IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No:

In the matter between:

OFFIT ENTERPRISES (PTY) LTD	First Applicant
OFFIT FARMING ENTERPRISES (PTY) LTD	Second Applicant

and

COEGA DEVELOPMENT CORPORATION (PTY) LTD	First Respondent
THE PREMIER OF THE EASTERN CAPE GOVERNMENT	Second Respondent
THE MINISTER OF PUBLIC WORKS	Third Respondent
THE MINISTER OF TRADE AND INDUSTRY	Fourth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

STEPHEN KENNETH GOUGH,

do hereby make oath and say that :

1. I am an adult male attorney practising as a director of Messrs Rushmere Noach Incorporated, 5 Ascot Office Park, Conyngham Road, Greenacres, Port Elizabeth. I have throughout represented the applicants and I am authorised to do so in this application and to depose to this affidavit on their behalf. They have resolved to institute these proceedings.

2. The facts contained in this affidavit are true and correct and are within my personal knowledge or are apparent to me from the applicants' files of papers which are in my possession, save where the context indicates otherwise. Where I make legal submissions I do so on the basis of my own experience and expertise and on the advice of counsel.

A THE PARTIES

3. The first applicant is Offit Enterprises (Pty) Ltd, registration number 1989/001560/07, a company with limited liability duly registered according to the company laws of the Republic of South Africa and with registered offices at Rosebank, 30 Bird Street, Central, Port Elizabeth.

4. The second applicant is Offit Farming Enterprises (Pty) Ltd, registration number 1970/003374/07, a company with limited liability duly registered according to the company laws of the Republic of South Africa and with registered offices at Rosebank, 30 Bird Street, Central, Port Elizabeth.

5. The first respondent is Coega Development Corporation (Pty) Ltd, a company with limited liability duly registered according to the company laws of the Republic of South Africa and with its principal place of business at Coega Business Centre, Alcoyn Road, Coega, Port Elizabeth.

6. The second respondent is the Premier of the Eastern Cape Government c/o The State Attorney, 29 Western Road, Central, Port Elizabeth.

7. The third respondent is the Minister of Public Works, c/o The State Attorney, 29 Western Road, Central, Port Elizabeth.

8. The fourth respondent is The Minister of Trade and Industry, c/o The State Attorney, 29 Western Road, Central, Port Elizabeth.

B THE APPLICATION IN OUTLINE

9. The first respondent is the operator of the Coega IDZ by virtue of a permit issued in terms of the Manufacturing Development Act, 187 of 1993 read with its regulations published on 27 October 2006 by Notice R1065 in Government Gazette number 29320 (the "*regulations*").

10. The first respondent "*is owned by government at the national and provincial level*"[1].

[1] Per Wallis AJA in *Offit Enterprises (Pty) Ltd and another v Coega Development Corporation (Pty) Ltd and others* (9/09) [2010] ZASCA 1 (15 February 2010) at paragraph [17].

11. The appellants own collectively ± 505 hectares of land within the Coega IDZ (the "*properties*")[2]. The properties are zoned for agricultural use with one of them having endorsed against the title deeds a special consent to operate an hotel.

12. It is not in dispute between the parties that:

12.1 The properties are the only land over which the first respondent requires control (the meaning of control is dealt with elsewhere in this affidavit) but has not yet achieved such control[3].

12.2 The applicants' business operations have since at least 2002 been destroyed and attempts to dispose of the properties thwarted by the ongoing conduct of the first respondent, including the threat of expropriation premised on its need to control the properties both in terms of the regulations and its operator's permit. The applicants derive no benefit, economic or otherwise, as a result of the conduct of the first respondent and its continued threats of expropriation of the properties.

13. The applicants contend that the first respondent is required both by the regulations and, perhaps more importantly, as a condition of its operator's permit to control the properties.

14. The history of *the threat of expropriation* over a period of at least 9 years is chronicled in the founding affidavit[4] and confirms that the first respondent has

[2] Founding affidavit, paras 10 – 11, vol.1 at pages 51-2.

[3] Replying affidavit, para 16.1.3, vol 6, page 391 and annexure RA 15, vol 7, page 548.

[4] Founding affidavit paras 58 – 61, vol 2 at pages 58 - 82 (read with annexures FA 11 – FA 50 at pages 136 -196).

always sought control through acquisition of the properties on an ongoing basis to comply with its statutory and contractual obligations as the operator of the Coega IDZ.

15. The first respondent does not, as it cannot, deny that history[5] choosing rather to say somewhat ambiguously that "*whilst negotiations [for the acquisition of the properties on a willing seller/willing buyer basis] ensue any expropriation process would be premature. Moreover, until such property is actually required any expropriation would similarly be premature.*"

16. Taken together, the events revealed by the history reflect a substantial interference in or limitation of the applicants' right to their property that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society and they therefore constitute a deprivation.

17. This Court has held that whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society amounts to deprivation[6].

18. Where, as in this case, an organ of state has finally decided to expropriate or is required by circumstances or law to do so, it must surely act fairly and expeditiously. Such an organ of state cannot *"deprive"* a property owner of its

[5] Answering affidavit, paras 37 - 40, vol 3, pages 223 – 227.

[6] See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005(1) SA 530 (CC) at 546 B.

normal property rights by deliberate delay and obfuscation. Such conduct constitutes deprivation in the sense defined by this Court in the ***Mkontwana*** case.

19. Accordingly the issue as to whether the ongoing threat of expropriation will amount to deprivation of property is inextricably linked with the facts of each particular case.

20. In this case, as will be shown from what is set out in the affidavit, the relevant respondents unequivocally indicated their need and desire to expropriate the properties. In doing so they have actively discouraged and prevented the development of the properties and the alienation thereof.

21. Their belated denials of any <u>current</u> intention to expropriate are simply incompatible with the objective facts as set out in the history of this matter.

22. The applicants as a result of the aforegoing sought an order in the High Court that:

22.1 any expropriation, in terms of legislation in effect as at the date of such order, of the applicants' properties at the instance of any of the respondents for the benefit of the first respondent is neither permissible nor lawful; alternatively

22.2 compelling any one of the respondents desirous of expropriating the properties to initiate a lawful expropriation process within a period of one month of any order.

23. The applicants appealed (with the leave of the court *a quo*) to the Supreme Court of Appeal of South Africa ("*the SCA*") against the judgment of Jansen J in the

Eastern Cape Division (Port Elizabeth) of the High Court refusing the applicants such relief. The appeal was dismissed by the SCA on 15 February 2010. Copies of the judgments of both the court *a quo* and the SCA are attached as "**A**" and "**B**" respectively.

24. It is in the application of the facts to the principles laid down in the ***Mkontwana*** case that, it is respectfully submitted, the SCA fundamentally erred.

25. This application for leave to appeal is therefore directed against:

25.1 first, the SCA's finding that there has not been an unconstitutional deprivation of the applicants' properties as prohibited by section 25(1) of the Constitution of the Republic of South Africa Act, 108 of 1996, this notwithstanding a long history of, *inter alia*, unlawful conduct on the part of the first respondent;

25.2 second, at the SCA's finding that the granting by the fourth respondent to the first respondent of an IDZ operator permit to operate the Coega IDZ did not amount to procurement as contemplated by section 217(1) of the Constitution and that compliance with a system when appointing an operator to operate an IDZ, which necessarily requires the granting of a permit, such appointment was preceded by a procurement process which was fair, equitable, transparent, competitive and cost-effect was not necessary.

C DEPRIVATION OF PROPERTY

26. I turn now to deal with the manner in which there has been an unconstitutional deprivation by the first respondent of the applicants' properties.

27. In order for this Court to have a complete and proper understanding of the manner in which that deprivation has occurred, it is unfortunately necessary to set out in some detail the undisputed history pertaining to the properties. This is so because, with respect to it, the SCA failed to take sufficient cognisance of that history; it dealt with the history in a superficial manner which was unjustified in the circumstances.[7]

28. The history reveals a number of things:

28.1 Firstly, a long history of threats of expropriation over a period of 9 years. Those threats were, in light of the first respondent's failure ever to give lawful effect to them, disproportionate.

28.2 Secondly, the unlawful spoliation by the first respondent of portions of the properties on several occasions during this period as well as two unlawful attempts at expropriation by the second respondent of the properties at the instance of the first respondent.

28.3 Thirdly, that the assertion of the first respondent for the first time in its answering affidavit delivered in November 2008, that it did not, and never had held such an intention to acquire the properties through expropriation (save for the limited purpose of a road reserve), was unsupportable on the facts.

[7] At paragraphs [4], [5] and [6].

28.4 Fourthly, that the judgment of this Court in ***Reflect-All 1025 CC and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government***[8] is distinguishable from the facts of this case and why the SCA's reliance on such judgment was, with respect, misplaced.

(a) Material Facts

29. The responsibility of the first respondent to develop the Coega IDZ is of national and regional importance. The regulations have been promulgated by the fourth respondent and it is he who issued the permit in terms of which the first respondent now purports to operate the Coega IDZ.

30. On 27 September 2000 the first respondent wrote to the applicants' auditor, Mr S J Kalogeropoulos, in which it was suggested that it would be in the applicants' best interest if the first respondent "*proceeded to expropriation [of the properties] in the near future*".

31. In an e-mail addressed to Mr Kalogeropoulos by the first respondent on 3 October 2000, reference was made to "*in any event on expropriation"* and the possibility of the applicants having to pay costs occasioned by the expropriation.

32. On 14 December 2000 a further offer was made in a letter received from the first respondent and it was stated that if the offer was not acceptable the first respondent "*will have to proceed with expropriation"*.

[8] 2009 (6) SA 391 (CC).

33. The properties were valued by a professional valuer at the instance of the first respondent and reference was made in that valuation to "*valuation for expropriation as at 1 January 2001"*.

34. On 24 January 2001 the first respondent wrote a letter to Mr Kalogeropoulos in which reference was made to the Expropriation Act and it was asserted that the price payable for the properties could well be reduced on expropriation.

35. On 6 February 2001 the applicants' then attorneys, Spilkins Attorneys, addressed a letter to the first respondent enquiring as to the basis upon which it would be able to expropriate given that the first respondent is a private company.

36. In reply to this letter, the first respondent wrote to Spilkins on 8 February 2001 advising that in the event of expropriation becoming necessary "*it would be necessary for the Department of Public Works to acquire the property"*.

37. In a letter dated 13 August 2001 addressed by the first respondent to Spilkins reference was again made "*to the possibility of the matter proceeding to the Expropriation Court*".

38. The first respondent prepared a development framework plan for the Coega IDZ, which was approved by the Nelson Mandela Bay Metropolitan Municipality ("*the NMBM*") on 20 June 2001. The plan specified the rezoning of the properties to uses other than agricultural.

39. On 27 August 2002, the first respondent wrote to the applicants' director by e-mail advising that the first respondent had to establish "*control"* over the

properties immediately in order to qualify for a final IDZ operator's permit. Reference is again made in such e-mail to the possibility of expropriation.

40. On 30 August 2002 Spilkins enquired of the first respondent under what legislation it would expropriate. The first respondent replied on 3 September 2002 advising that this would be done by the Department of Works in terms of section 2 of the Expropriation Act and indicated that, in some circumstances, expropriation may suit a landowner.

41. On 9 October 2002 the first respondent wrote to Spilkins seeking a response by 10h00 on Monday 14 October 2002, failing which it would assume that the applicants "*would prefer the expropriation route"* and that the request would be processed.

42. On 8 November 2002 the first respondent wrote to Spilkins advising the latter that in light of the failure to reach agreement on a purchase price the first respondent had given instructions to its legal specialist "*to proceed with expropriation* " of the properties. It did not do so for some years and, when ultimately it did so, its attempts at expropriation were unlawful – as will be apparent from what I say below.

43. On 13 November 2002 Spilkins wrote to the first respondent requesting that it advise Spilkins in terms of what legislation the Minister of Trade and Industry had been given the power to expropriate or request expropriation.

44. As early as 17 December 2002, Spilkins wrote on behalf of the applicants to the first respondent's then attorney, Soni Incorporated, advising the first respondent that the applicants were being prejudiced by the failure to bring matters to finality.

45. On 10 January 2003 the first respondent posted a press release in which it advised the public generally and property owners in the Coega IDZ that expropriation was available to it for taking control of the land.

46. On 14 February 2003 CB Richard Ellis, on behalf of the first respondent, wrote to Mr R Parkinson, a tenant of the applicants, advising him that the first respondent intended "*to acquire the freehold interest in this property from Offit Coega (Pty) Ltd (sic) in the immediate future"* (emphasis supplied).

47. On 27 February 2003 Soni Incorporated wrote to Spilkins advising that updated valuations of the properties had been obtained as these were required "*in respect of the expropriation"*.

48. On 13 March 2003 Spilkins wrote to Soni Incorporated recording that the applicants had previously requested that the first respondent disclose its authority to arrange for expropriation, but that the first respondent had not responded. The letter went on to record specific instances of prejudice which the applicants were suffering. The letter records that the applicants' development of the properties had been delayed and stultified by the actions of the first respondent in threatening expropriation of the properties. A copy of this letter, being but one illustration of the undisputed sustained and severe deprivation already suffered by the applicants, is annexed as "**C**".

49. On 19 March 2003 Soni Incorporated advised Spilkins that, because of the difference in the valuation of the properties by the respective parties, the first respondent "*will be compelled to proceed with the expropriation route"*.

50. On 24 March 2003, Spilkins again wrote to Soni Incorporated recording that the first respondent had not responded to the applicants' query as to the first respondent's right to expropriate.

51. A similar letter was written by Spilkins to Soni Incorporated on 8 April 2003.

52. On 19 September 2003 Spilkins addressed a lengthy letter to Soni Incorporated setting out the applicants' position and pointing out that the first respondent has no powers of expropriation. The letter also records in detail the prejudice which the applicants were suffering as a consequence of the dilatory conduct on the part of the first respondent. These included the collapse of a township development, the removal of a community of persons living in informal housing, the closure of a post office and the termination of an agreement of lease in respect of the hotel on the properties as well as the suspension of plans for the expansion of the hotel. A copy of this letter is also annexed as "**D**".

53. On 10 November 2003 Spilkins wrote to Soni Incorporated advising it that "*more threats of expropriation would illicit an application from the applicants to stop such actions*."

54. There then followed some delay. However, the first respondent subsequently unlawfully spoliated the properties (or portions of them) on several occasions and

the second respondent – at the instance of the first respondent – unlawfully attempted on two occasions to expropriate the properties. (On the second occasion, she attempted to expropriate a portion of the properties).

55. During or about 2004 the first respondent spoliated the second applicant's property by erecting a vibrecrete fence around a grave site established on such property. It did not have the second applicant's consent to do so and its conduct was unlawful. When demand was made on the first respondent to rectify the position, it gave undertakings to return the keys to the gate and lock and to remove the vibrecrete fence. This was not done and necessitated subsequent demands having to be made.

56. The applicants applied to the NMBM to have the properties rezoned to accord with the spatial framework plan. The applicants were met with successful opposition by the first respondent[9] (although erroneously premised on the basis that "*the land under discussion was expropriated by the state.*"[10]) but for which the applicants would have been able to use the properties in accordance with the uses specified by the first respondent itself. The zoning thus remains agricultural save for 3,03936ha which has a special consent use for a hotel although it falls squarely within an industrial zone.

57.

57.1 Ultimately, in execution of the repeated threats previously made, the second respondent on 2 February 2005 purported to expropriate the properties at the

[9] Replying affidavit, para 76.2, vol.6 at page 401, and vol 7, annexure RA 24, pages 567 – 570..

[10] Annexure RA 24, vol 7, page 569.

instance of the first respondent. The first respondent prepared the notices and motivated the urgency of the expropriations as "*[t]he CDC's permit will expire in the event of it failing to obtain control of the Coega land, by 20 February 2005. Control is described by relevant regulations as ownership of the land or a servitude over the land or a 30 year lease of the land, or an option over the land, which option is enforceable at the instance of the CDC ... [a]ll but two of the owners*[11] *of the properties in the Coega IDZ have sold their properties to CDC*"

57.2 The applicants contended that the second respondent in issuing the notice acted *ultra vires* and accordingly that the notice was invalid and of no force and effect. Papers were filed and after hearing full argument Ebrahim J, on 31 January 2006, upheld the applicants' contentions and he set aside the second respondent's notice of intended expropriation. The first and second respondents appealed against the judgment but ultimately withdrew that appeal shortly before the scheduled hearing of the appeal before the SCA on 8 May 2007. The third and fourth respondents were parties to this litigation, although they did not oppose the application, and were fully aware of the process.

58. On 1 September 2006 the first respondent again spoliated the properties by moving plant and earthmoving equipment onto the properties and commencing operations thereon. On demand, the first respondent's attorneys informed that the first respondent would immediately stop its acknowledged unlawful activities and would rehabilitate the properties.

[11] i.e. the applicants.

59. Shortly thereafter, it was established that the first respondent had further spoliated the properties by establishing a butterfly reserve on one of them. Once again its conduct in doing so was unlawful. The first respondent also failed to rehabilitate the properties as previously undertaken by it. I had by then been instructed by the applicants. On their behalf, I on 18 September 2006 demanded that the first respondent fulfil its undertakings and also that it remove the fencing and posting established in respect of the butterfly reserve.

60. On 28 September 2006 a letter was received from Mr Le Roux, then acting on behalf of the first respondent, in which the applicants were informed that the rehabilitation work would commence on 2 October 2006 and that it was anticipated that it would be completed within a period of approximately two weeks.

61. Mr Le Roux's letter made no mention of the butterfly reserve, however, and I therefore addressed a further letter to him on 3 October 2006. In his response to my letter, Mr Le Roux stated that "*notwithstanding the legal challenge to the expropriation process, [the first respondent] will eventually acquire the properties for the purposes of the IDZ.*"

62. I replied to Mr Le Roux's letter on 10 October 2006. I disputed that irrespective of the outcome of the legal challenge the first respondent would eventually acquire the properties for the purpose of the IDZ. The first respondent was afforded a further opportunity to rehabilitate the properties as this had not as yet been done. At a meeting held shortly thereafter a firm commitment was made that the properties would be rehabilitated as a matter of urgency.

63. I wrote a further letter on 11 October 2006 in which demand was made that the first respondent meet the undertakings given by it when spoliating the applicants' properties during October 2004, as referred to above.

64. A reply was received from Mr Le Roux on 11 October 2006. The reply tendered the first respondent's "*apologies for the unauthorized activities of its employees and contractors who have disregarded the rights of [the applicants]*" (My emphasis). The reasons for having failed to commence rehabilitation of the properties earlier were furnished and a new timetable set out for the rehabilitation.

65. By 23 October 2006 the first respondent had only commenced with the rehabilitation of certain of the vegetation in the proximity of the Coega Hotel. I was obliged to address a further demand to the first respondent calling upon it to comply with its further undertaking.

66. A letter was received from Mr Le Roux on 31 October 2006. The letter conveys that the first respondent would not, contrary to its earlier undertaking, remove the vibrecrete fence around the graveyard purportedly on the basis of an agreement concluded (without the knowledge or consent of the second applicant as the owner of the property) with the community regarding the fencing of the graveyard.

67. I replied to this letter on both 6 November and 4 December 2006. My letters advised that the second applicant was not bound by the unlawful arrangements which the first respondent had purportedly concluded with the community and that it would not tolerate the first respondent reneging on its previous undertakings regarding the removal of the fencing.

68. When by 12 December 2006 no response had been received from the first respondent, I made further demand on it in a letter of the same date.

69. A further unlawful attempt at expropriation was made soon thereafter. On 17 March 2007 the second respondent – again at the instance of the first respondent – delivered a notice of expropriation to the second applicant claiming the expropriations of portions of the properties as a road reserve. The applicants sought and obtained an order from Plaskett J on 19 April 2007 declaring that this further attempted expropriation was also invalid and of no force and effect.

70. On 4 June 2007, after both attempts at expropriation had been declared invalid and in light of the failure of the first respondent to take the matter any further, I wrote to the first respondent's then attorneys and to the State Attorney who represent the remaining respondents in which I recorded the following :

> "*Kindly note that it is our client's (sic) instruction that our client is now proceeding on the basis that your respective clients have no further interest in pursuing the acquisition of our client's property whether by private treaty or expropriation (which our client in any event denies is permissible), and they will now commence marketing the property on the open market*."

71. No response was received to this letter. The applicants therefore instructed a prominent firm of estate agents to market the properties, both nationally and internationally. Advertisements were placed prominently in the media advising the public that the properties were for sale.

72. In a direct response to the advertisement for the sale of the properties and notwithstanding its failure to reply to my letter dated 4 June 2007, the first respondent placed advertisements in the Business Day newspaper during June 2007 advising the public that it is the intention of the first respondent to expropriate the properties if it is unable to acquire them by private treaty. A copy of the advertisement is attached as "**E**".

73. In explaining why it had placed its advertisement Mr Zeiss for the first respondent says "*[h]owever, due to its inability to secure the properties belonging to Applicants through negotiations, the CDC was intending, as a remedy of last resort, to request the relevant authority that the land be expropriated, a matter of which the applicants were fully aware as they had been informed of such in writing by the CDC on many occasions. However, despite this knowledge, the applicants through the advertisement and media release, proceeded to deal with their properties relative to the public in a manner which failed to communicate this information*."[12] (My emphasis).

74. Notwithstanding this advertisement, still no attempt to expropriate the properties lawfully has been made. The applicants received an offer to purchase the properties from Algebra Properties in London on 24 July 2007. However, that offer was R10 million less than the asking price; it was expressly stated by Algebra Properties that the depressed price was as a consequence of the difficulties arising from the first respondent's threat to expropriate the properties.

[12] Answering affidavit para 40.8, vol 3, page 226.

75. The Applicant then launched proceedings in the High Court on 17 August 2007, the following month, for the relief sought.

(b) The issues

76. I must also deal with the contention of the first respondent that it has no current intention to expropriate the properties, as this was accepted by the SCA as a proven fact[13], and was thereafter fundamental to its reasoning in dismissing the appeal. I say the finding is wrong for the following reasons:

76.1 the first respondent has on occasion already sought to take control of all the land by expropriation[14] and portions thereof through spoliations admitted to being unlawful by the first respondent, including fencing areas off for the establishment of a butterfly reserve, seeking to have a portion of the properties expropriated for a road reserve (now achieved through a lawful process) and the eradication of alien vegetation on the properties;

76.2 the astonishing contention of the first respondent for the first time in its answering affidavit in the application *a quo* that, save for the limited purpose of a road reserve, it has never sought the expropriation of the properties[15]. The first unlawful attempt at expropriation, set aside by Ebrahim, J[16], was for the

[13] At paragraph [38].

[14] Annexure A of Annexure RA 14, vol 7, page 531ff.

[15] Answering affidavit, vol2 para 8, pages 210-211.

[16] Annexure FA 3, vol 2, page 90ff; see also annexure A of Annexure RA 14, vol 7, page 531.

entire extent of the properties and the purpose was not limited to the establishment of a road reserve[17];

76.3 the first respondent had over 9 years, including two failed expropriations attempted to acquire control (through ownership) over the properties. On 6 June 2008 the first respondent repeated an offer to purchase the properties[18];

76.4 the first respondent successfully opposed the applicants' 2006 rezoning application[19];

76.5 the first respondent in its 2007 application for an operator's permit identified the properties as the only land[20] over which it had not acquired control and stated that *"[f]inal efforts are being made to arrive at a settlement on a wb/ws basis. If this last attempt fails, the Hotel [one of the properties] will be expropriated*."[21];

76.6 the operator's permit itself, which was issued in March 2007, contained the following special conditions[22]:

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[17] See the motivation for that expropriation in the notice prepared by first respondent and then issued by the Premier in annexure A of Annexure RA 14, vol 7, page 531ff.

[18] Annexure AZ 1, vol 3, page 234, read with the replying affidavit, para 42,vol 6, page 421,

[19] See para 56 supra.

[20] Replying affidavit, para 16.1.3, vol 6, page 391 and annexure RA 15, vol 7, page 548

[21] Annexure RA 25, vol 7, page 572.

[22] Annexure NB 1, vol 4, page 263.

"CDC must provide the Department with bi-annual reports on the progress made in respect of expropriation proceedings relating to the 8.1% of the area not yet under the control of CDC;

Should the Board be of the opinion that after some period of deliberations and/or a final court order/decision (i.e. when no further appeal is available, or a further appeal is not advisable), the CDC will not be able to obtain control of the area currently indicated as subject to expropriation proceedings, or any part thereof, the board may recommend to the Minister to amend the operator's permit so as to exclude that specific area or portion thereof." (My emphasis);

76.7 there was no evidence placed before the court by either the first or fourth respondents that recommendations had been made to the fourth respondent to exclude the properties from the Coega IDZ or that it had abandoned the "*expropriation proceedings*" of the properties;

76.8 in late June 2008, only some two months before the launch of the application *a quo*, it had placed an advertisement in the newspaper designed to deter prospective purchasers of the properties[23] stating , *inter alia*, that *"[t]he Coega Development Corporation (CDC) is in discussions with all land owner's(sic) within the IDZ to acquire their land, and is offering to purchase this land at reasonable market rates. The CDC has largely succeeded with the option to purchase land, but where this option does not yield positive results, an alternative to expropriate land in order to secure the control of*

[23] Annexure FA 48, vol 3, page 192.

land over the proclaimed IDZ boundary will be taken (my emphasis). The "*land owner's*" could only be the applicants if regard is had to paragraph 76.5 above.

76.9 The requirement of the permit that the first respondent report on expropriation proceedings in respect of land not under its control. The only inference is that control in the restricted sense of ownership, servitude, notarial long lease or an option is what was required by the first respondent. Significantly no explanation was given by the fourth respondent in her answering affidavit of what she required in terms of control in imposing the special conditions in the permits. The point on the papers taken by the fourth respondent was not that control meant something other than that contended for by the applicants but rather that it was not necessary for the first respondent to control all the land within the Coega IDZ.

77. In the light of the above facts, the finding that "*there is no current plan to undertake an expropriation*", cannot be correct.

78. It is also apparent that the permit condition which required the first respondent to control the land[24] was far more restricted than the meaning attributed to "*control*" in the regulations by the SCA, namely that the first respondent "*indicate with appropriate clarity the manner in which control is to be obtained and exercised as the development of the IDZ proceeds*"[25]. Plainly the permit condition required more than some indication as to how at some time in the future control may be

[24] See para 76.6 supra.

[25] At paragraph [33].

obtained by the first respondent over the properties. On such an interpretation there would have been no need to impose the condition in the first place or require biannual reporting on their expropriation as the first respondent would already by then have been exercising the control of the kind found by the SCA to be a requirement of the regulations.

79. The history of this matter is far more prejudicial to the applicants than is revealed by the SCA judgment as it involves unlawful conduct over a protracted period of time. It differs markedly and materially from the history revealed by the judgment in the Reflect-All case (*supra*) where there was an orderly, lawful and necessary process of strategic forward planning of roads in the Gauteng Province. I am advised that the Reflect-All case was not argued on the basis that the landowners had by the conduct of the organs of state already been deprived for some considerable period of time of any and all beneficial use and enjoyment of their land or that their was any prospect of this occurring in the future.

80. It is for these reasons that I respectfully say that the SCA misdirected itself by relying on that judgment as support for its conclusion that there has been no deprivation of the applicant's use and enjoyment of properties.

81. Quite on the contrary, the history to which I have referred reveals plainly , with respect, the finding of the SCA that "*it is not suggested that it [the threatened expropriation] prevents the appellants from using the properties for whatever purpose they deem appropriate*"[26] cannot be correct. The truth is rather that the deprivation is "*the type of substantial interference or limitation of the owners' use*

[26] At paragraph [38].

and enjoyment of their properties that it is the hallmark of a deprivation of property under s25 (1) of the Constitution.[27]". In my respectful submission, there has indeed been a deprivation which goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society is demonstrated on the papers as an uncontroverted fact. The SCA erred in not finding accordingly.

82. This being so, it follows logically that were that history now to culminate in an expropriation of the applicants' properties that such expropriation must necessarily constitute unfair administrative action as contemplated by section 6(1)(c) of the Promotion of Administrative Justice Act[28] as is the failure to take a decision to expropriate.

83. The proposition relied on by the SCA that the third and fourth respondents were oblivious to the activities of the first respondent and to the requirement that there be an expropriation of the properties[29] is fundamentally flawed. That proposition ignores that:

83.1 The first respondent is owned by government;

83.2 The relationship between the respondents. The responsibility of the first respondent to develop the Coega IDZ is of national and regional importance and the development takes place in accordance with authority given under the Manufacturing Development Act. The regulations have been promulgated by

[27] Mkotwana case, supra, at para [32].

[28] Act 3 of 2000.

[29] At paragraph [43].

the fourth respondent and it is he who issued the permit in terms of which the first respondent now purports to operate the Coega IDZ. Providing industrial development with its concomitant benefits of employment and economic growth is central to the development plans and policies for the Eastern Cape and National Government (which obviously includes the third and fourth respondents), as is the establishment of an important deep water port.

83.3 The ongoing requirement that there be control by expropriation, if necessary, as evidenced by the regulations promulgated by the first respondent and, in particular, the permit issued by the fourth respondent to the first respondent. National Government, including the third and fourth respondents, has worked energetically and collectively with the first respondent for the common good and success of the Coega IDZ.

84. The finding also conflicts with the SCA's finding in support of its conclusion that section 2(1) of the Expropriation Act does not prohibit expropriation by the state for onward transfer to another entity. To this end the SCA had no hesitation in concluding that the first respondent is owned by government[30]. The first respondent is controlled by government through the shareholding of the fourth respondent[31]. The SCA criticised the applicants for drawing a distinction between the government and the first respondent saying "*I fail to see why it should be any different because a company owned by government at the national and provincial level undertakes the task [of operating the Coega IDZ] instead*"[32].

[30] See para 10, supra.

[31] Per Ebrahim,J in *Offit Enterprises (Pty) Ltd and another v Coega Development Corporation (Pty) Ltd and others* (unreported judgment), case no 1764/2005 in the High Court, Eastern Cape Division (Port Elizabeth) at para [26].

[32] At paragraph [17].

85. It is respectfully submitted, therefore, that the SCA erred in not finding that there has been a deprivation of property of the very kind contemplated by the ***Mkontwana*** case.

86. I am advised, and verily believe, that for the following reasons (notwithstanding the severe and sustained hardship endured by the applicants over a lengthy period of time at the hands of an entity controlled by national government) the finding of the SCA that the interference by the courts in coming to the assistance of the applicants "*as this would trespass across the boundaries constituted by the doctrine of separation of powers*"[33] is of fundamental importance, and has consequences, for the constitutionally entrenched rights of ownership in property beyond those of the applicants alone:

86.1 The SCA found "*[t]he protection that the Constitution affords against arbitrary deprivation of property may enable a property owner to seek relief in certain situations, but as a general proposition it seems to me that the expropriating authority must be left to decide for itself when to expropriate*"[34].

86.2 The SCA does not inform through illustration what may be considered "*certain situations*". If the situation of the applicants, deprived of any economic benefit in their properties for all of 9 years by government through its controlled entity, is not such a situation, it is difficult to conceive what may constitute such a situation. The rider to the general proposition stated by

[33] At paragraph [48].

[34] At paragraph [48].

the SCA is, with respect, meaningless and of little comfort to landowners who in the face thereof, even if facing financial ruin, have little prospect of a court coming to their assistance.

86.3 On the strength of the SCA judgment, effectively the rights of a land owner no matter how severe and sustained the deprivation may be will always be trumped by the public purpose, and he will have no prospect of a court coming to his assistance.

86.4 The pursuit of the public purpose and the interests of the land owner are thus disproportionately weighted in favour of the former as a consequence of the SCA judgment. The interests of justice require a balance to be struck and I am advised that it is only through the intervention of this Court that this can be achieved.

D SECTION 217 OF THE CONSTITUTION

87. I turn now to deal with the second constitutional issue raised by the SCA judgment. It held that *"(t)he issue of an operator permit under the regulations is not a contract for the supply of goods and services but a licensing activity directed at authorising Coega Development [the first respondent] to carry out the task of developing the Coega IDZ. That is something wholly distinct from contracting to supply goods and services to organs of State."* [35] Once again and with respect to it, the SCA dealt with this issue on an unjustifiably superficial basis.

[35] At paragraph [45].

88. It is necessary to have regard to what the regulations provide.

89. "*Permit*" is defined in the regulations as meaning "*a written agreement entered into between the Department and an IDZ operator in terms of which rights and obligations of both parties are set out*", while "*operate* " or "*operation*" are given the meaning to "*administer, manage, maintain, control and cause to function*".

90. Regulation 3 goes on to provide that :

> "3. **Industrial Development Zones.**
>
> *The Minister may identify an area as suitable for development of an Industrial Development Zone by notice in the Gazette if the Minister is satisfied that designation of the area as an Industrial Development Zone will*
>
> *(1) Facilitate the creation of an industrial complex having strategic economic advantage;*
>
> *(2) Provide the location for the establishment of strategic investments;*
>
> *Enable the exploitation of resource – intensive industries;*
>
> *(4) Take advantage of existing industrial capacity, promote integration with local industry and increase value-added production;*

(5) Create employment and other economic and social benefits in the region in which it is located; and

(6) Be consistent with any applicable national policies and law, as determined by appropriate environmental, economic and technical analyses.

(a) *Other criteria and prerequisite procedures for such designation shall be a matter of policy and will be set out in guidelines to this programme.*"

91. In terms of regulation 17(e), moreover, an IDZ operator permit or contract is required to stipulate, *inter alia* :

91.1 The IDZ operator's duties, terms and conditions for the development and operation of the IDZ;

91.2 The requirements and timetable for the planning, construction, supply of infrastructure and utilities within the IDZ;

91.3 The security measures which the IDZ operator is to provide and maintain;

91.4 The facilities which the IDZ operator must provide to enable the fourth respondent's Board to exercise its functions;

91.5 A construction timetable for the development of the IDZ; and

91.6 Any special requirements that the fourth respondent may deem appropriate to impose.

92. A consideration of these aspects of the regulations demonstrates, in my submission, that the operator of an IDZ performs a service on behalf of the first respondent in terms of an agreement sanctioned by the granting of a permit, namely the operation of the IDZ on behalf of national government and the fourth respondent in particular. The granting of the permit does not solely serve a regulatory purpose as may be the case in respect of other permits which may be issued in terms of other regulatory provisions, as for instance a liquor licence for an hotel or permit to operate a private taxi. It is also required to provide goods in the form of materials and infrastructure. All of this falls squarely within the ambit of what is contemplated by section 217(1) of the Constitution.

93. The position of an IDZ operator is analogous to an organ of state resolving to construct and operate a rapid transport system itself or through a public entity as part of its constitutional obligation to provide transport services. On the finding of the SCA because construction of the infrastructure and operation of the transport system requires permits in terms of statute should the organ of state wish to outsource some or all of the construction or operation of the system the procurement imperatives of section 217 of the Constitution can be ignored. This, with respect, cannot be correct.

94. It is common cause that the granting of the permit to the first respondent in terms of the regulations was not preceded by a system which was fair, equitable, transparent, competitive and cost-effective as required by section 217.

95. The fourth respondent has to date promulgated two sets of regulations[36] in terms of the Manufacturing Development Act. The earlier regulations required as a precursor to a final permit, the issuing of a provisional permit.

96. Where the previous provisional permits issued to the first respondent in terms of the earlier regulations were bedevilled by irregularities and non-compliance with those regulations – a position asserted by the applicants, not challenged by the respondents and apparently recognised by the SCA[37] - then the constitutional imperatives of fairness, transparency and the like obtain *a fortiori*.

97. The SCA accordingly erred, with respect, in not finding that the first respondent is not in possession of a valid IDZ operator's permit, for want of compliance with section 217(1) of the Constitution, and accordingly that, by virtue of its unlawful operation of the Coega IDZ, any expropriation for its benefit could never meet the other constitutional imperative in section 25(2) that an expropriation of property may only be for a public purpose. The public purpose requirement can never be met where the operator is itself acting unlawfully.

98. Whilst it is so that the applicants have not challenged the validity of that permit, their challenge within the narrow confines of this application constitutes a permissible collateral challenge as recognised by the SCA in Oudekraal Estates (Pty) Ltd v City of Cape Town and Others[38].

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[36] Early regulations were promulgated in Government Notice R1.1224 dated 1 December 2000; amended regulations were promulgated in Government Notice R1.1065 dated 27 October 2006

[37] At paragraph [29]

[38] 2004 (6) SA 222 (SCA) at paragraph [35]

99. The finding of the SCA that the imperatives of section 217 of the Constitution are not of application in the instance of this case has implications beyond the case itself:

99.1 Company is defined in the regulations as meaning "*a company incorporated and registered in terms of the Companies Act (Act No. 61 of 1973), a close corporation incorporated and registered in terms of the Close Corporations Act (Act No. 69 of 1984), or an external company registered in terms of Chapter XIII of the Companies Act (Act No. 61 of 1973). "Company" shall exclude any South African Company; association; branch of foreign company that are not for profit or gain*".

99.2 Regulation 16 provides that a company may apply for an IDZ operator's permit.

99.3 It is immediately apparent that an IDZ operator need not be an organ of state or controlled by it and shall not be a company not for profit or gain.

99.4 The SCA judgment has thus opened the door for an organ of state requiring the supply of services or goods to avoid the constitutional requirements of a transparent, equitable and fair process merely because the rendering of the service or supply is premised upon the grant of a permit before the goods or services may be supplied. Thus it may in such circumstances award contracts to private enterprise without any procurement process at all. In my submission such avoidance is manifestly in conflict with the Constitution and

the subsequent legislation introduced to give effect thereto. It is again in the interests of justice that this finding be considered by this Court.

E CONCLUSION

100. I respectfully submit that, in compliance with Rule 19(3), the decision against which the appeal is brought and the grounds upon which such decision is disputed are adequately set out above. This affidavit also sets out clearly and succinctly the constitutional matters raised and the information which is supplementary thereto. The applicants have not applied and do not intend to apply for leave or special leave to appeal to any other court.

101. In all the premises, it is respectfully submitted that:

101.1 The SCA erred in respect of these constitutional issues;

101.2 The applicants enjoy reasonable prospects of succeeding in the appeal, should leave be granted to them;

101.3 It is in the interests of justice that leave be granted. In this regard, the issues raised are of considerable importance to all the parties concerned as well as to National and Provincial Government generally as well as landowners and people or entities doing business with an organ of state;

101.4 I submit it is fundamentally important for all of the above reasons for this Court to decide whether in circumstances where an organ of state needs to

expropriate or is required by circumstances or law to do so, it must act fairly and expeditiously.

101.5 The constitutional issues raised are matters of substance on which a ruling by this Court is desirable. The matter is therefore of considerable public importance.

102. An order is accordingly respectfully sought in terms of the notice of motion.

sgned SK GOUGH

STEPHEN KENNETH GOUGH

Sworn to before me and signed in my presence at PORT ELIZABETH on this **5TH** day of **MARCH** 2010, the deponent having acknowledged that he knows and understands the contents of this Affidavit, that he had no objection to taking the prescribed oath and that he considered the prescribed oath to be binding on his conscience.

sgned **TANIA BARNARDO**

COMMISSIONER OF OATHS

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