

# SUMMARY OF THE JUDGMENT

## EXPROPRIATION BY LOCAL AUTHORITY: DECISION-MAKER MUST BE APPRISED OF ALL FACTS

**Kohler Bricks (Pty) Ltd v City of Cape Town and Another (21362/2017) [2019] ZAWCHC 6 (15 February 2019)**

*When there is real urgency to secure continued access to a landfill for solid waste disposal, a municipality can contemplate issuing expropriation notices to ensure it can address waste generated daily in its jurisdiction. The matter in consideration dealt with a scenario where the City approved an expropriation notice after it seemed that they had reached a deadlock in negotiating access to the landfill. However, as a last resort, between the initial commencement of the paperwork to effect expropriation and submitting it to the mayor's office for sign-off, the land-owner granted an extension to the City. This was not communicated to the decision-maker and the notice was issued. Was this fair administrative action as required by PAJA?*

The Judgment can be viewed [here](#).

### FACTS

Kohler Bricks (Pty) Ltd (Kohler) owns immovable property in the Vissershok area outside Cape Town. The land is situated in close proximity to a large landfill site that has for some years now been used for the daily disposal of approximately one quarter of the solid waste that is generated by the City's inhabitants.

The waste is transported to the landfill daily by train from a sorting facility at Athlone. The carriage of the waste occurs pursuant to a contractual arrangement between the City of Cape Town (the City) and Transnet. The siding at which the waste is offloaded, and part of the railway line approach to it, is situated on Kohler's property. The affected part of Kohler's land has been leased by Transnet from Kohler in terms of a succession of lease agreements concluded periodically between them over the years since 1995. The last of those leases lapsed by effluxion of time on 31 December 2016.

The City had invested a considerable sum in the infrastructure that had been put in place at the siding to facilitate the off-loading of the waste containers transported there by rail. The facility had moreover recently been enlarged in order to accommodate the reception of an increased daily load of waste. Railing the waste to the facility was reportedly the most practical and economical method of transport. The alternative of road transport would not only be much more expensive in terms of direct cost, but would also add materially to Cape Town's notorious traffic congestion and carry an additional indirect cost in the form of extra wear and tear to the roads on affected road routes. The evidence suggested that it was anticipated that the lifetime of the landfill will extend into the 2030's.

Transnet showed itself to be remiss in timeously attending to the periodic renewal of the lease of the property. It also ceased to pay rental in respect of its occupation of the land when the various leases expired. It nevertheless continued, without interruption, to use the property for the purposes of its contract with the City during the intervals when it was effectively in unlawful occupation of Kohler's land. As a result, on two occasions, Kohler instituted proceedings to interdict Transnet from using the land after the latter had failed to renew the lease arrangements. The interdict proceedings, which on each occasion were instituted without notice to the City, were clearly directed (ultimately successfully) at compelling Transnet to conclude a new lease.

Negotiations continued throughout 2016 regarding renewal of lease agreements and/or the purchase of the property by the City. No agreement was reached however and at the last moment, it appeared to the City's officials that it was most unlikely that an agreement could be reached. It was accordingly determined to recommend to the acting executive mayor that a decision should be made in terms of section 3(2) of the City of Cape Town: Immovable Property By-Law, 2014, read with the Expropriation Act 63 of 1975, to expropriate the property. Section 3(2) of the by-law provides: *'Subject to the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975) the City may expropriate immovable property and rights in immovable property or may temporarily take the right to use immovable property'*. The municipal officials' recommendation was incorporated in a written report to the mayor that appears to have been drawn up on or about 14 December 2016. The report was circulated to, and endorsed by, a number of officials in the relevant administrative departments of the City, including the city manager. Judged by the dates of their signatures, it would appear that it reached the city manager on 20 December 2016 and the acting mayor on 22 December.

Clearly the City urgently needed to secure the continued use of the siding so as to ensure that there was no disruption to an essential component of the municipal waste disposal system when the Transnet lease expired at the end of the month. In this regard the report drew attention to the threat by Kohler to remove the rail line at the end of the month should a new agreement not be in place by then. It stated that ending the use of the offloading facility at the railway siding would result in an accumulation of waste in parts of the City with an attendant risk to public health. In short, the report unambiguously presented a situation of a potential emergency that called to be addressed by urgent measures. The acting mayor signified his acceptance of the recommendation, thereby making the decision that the applicant's property should be expropriated sometime during 22 December 2016. Notices of expropriation as provided for in terms of the Expropriation Act were consequently served on Kohler on 23 January 2017.

It appeared however as if the content of correspondence between the parties' attorneys on 19 December 2016, which lead Kohler to agree to an extension until February the next

year, was not communicated to the city manager or the acting executive mayor at the time when they were processing the decision to expropriate. The first that Kohler came to know of the expropriation was when notices of expropriation were served on it on 23 January 2017. The effect of such service was to transfer ownership in the affected land to the City forthwith because the date of expropriation stated in the notices was also 23 January 2017.

Kohler brought an application for review and setting aside of a decision by the City to expropriate part of its land. Kohler challenged the expropriation on the ground that it was procedurally unfair in that: (i) the decision was made without affording Kohler prior notice of the intended action and an opportunity to make representations in the manner contemplated by section 3(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and (ii) that the decision-maker took the decision to expropriate without having taken relevant considerations into account. (It was common ground between the parties that the City's decision to expropriate the land constituted 'administrative action' as defined in PAJA.) It argued that had it been given the opportunity to make representations it would have argued that 'less invasive' means than outright expropriation were reasonably available to address the public purpose need to which the decision in question was directed. The service upon it of notices of expropriation that had immediate effect unfairly deprived it of the opportunity to do so.

**HELD:**

- The communications of 19 December between the parties' attorneys defused the situation of emergency described in the City officials' motivational report to the acting executive mayor. It moved the critical date by which the recommended decision to expropriate or any alternative arrangement had to be made from 31 December 2016 to 28 February 2017. This change of circumstances had a material bearing on the appropriate procedural approach to be adopted in respect of any decision to expropriate Kohler's property. Any decision-maker involved in taking administrative action is required to make the decision concerned with regard not only to its substantive import and effect, but also with conscientious regard to the consideration of the affected parties' constitutional right to procedural fairness. An integral approach is required.
- Section 3 of PAJA entrenches the constitutional right of everyone in terms of section 33(1) of the Constitution to administrative action that is procedurally fair. The provision acknowledges that procedural fairness in a given case is always

dependent on the circumstances of the matter. Section 3(2), however, provides for what might be regarded as a default position that should be departed from by administrative decision-makers only to the extent that circumstances might make it appropriate to do so. Section 3(2) provides as follows:

*'(2) (a) A fair administrative procedure depends on the circumstances of each case.  
(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.'*

- Subsections 3(4) and (5) further provide:

*'(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).  
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including -*

- (i) the objects of the empowering provision;*
- (ii) the nature and purpose of, and the need to take, the administrative action;*
- (iii) the likely effect of the administrative action;*
- (iv) the urgency of taking the administrative action or the urgency of the matter; and*
- (v) the need to promote an efficient administration and good governance.*

*(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.'*

- In the present matter there was no procedural fairness as required by PAJA as the decision-makers, at the relevant time, were not apprised of the correct position, i.e. that the City was afforded an extension.
- The decision was therefore made without regard to the information in the email of the attorneys and it followed that the decision was taken in a manner materially distinguishable from the procedure contemplated in terms of section 3(2) of PAJA; a very relevant consideration was not taken into account; and if it were taken with knowledge of the email, then it was procedurally unfair because Kohler was unreasonably denied the opportunity to make representations. Allowing Kohler a

reasonable opportunity to make representations could easily have been accommodated in the period between 19 December and 28 February.

- An expropriating authority would ordinarily be bound, in terms of constitutional principles, to have regard to such representations in *its 'evaluation of whether an expropriation is expedient or necessary'*.

The review therefore succeeded.

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