevant considerations and which he no doubt seeks to have this court take into account in determining the respondent's lack of *bona fides* in ignoring them in its deliberations before coming to a decision to expropriate the

applicant's property. But they too are of no consequence in the greater scheme of things because the act of expropriation is a purely administrative act. Therefore the mere fact that the respondent failed to take into account what applicant deemed to be relevant considerations is not a good ground for upsetting the expropriation. See **DURBAN CITY COUNCIL v JAILANI CAFE** 1978 (1) SA 151D at 153H and 154A and the cases there cited.

- [9] There will accordingly be a dismissal of the application. I have been asked by the respondent's counsel to make a punitive order of costs against the applicant on the grounds of his vexatious stance in bringing this application as being indicative of a malicious drive to obstruct the planned shopping complex development by withholding access to that development. I am of the view that the applicant's conduct in persisting with his aggressive efforts to convince the respondent to grant approval to him as developer by dispossessing the Junction Group of its land and his conduct in bringing these proceedings was motivated by the proverbial "sour grapes" syndrome and not by malice.

[10] In the result the order I make is the following:

1. The application is dismissed.
2. The respondent's decision to expropriate the applicant's property being Portion 1 of Erf 985 Harrismith, Extension 18, Registration Division Harrismith, Free State Province, is hereby confirmed.
3. The applicant is ordered to pay the respondent's costs on the ordinary party-party scale.

S. EBRAHIM, J

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