

PUBLIC PURPOSE AND CHANGING CIRCUMSTANCES:

HARVEY v UMHLATUZE MUNICIPALITY & OTHERS

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INTRODUCTION

The purpose of this note is to highlight an interesting point raised in the recent decision in *Harvey v Umhlatuze Municipality & others* 2011 (1) SA 601 (KZP) (*Harvey*). In *Harvey*, the applicant's property was expropriated for a valid public purpose, namely creating a recreational area for general use by the public. However, once the expropriation was completed, it appeared that the original public purpose could not be realised. As a result, the expropriating authority (the municipality) decided to change the intended use of the property. The changed purpose would involve selling the land on tender to a private developer. The applicant reclaimed his expropriated property on the basis that the public purpose for which the property was originally expropriated was abandoned. To substantiate his claim the applicant relied on s 25 of the Constitution of the Republic of South Africa, 1996 and on authority in German law.

Consequently, one of the issues was whether the court was competent to grant an order effecting the re-transfer of the applicant's previously expropriated property, given the fact that the original public purpose for which the property was expropriated could no longer be achieved. (For other discussions of the decision, see Elmien du Plessis 'Restitution of expropriated property upon non-realisation of the public purpose: *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP)' 2011 *TSAR* 579; J C Sonnekus & A J H Pleysier 'Eiendomsverwerwing of -verlies onder 'n tydsbepaling of 'n voorwaarde en die privaatregtelike implikasies vir onteiening (deel 2)' 2011 *TSAR* 601). The court made some general remarks on South African expropriation law before considering the German position in some detail.

In South African law the authority to expropriate stems exclusively from legislation, primarily the Expropriation Act 63 of 1975 (*Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 at 657; M Jacobs & A Gildenhuys 'Expropriation in South Africa' in G M Erasmus (ed) *Compensation for Expropriation: A Comparative Study Volume I* (1990) 373; Antonie Gildenhuys *Ontieningsreg* 2 ed (2001) 49), and is subject to the provisions of s 25(2)–(3) of the Constitution. Property may only be expropriated for a public purpose or in the public interest and subject to the payment of compensation. At present there is no established principle, statutory or otherwise, that allows an expropriated owner to reclaim his previously expropriated property when the public purpose for which the property was expropriated cannot be realised or is abandoned.

German law implicitly and explicitly provides for the re-transfer of expropriated property to the former owner upon non-realisation of the intended public purpose. The authority for re-transfer is derived from the Basic Law (implicitly) and legislation (explicitly) (D P Currie *The Constitution of the Federal Republic of Germany* (1994) 293–4; A J van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 149; Du Plessis op cit at 589; Sonnekus & Pleyzier op cit at 613–19). Given the absence of comparable legislation in South African law and the particular context in which the German position developed, the court dismissed the applicant's claim in *Harvey*.

In *Harvey*, the court discussed the law of expropriation in foreign jurisdictions including Australia, Canada, France, Germany, Italy, Sweden, the United Kingdom and the United States of America. A similar issue also featured in recent judgments in at least two other foreign jurisdictions not considered by the court, and which shed interesting light on the matter. In *United Development Company Sdn Bhd v The State Government of Sabah & another* [2011] 7 MLJ 209 the Malaysian High Court granted the plaintiff's plea for re-transfer of its previously expropriated property because the state had not used the property for the intended purpose for a period of 30 years. This delay was regarded as an indication that the state expropriated the property in bad faith. In *Ouano & others v MCI AA; MCI AA v Inocian & others* GR NO 168770; GR NO 168812, 9 February 2011, the Supreme Court of Manila, Republic of the Philippines, ordered the expropriating authority to return the property to its former owners because the original purpose for which the property was expropriated had fallen away. Both of these cases will be more fully discussed below.

The public purpose/public interest requirement in s 25 of the Constitution justifies expropriation (*Harvey* para 82). On the basis of the justificatory function of the public purpose requirement — as well as the position in terms of German, Malaysian and Philippine law — it could be argued that the *Harvey* judgment unnecessarily restricts the role that the public purpose requirement should play in the expropriation process, especially when the original purpose of the expropriation becomes impossible or is abandoned. While the administrative process of expropriation ends once the property is

validly expropriated, the public purpose requirement should remain relevant since it is the public purpose which justifies the expropriation and the state's subsequent use of the property. As a result, the previous owner arguably might be able to succeed with a re-transfer claim on the basis of the abandonment of the public purpose and not in terms of a right to property in terms of s 25 of the Constitution. Alternatively, we argue that the effect of the public purpose requirement on post-expropriation changes of purpose might require reconsideration.

Since the court refused to order the re-transfer of the property in *Harvey*, the question can be asked what the function of the public purpose/public interest requirement is in light of the Constitution. How far should the public purpose extend to ensure the validity of an expropriation? Does the public purpose requirement only apply during the initial administrative act of expropriation, or is it applicable during the entire period (or at least part of the period) that the property is used by the state subsequent to the expropriation? In this note we argue that if the original public purpose cannot be realised, any new purpose for which the expropriated property is subsequently used should also (at the very least) be assessed according to the public purpose/public interest requirement in s 25(2) of the Constitution. Furthermore, if the property cannot be utilised for a legitimate public purpose, there is a strong case to be made in favour of returning it to its original owner, perhaps even in the absence of legislation that explicitly authorises such a re-transfer and sets out the conditions under which such a re-transfer should occur.

HARVEY v UMHLATUZE MUNICIPALITY

Introduction

As indicated above, the *Harvey* case dealt with the question whether the former owner of land has the right to reclaim expropriated property on the basis that the expropriating authority is no longer justified in retaining ownership of the property because it cannot or does not use it for the public purpose for which the property was originally expropriated. The municipality initially expropriated the applicant's property in 1992 to create a public recreational open space and conservation area. After the municipality and Harvey agreed on the amount of compensation, the property was registered in the municipality's name. However, in 1996 it became apparent that the property could no longer be used effectively for the intended public purpose. Therefore, in 2006 the municipality re-zoned the property so that it could be utilised as a medium-density residential area. The municipality decided to put the property out to tender and, once all the formalities had been complied with, the tender was awarded to a private company (the second respondent).

The issue in this case was not whether the initial expropriation was valid, since the parties agreed that the expropriation was for a valid public purpose. If the expropriation had not been for a public purpose or if bad faith had been

present on the part of the municipality (as was the case in the Malaysian decision of *United Development Company Sdn Bhd v The State Government of Sabah* (supra) discussed below), the expropriation would have been invalid from the start and the question of the changed purpose and re-transfer would not have surfaced. In such a case the owner does not ever lose his or her ownership, because the expropriation is invalid (see also *Sonnekus & Pleyzier op cit* at 623). The issue in *Harvey* was, however, whether a subsequent change of the purpose is possible, assuming that the initial expropriation was valid and for a legitimate purpose.

Significantly, the effect of the change in purpose in the *Harvey* case was that the applicant's property was transferred to another private party for economic development when the intended public use of the property was abandoned (see *Du Plessis op cit* at 585). Expropriation of property for the benefit of another third party can be justifiable in terms of the public purpose/interest requirement, for example if it occurs in terms of a land reform programme (s 25(4)(a) of the Constitution), or if the private beneficiary is responsible for and requires the land in the process of providing a public utility (AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 464–5; PJ Badenhorst, J M Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 567). However, it is a different and potentially contentious matter when property which is expropriated for a public purpose or in the public interest is then transferred to a third party who economically develops the property for private profit (see *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation (Pty) Ltd & others* 2010 (4) SA 242 (SCA); AJ van der Walt 2008 (4) JQR *Constitutional Property Law* 2.1; AJ van der Walt 2011 (1) JQR *Constitutional Property Law* 2.5). The question in this case therefore was not simply whether the expropriating authority could change the purpose for which it wanted to use the expropriated property, but also whether it could change the purpose to the particular use of the property, namely for economic development by a private party.

The re-transfer argument

The applicant argued that the first respondent had an obligation to grant him restitution of his former property (against repayment of the market value) since the first respondent abandoned its plan to use the property for the original purpose (*Harvey* para 80). To substantiate his claim, the applicant relied on s 25(2) of the Constitution, which states that property can only be expropriated for a public purpose or in the public interest. He therefore argued that when the public purpose falls away, becomes impossible, or is abandoned, the expropriation is no longer 'legally and constitutionally sustainable in the face of a claim to the property by the original owner' (*Harvey* para 80). Consequently, since the expropriation was no longer justified by the original public purpose, the expropriating authority should return it to the original owner.

The court considered this argument in the context of expropriation in South African law. In terms of the Expropriation Act 63 of 1975 there are

only two prerequisites for a valid expropriation: it must be for a public purpose and compensation must be paid. This is echoed in the Bill of Rights: in terms of s 25(2) of the Constitution too, expropriation must be for a public purpose or in the public interest and just and equitable compensation must be paid. The court recognised that the public purpose requirement serves as the justification for the expropriation, while the payment of compensation is merely the result of the expropriation and not a justification for it (*Harvey* para 82). Compensation can therefore not in itself justify the expropriation, which seems to support the applicant's argument.

The court considered foreign law on the question whether re-transfer of expropriated property is possible or obligatory if the original purpose falls away or becomes impossible (the court relied on G M Erasmus (ed) *Compensation for Expropriation: A Comparative Study Volume I* (1990) to compile its overview of foreign law). In certain foreign jurisdictions (in this instance Canada, Germany, France, Italy and the United Kingdom) a former owner can reclaim the property when it becomes clear that the expropriated property was not used for the intended purpose. The right of the expropriated party to reclaim his property is based on legislation or administrative rules in each of these jurisdictions. The court also reviewed expropriation law in other foreign jurisdictions (Australia, Sweden and the United States of America) but it did not explicitly state whether re-transfer is possible in these jurisdictions.

From the discussion on foreign law the court deduced that the power of expropriation is always subject to certain requirements and that there is therefore no unfettered power of 'eminent domain'. The court concluded that expropriation must be justified by its serving some 'public purpose, use, interest, benefit or necessity' (*Harvey* para 114). However, in so far as actual re-transfer of the property to the former owner is concerned, the overview of foreign law merely indicated that the former owner would have a right to claim re-transfer if such a right or procedure was provided for in legislation. The applicant relied particularly on German law for his argument in favour of a more general right to claim re-transfer.

German law

In German law expropriation is only allowed if it is in the public interest (art 14.3 GG). The German courts interpret the public interest requirement strictly. Expropriation must be the only possible way to achieve the required result (which is in the public interest) and the expropriation must be strictly necessary to satisfy that need (Van der Walt *Constitutional Property Clauses: A Comparative Analysis* op cit at 147; see also Sonnekus & Pleysier op cit at 613–619).

The applicant relied on an argument that Van der Walt made with reference to German law (AJ van der Walt *Constitutional Property Law* (2005) 256. In the 3rd edition (op cit at 493–9) this argument is expanded and refined with reference to the *Harvey* decision as well as the Malaysian case law discussed below). In *BVerfGE* 38, 175 [1974] the German court held that the

ownership guarantee in art 14 of the Basic Law serves as the basis for the repurchase of the property by the former owner if the public purpose is not realised (*Harvey* para 129). Furthermore, legislation such as the German Federal Building Code, among others, specifically provides for the ‘re-expropriation’ of expropriated property upon the non-realisation of the public purpose requirement (*BVerfGE* 97 89 [1997]; *Harvey* para 131; on the Federal Building Code see further Sonnekus & Pleysier op cit at 616–17).

Relying on *BVerfGE* 38, 175 [1974], *BVerfGE* 56, 249 [1981] and *BVerfGE* 97 89 [1997], Van der Walt argued that if the purpose for which the property was expropriated is never realised, or ceases to exist, the property should be returned to the previous owner, regardless of whether compensation was paid (Van der Walt *Constitutional Property Law* (2005) 256; 3 ed (2011) at 167). Since the public purpose serves as the justification for the expropriation, the justification falls away when the public purpose can no longer be achieved. In German law, the property guarantee is a guarantee of the specific property and not a guarantee of its equivalent in monetary value. Therefore, the payment of compensation does not release the state of its obligation to use the property for the particular public purpose (Currie op cit at 291; Du Plessis op cit at 588). Therefore, upon the non-realisation of the public purpose, the state can no longer lawfully retain the property. As a result, Van der Walt argues that the public purpose requirement should have a ‘lasting rather than fleeting or temporary quality to secure the interest of the public in the fulfilment of that purpose’ (Van der Walt *Constitutional Property Law* (2005) 256; see now 3 ed (2011) at 493).

In German law, the public purpose requirement is bolstered by legislation to ensure that the expropriated property is transferred to its original owner in the event that the public purpose ceases to exist (Van der Walt *Constitutional Property Clauses: A Comparative Analysis* op cit at 149). According to the *Harvey* court, there is no equivalent doctrine (or legislation) to facilitate following the German principle in South African law. Therefore, the court was unwilling to order the re-transfer of the property to the applicant. Relying on *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a v Minister of Finance* 2002 (4) SA 768 (CC), the court stated that comparative law cannot by ‘simplistic transference’ determine the proper interpretation of the South African Bill of Rights (*Harvey* para 133).

Accepting the notion that the public purpose requirement has a lasting effect means that if the public purpose is not realised, the justification for the infringement of private property falls away and the state has no legal ground to retain the property (Van der Walt *Constitutional Property Law* (2005) 256; 3 ed (2011) 167). Therefore, irrespective of the presence or absence of legislation that provides for the re-transfer of the property, retaining the property when the public purpose for which the property was expropriated falls away is considered unconstitutional in German law. The legislation therefore merely facilitates the re-transfer of expropriated property, but the state’s continued ownership and use of the property becomes unconstitu-

tional as soon as the original purpose fell away or was abandoned. This topic is fairly complicated (we return to some aspects below), but for the moment being the argument at least means that the original purpose of the expropriation must survive for a reasonable time after the date of expropriation. Purely on this basis, it can be argued therefore that there was no principled ground why the South African court could not follow the German example merely because of the absence of comparable legislation (see further Sonnekus & Pleyzier *op cit* at 616–19).

Is the new purpose also a valid public purpose?

In *Harvey*, the South African court was unwilling to follow the German example because of the lack of suitable legislation that could regulate the re-transfer of expropriated property in South African law. In the previous paragraph we argued that the effect of the public purpose requirement should be that the original purpose of the expropriation must be lasting and that the justification falls away if the purpose no longer exists, even (at least for a certain time) after the original expropriation. However, it has been argued elsewhere that (even if one accepts the court's reasons for not following German law) the court in *Harvey* failed to address a second question, namely whether the new purpose for which the state intends to use the land was also legitimate (for a public purpose or in the public interest) in terms of the requirements of s 25(2) of the Constitution and the 1975 Expropriation Act (Van der Walt 'Constitutional Property Law' in 2010 *ASSAL* 251 at 291–2; Van der Walt 2011 (1) *JQR Constitutional Property Law* 2.5). The original purpose for the expropriation in *Harvey* (creating public recreational space) was clearly a public purpose. However, it is a different question whether the new purpose, which involves economic development that would predominantly benefit private third parties, is also a public purpose or in the public interest.

With reference to *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* (*supra*), the court in *Harvey* simply accepted that expropriation of property for the benefit of a third party can be valid, even if it takes place outside the land reform programme (see Du Plessis *op cit* at 585–6). However, the court cautioned against the expropriation of property under the guise of 'public purpose' while the real purpose is to increase the wealth of the state or to benefit another private party financially (*Harvey* para 125). Expropriation for the sake of enriching the state is not for a legitimate public purpose and therefore invalid (Van der Walt *Constitutional Property Law* 3 ed (2011) 465).

The *Harvey* court did not address the question whether the expropriation of the applicant's land for the economic benefit of a third party is for a public purpose. Instead, with reference to a pre-1996 case (*White Rocks Farm (Pty) Ltd & others v Minister of Community Development* 1984 (3) SA 785 (N)), it focused on the question whether the local authority was in good faith when it originally expropriated the property. The court also relied on Canadian law, where it has been stated that it is possible for the expropriating authority

to change the purpose of the expropriated property, provided that it does not form part of a colourable scheme. The court equated the absence of a 'colourable scheme' to that of good faith on the part of the expropriating authority in terms of South African law. Therefore, the court concluded that the good faith at the time of initial expropriation made it possible for the municipality to change the use of the expropriated property when it becomes clear that the original purpose is no longer viable (see Van der Walt 2011 (1) *JQR Constitutional Property Law* 2.5 for a critical discussion of the court's reliance on Canadian law).

According to the court's reasoning it seems to follow that if the property was originally expropriated in good faith, a change in circumstances that renders the original purpose impossible is sufficient justification for the expropriator to abandon the original purpose and use the property for another purpose. Bad faith will clearly render the expropriation unlawful and invalid. However, good faith on the part of the state at the time of the initial expropriation cannot justify either the original or the new purpose. Both the Constitution and the Expropriation Act require expropriation to be for a public purpose (or in the public interest), and not merely that the expropriation must originally have been undertaken in good faith. Good faith on the part of the expropriator can indicate at most that the original purpose was not a smokescreen to expropriate property for an unlawful purpose (see *Gildenhuis op cit* at 103–5), but it cannot in itself justify the new purpose for which the land is to be used.

Even if the land is not re-transferred to the original owner when the original purpose for the expropriation falls away, the new purpose for which the state intends to use the land should also be judged against the public purpose and public interest requirement, since the fulfilment of this requirement justifies the state in retaining the property. Therefore, if it becomes clear immediately or shortly after the expropriation that the original purpose can no longer be realised, the new purpose should be justified in terms of the same constitutional and statutory requirements as the original purpose (Van der Walt 2011 (1) *JQR Constitutional Property Law* 2.5; Van der Walt 'Constitutional Property Law' in 2010 *ASSAL* 292). In that sense, the public purpose or public interest that justifies expropriation must endure beyond the moment of expropriation. In other words, even if one agrees with the court's reasons for not following German law to enable return of the property to the former owner, the court at least should have tested the legitimacy of the new purpose more strictly.

Evaluation

The *Harvey* court had difficulties in accepting the argument in favour of re-transfer based on German law. The court was not prepared to take the leap and accept that the constitutional property guarantee — especially the justificatory public purpose requirement — makes such a re-transfer legitimate and possible. The applicant was prepared to repay the amount of compensation received at the time of expropriation, thereby reinstating the

status quo ante. Nonetheless, the court dismissed the argument on the basis that the various federal and provincial laws in Germany create a statutory and regulatory framework that makes it possible for the German courts to interpret the constitutional property provision to include a right of re-transfer in the event that the justification for the expropriation disappears (*Harvey* para 134). Since the South African legislature has not enacted similar legislation, the court argued, it had no legal basis to grant the re-transfer and as a result it rejected the applicant's plea.

Although this argument is not necessarily the last word on the topic (see eg *Sonnekus & Pleyzier* op cit at 618, 623), one could have sympathy with this attitude. The courts may find it difficult, in the absence of suitable regulatory legislation, to decide the technical issues accompanying an order to re-transfer expropriated land to the original owner. In that sense it could be argued that it is not necessarily wrong for a South African court of first instance to refuse to order re-transfer in the absence of authorising legislation. This issue may have to be tested in a higher forum. However, even if one agrees with the judgment, the court failed to judge the new purpose for use of the land against the public purpose requirement. Accepting that the original expropriation was bona fide, the court was apparently of the view that the original good faith of the state warrants any change in the purpose for which the land was to be used. This is partly due to the contested view of the court that the municipality acquired unrestricted ownership over the property when it expropriated the property. This view supposedly made an additional inquiry into the justificatory public purpose requirement unnecessary (*Du Plessis* op cit at 582–3; *Sonnekus & Pleyzier* op cit at 609, 623). However, in our view the very least that one could expect of a South African court is to subject the new purpose for which the state intends to use expropriated property, once the original purpose for which it had been expropriated becomes impossible, to exactly the same scrutiny that applies to all expropriations in the first place. In the absence of regulatory legislation it might be unclear how long after the original expropriation such a restriction should rest on the state's ability to use the land. At a minimum, we believe that this should happen when the change of purpose surfaces immediately, or shortly after the expropriation — and if the change is then immediately challenged by the original owner — the reach of the constitutional public purpose requirement should be sufficient to warrant further investigation. It is also unclear what the remedy should be if the court decides that the new purpose does not satisfy the constitutional requirement. Logic suggests that the expropriation then simply should be invalid.

Additionally, there is some evidence from foreign law that was not considered by the court that it may be possible to order re-transfer of expropriated property, even in the absence of authorising legislation. In the following two sections we consider this evidence. The two cases we discuss are not on all fours with South African law, but they do address a similar issue and offer interesting perspectives on its solution.

*MALAYSIAN LAW**Introduction*

Section 13 of Malaysia's Federal Constitution of 1957 protects property against compulsory acquisition and use without compensation. Section 13 makes no reference to the public purpose requirement. However, the Malaysian Land Acquisition Act of 1960 requires that the compulsory acquisition of land must be for a public purpose (Van der Walt *Constitutional Property Clauses: A Comparative Analysis* op cit at 272). Furthermore, in *S Kulasingman & another v Commissioner of Lands, Federal Territory & others* [1982] 1 MLJ 204, the court stated that compulsory acquisition must serve the general interest of the public.

Case law: United Development Company Sdn Bhd v The State Government of Sabah [2011] 7 MLJ 209

In 1979 the Malaysian government acquired the plaintiff's land for the purpose of developing the Skim Penempatan Semulia project. The compensation was fixed at RM1m. Seventeen years later, notice of the acquisition appeared in the Gazette and the property was eventually registered in the state's name in 1997. During March 2001 the plaintiff requested the return of the land for a consideration sum of RM1m on the basis that the land was not developed for the intended purpose. Although the plaintiff was prepared to repay the RM1m, the state refused to re-transfer the property.

The High Court of Malaysia considered several issues. The first issue was whether the acquisition of the land was ultra vires s 3 of the Land Acquisition Ordinance and/or art 13 of the Federal Constitution. In terms of the Ordinance, the acquisition must be approved by the relevant authorities and must be completed within a reasonable time. Given that there was a delay of seventeen years before the acquisition was published in the Gazette, the acquisition did not comply with the relevant formalities, which meant that it was in conflict with art 13(1) of the Federal Constitution and ultra vires s 3 of the Land Acquisition Ordinance.

The second and more important issue for purposes of this note is whether the state was mala fide in not putting the land to use for the purpose for which it was initially acquired. The plaintiff argued that the state acted in bad faith when it acquired the property for a 'public purpose when in fact it was not needed for a public purpose at all' (ibid para 22). A letter presented to the court indicated that the project for which the property was expropriated was to be carried out immediately, but 31 years later (when the case was heard by the High Court) nothing had been done with it. According to the government, the property was to be used for a different project, namely Taman Kekal Pengeluaran Makanan. Therefore, it was clear that the government had no intention to use the property for the purpose it was expropriated for in 1979.

Although the court stated that the issue was not whether the acquisition was for a public purpose but whether the government acted in bad faith

when it expropriated the property, it made some interesting remarks regarding the public purpose requirement. The Malaysian courts adopt a deferent attitude towards adjudication of the public purpose requirement. When the government declares that the acquisition of land is for a public purpose, it is deemed to be for a public purpose. However, even then the exercise of the government's discretion is not beyond reproach. With reference to earlier case law (*S Kulasingman & another v Commissioner of Lands, Federal Territory & others* (supra), where the Federal Court relied on the Privy Council decision of *Syed Omar bin Abdul Rahman Taha Alsagoff & Another v Government of the State of Johore* [1979] 1 MLJ 29), the court noted that the 'purpose of the compulsory acquisition can be questioned, but only if it can be shown that the acquiring authority has misconstrued its statutory powers or if bad faith is established' (*United Development Company Sdn Bhd v The State Government of Sabah* (supra) para 27).

In *United Development Company Sdn Bhd v The State Government of Sabah*, the court decided that the government cannot use the expropriated property for purposes other than those originally published in the Gazette. In terms of the Land Acquisition Ordinance, the government can acquire the land for a specific purpose, but 'they do not have carte blanche to do with the property what they wish post acquisition' (para 29). The court stated that it would be unjust to allow the government to change the land use at whim, since the owner has negotiated for compensation on the understanding that the property will be used for a specific public purpose and not for any public purpose. Landowners should be protected against expropriation for some oblique motive disguised as 'public purpose'. In this case there was evidence that the state attempted to use the property for other purposes than those stated in the Gazette, since the evidence before the court indicated that the state intended to transfer the land to a third party.

Therefore, the court stated that the defendants acted mala fide in not putting the land to use for the specified purposes and held that the acquisition was void and of no effect. Therefore, the plaintiff was entitled to take repossession of the land previously acquired by the state.

Although this decision illustrates that bad faith on the part of the expropriating authority at the time of expropriation nullifies the expropriation the court did, albeit obiter, state that the public purpose requirement should be interpreted strictly so that the state does not abuse its power of expropriation. In this regard the court stated that the property cannot be used for any other purpose than that which was stated in the expropriation notice. The decision also illustrates the point that the public purpose requirement is not restricted to the act of expropriation but reaches beyond it to the state's subsequent use of the property. It remains unclear for how long after the expropriation the public purpose should play a role. In the Malaysian case discussed above the period was around 30 years; in the *Canadian Woodburn Estate* case referred to in *Harvey (Woodburn Estate v Canada (National Capital Commission))* 2000 (1) SC 305 the state also did not use the property for the public purpose for 32 years. Some countries put time limits on the public

purpose requirement (i.e., if not used within five years for the specified purpose, the previous owner can claim back the property). In France the state is obliged to adhere to the public purpose requirement within five years of expropriating. As Sonnekus & Pleysier (op cit at 619–22) show, the position in Dutch law is also that the owner can reclaim his property if after three years it has not been used for the purpose for which it had been expropriated.

Evaluation

In the *Harvey* and the Malaysian decisions discussed above, the property was expropriated for a specific and generally valid public purpose. In *Harvey*, the stated public purpose became impossible and the municipality decided to use the land for a different purpose. In *United Development Company Sdn Bhd*, the state did not use the land for 31 years, indicating later that the property would be used for a different purpose. Neither the *Harvey* nor the *United Development Company Sdn Bhd* decision addressed the question whether or not the new purpose was also a valid purpose. However, they failed to consider this aspect for different reasons.

In *Harvey*, the court decided that since the original expropriation was in good faith, the impossibility of achieving the stated public purpose justified the state in changing the use of the land. The Malaysian court, on the other hand, held that the initial expropriation was invalid due to bad faith on the part of the state. Significantly, in the latter case the original owner never lost ownership because the expropriation was invalid (compare further Sonnekus & Pleysier op cit at 623). However, the court stated obiter that expropriated property must be used for the specified public purpose and not just for any public purpose. Therefore, expropriated property must be used for the purpose for which it was expropriated and the state does not have *carte blanche* to do with the property as it sees fit after expropriation has taken place.

The Malaysian decision indicates that expropriated property must always be used for the purpose for which it was expropriated. This leads to the conclusion that if the property were to be used for a different purpose, the new purpose should also be a valid and legitimate public purpose. Significantly, the decisions of the Malaysian court should be seen against the backdrop of the deferent approach followed by the Malaysian courts, which accept that expropriation is for a public purpose if the state declares that it is for a public purpose. The Malaysian courts follow the example of the US Supreme Court in their deferent approach to the public purpose requirement (see *Berman v Parker* 348 US 26 (1954); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)). South African courts, however deferential they may be towards the decision of the legislature to expropriate property for a public purpose (see Gildenhuis op cit at 77), should therefore arguably at least follow the lead of the Malaysian courts and inquire whether the new purpose is also a valid public purpose in terms of s 25 of the Constitution.

THE REPUBLIC OF THE PHILIPPINES

Introduction

In terms of s 9 of art 3 of the 1978 Constitution of the Republic of the Philippines, '[p]rivate property shall not be taken for public use without just compensation'. According to case law, the power of eminent domain may only be exercised if two conditions are met: the expropriation must be for a particular public purpose, and compensation must be paid (*Mactan-Cebu International Airport Authority and Air Transport Authority v Bernardo L Lozada SR et al* GR NO 176625 (25 February 2010)).

Case law: Ouano and Others v MCIAA; MCIAA v Inocian and Others GR NO 168770; GR NO 168812, 9 February 2011

In this decision, the National Airport Corporation — now the Mactan–Cebu International Airport Authority (MCIAA) — needed several plots of land to expand the Lahug Airport in Cebu City. A group of owners (the Inocians) willingly sold their property, but with the assurance that if the property was no longer needed for the airport or if the expansion did not occur they had the right to reclaim the property. During evidentiary proceedings it was shown that they would not have sold their properties were it not for this assurance. A second group of owners (the Ouanos) refused to sell their property, because they believed that the compensation was insufficient. This led to the expropriation of their properties, which was confirmed by the court of first instance on 29 December 1961. However, it later became apparent that the planned expansion of Lahug Airport in Cebu City did not take place and eventually the Airport was closed and abandoned.

Irrespective of the Inocians' established right to reclaim their expropriated properties, both groups of owners 'assert[ed] that they have the entitlement to recover the litigated property' (the case report is neither paragraphed nor paginated). On this basis, the key issue in this case was whether the abandonment of the public purpose for which the properties were expropriated entitled the petitioners to reclaim them. MCIAA relied on *Fery v Municipality Cabanatuan* 42 Phil 28 (1921) (*Fery*) where the court stated that when an assurance is given to the previous owner that he can reclaim the expropriated property when the public purpose ceases to exist or is abandoned, he has the right to reclaim the property. Where no such assurance is given, the property is transferred in fee simple and a right to reclaim the property does not exist.

In *MCIAA v Lozada SR* GR No 176625 (25 February 2010) (*Lozada*), the Supreme Court abandoned the *Fery* ruling. With reference to s 9 of the 1987 Constitution, the *Lozada* court stated that the government can only exercise its power of eminent domain if two requirements are met: the expropriation must be for a particular public purpose, and compensation must be paid. With regard to the public use requirement, the court in *Lozada* stated that the expropriating authority must use the property for the purpose stated in the expropriation petition. If not, the expropriating authority must file another petition for approval of expropriation for the new purpose. If the new

petition is not filed, the original property owner has the right to reclaim the property if he so wishes. If there is no such right to reclaim the property upon the change or abandonment of the public use requirement, the expropriation procedure is flawed since the public use requirement is not met, which leads to a violation of the property owner's right to justice, fairness and equity.

The Supreme Court in *Ouano v MCIAA*; *MCIAA v Inocian* accepted the ruling in *Lozada* and added that the 'government cannot plausibly keep the property it expropriated in any manner it pleases and, in the process, dishonour the judgment of expropriation'. According to the court, the taking of private property by the power of eminent domain is always conditional, the condition being that the property must be used for the specific public purpose for which it was expropriated.

Evaluation

The case of *Ouano v MCIAA*; *MCIAA v Inocian* is authority for the argument that the constitutional entrenchment of a public purpose requirement for expropriation obliges the state to use expropriated property for the stated purpose and that this obligation endures beyond the act of expropriation. If that purpose changes, ends, or is completed, the state can file (or, in a different procedure, rely on) a new purpose. If it does not do so, it must allow the expropriated owner to take re-transfer of the property if the owner is willing to repay the compensation initially received. Although there is no legislation that regulates the re-transfer of expropriated property when the public purpose cannot be realised, the law of the Philippines seems to have developed such a right over time, albeit in a context that differs from South African law as far as the expropriation process is concerned.

This development probably stems from the assurance that was routinely given to expropriated parties regarding the reclaiming of their properties when the public purpose could not be realised. This assurance was later regarded to be applicable to all expropriated property, even when no assurance to the effect was given. Therefore, the rule is specific to the situation in Philippine law. However, although this is a difficult decision for the courts to make in the absence of a legislative foundation, the development of the justificatory public purpose requirement warrants the strict rule that the expropriated property must be used for the intended public purpose or returned to its former owner.

In terms of Philippine law it follows that if the condition (the fulfilment of the public purpose requirement) is not met, the property owner can reclaim the expropriated property. However, if the property owner wishes to reclaim the property, she must repay the compensation initially received. As a result, the Supreme Court in *Ouano v MCIAA*; *MCIAA v Inocian* ruled that the petitioners were allowed to take transfer of their previously expropriated property, provided they repaid the compensation received together with other additional costs.

CONCLUSION

An expropriation is valid if it is for a public purpose or in the public interest and provided that just compensation is paid. In *Harvey*, the court accepted

that the justification of the expropriation lies in the public purpose that is served and not in the payment of compensation. Relying on German law, Van der Walt (*Constitutional Property Law* (2005) 256; 3 ed (2011) 495–9) argues that the public purpose requirement, which serves as the justification for the expropriation, has to endure beyond the initial act of expropriation. It is the public purpose that is continuously served that allows the state to retain the property. If the public purpose does not endure beyond the initial act of expropriation, there is a real danger that the state can use its power of eminent domain arbitrarily.

In *Harvey*, the applicant argued that the local municipality was no longer justified in retaining the property, since the purpose for which the property was expropriated became impossible. On this construction of the public purpose requirement based on a particular interpretation of s 25(2) of the Constitution and supported in German law, the applicant should have been successful with his claim. Under the circumstances, the court was unwilling to grant the order because there was no legal basis (such as the legislation that exists in German law) for such an order. However, in the *United Development Company Sdn Bhd v The State Government of Sabah* (supra: Malaysia) and *Ouano v MCIAA; MCIAA v Inocian* (supra: Philippines) decisions the respective courts granted a similar order even though there was no legislation that made it possible for the expropriated owners to reclaim their property. Despite contextual differences, these judgments, especially the Philippines judgment of *Ouano v MCIAA; MCIAA v Inocian*, were based on the courts' interpretation of the public purpose requirement and the developments in terms of that requirement that had taken place in those jurisdictions.

In the Republic of the Philippines a court must approve an expropriation. In *Ouano v MCIAA; MCIAA v Inocian* the Supreme Court of the Republic of Philippines explicitly stated that if the purpose for which the property was initially expropriated differs from the purpose stated in the petition (that was approved by the court), the new purpose must also be approved by the court. Therefore, whenever the public purpose for which the property was expropriated changes, the new purpose has to be judged against the public purpose requirement and not just on the good faith of the expropriating authority at the time of the original expropriation. Furthermore, if the original public purpose is abandoned or becomes impossible, the state can no longer lawfully retain ownership if the previous owner reclaims it and offers to repay the compensation received. Arguably, the new purpose for which the property was to be used in the *Harvey* case should have been tested against the public purpose or public interest requirement. Further, the court should not simply have accepted that the new purpose was legitimate on the basis of the good faith on the part of the municipality at the time of the initial expropriation.

In *United Development Company Sdn Bhd v The State Government of Sabah* the High Court of Malaysia stated obiter that the government cannot use the property for purposes other than that made public in the Gazette. The state does not have carte blanche to do with the property as it pleases post-

expropriation. This decision illustrates that the public purpose requirement could have a more prominent role than was given to it in *Harvey*. Furthermore, the Malaysian court stated that it would be unjust to allow the state to change the purpose for which it uses expropriated property at its whim, since the expropriated owner negotiated the compensation on the basis that the property would be used for a specific and valid purpose. Applied to *Harvey*, the Malaysian decision is persuasive authority for the proposition that the municipality does not have the unfettered discretion to use the property as it pleases post-expropriation; the property must be used for the purpose for which it was expropriated or a new, equally legitimate purpose must be established.

The approach adopted by the Pietermaritzburg High Court in *Harvey* might mean that the public purpose requirement in the Constitution and in the Expropriation Act does not have the protective effect it is supposed to have. The public purpose serves as a protective shield against unwarranted infringement of private property. Without a proper safeguard against the state's power of expropriation, property may be taken for a public purpose initially but later used for an entirely different purpose that is never open to judicial review. The different purpose may not be a valid public purpose at all, or it may be a contentious purpose such as selling the land for private development or to increase the wealth of the state. Given the logic followed in *Harvey*, property owners would not be able to rely on the public purpose requirement to claim re-transfer of their expropriated property but would have to argue that bad faith existed on the part of the state during the initial expropriation. It is fairly easy to establish whether or not the property is used for a public purpose, but it is sometimes difficult to establish bad faith on the part of the state at the time of expropriation.

It is therefore submitted that the public purpose requirement should have the lasting effect it is supposed to have. If the public purpose for which the property was expropriated is changed or ends, the court should have the discretion to determine, when asked to do so, whether the new purpose is also a valid public purpose in terms of s 25 of the Constitution and the Expropriation Act. If the court finds that the new purpose is a valid public purpose, the state would be justified in retaining ownership of the property and to use it for the new purpose.

However, if the public purpose ends and the property is not used for a different public purpose or if the court finds that the changed use is not a public purpose, the justification for the state retaining the property falls away. In principle it follows that the expropriation would then be invalid. Practically, it might mean that the state should offer the property back to the initial owner. If the owner accepts, the compensation originally received has to be repaid. However, this would not take the form of re-expropriation, because only the state has the power to expropriate, but rather a form of re-purchase of property on the basis that the initial valid expropriation has through time become invalid.

In such an event, the court would have to calculate the amount that has to be repaid. Without legislation similar to that in German law that provides for

re-transfer, the courts might find it difficult to calculate the amount to be repaid. In the absence of legislation, the Philippines decision of *Ouano v MCIAA*; *MCIAA v Inocian* (supra) provides a possible solution. In that decision the court ordered that the expropriated owner had to repay the compensation initially received plus legal interest and any necessary expenses that the state might have incurred in maintaining the property. However, it is not evident that South African courts have the power, or would be willing, to grant such an order.

If, on the other hand, the former owner refuses or is not interested in re-purchasing the property, the question is: what can the state do with the property? Can the state then use the property for any purpose (including selling it to third parties for profit), or is it still bound to use the property for a different, but equally legitimate, public purpose? In this regard there seem to be two conflicting arguments. (These arguments also apply when there is no statutory provision that allows the former owner an enforceable right to repurchase the property.) The first argument is that the state can only ever use expropriated property for a public purpose, which means that property that can no longer be used for the purpose for which it has been expropriated has to be used for another — equally legitimate — public purpose. The second argument is that once the state acquires the property legitimately (ie for a valid public purpose) it owns the property and can use it for any lawful purpose if the original public purpose should become impossible or if circumstances should change to such an extent that the original purpose is no longer relevant. In this regard it has been said that the original acquisition had to be *bona fide* for an originally legitimate public purpose.

Given that there is no common law power of expropriation, the courts would be placed in a difficult position when the justification for the state retaining ownership of the expropriated property falls away. In all probability the court is not competent either to order re-transfer of the property or to calculate the amount that should be repaid by the previous owner without any legislative foundation. Therefore, either the Expropriation Act should be amended to provide for these situations, or legislation similar to that which exists in German law should be promulgated. Nevertheless, even in the absence of such legislation the courts should at least exercise strict control over the legitimacy of the new purpose for which the state wants to use the property once it becomes clear that the original purpose is no longer viable.