IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 19661/2009

In the matter between:

GLENN YVES JAMES DOLPIRE	**APPLICANT**
AND	
THE SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED	**FIRST RESPONDENT**
THE MINISTER OF TRANSPORT	**SECOND RESPONDENT**

JUDGMENT DELIVERED ON 17 JUNE 2010

DLODLO, J

[1] This is an opposed application brought on urgent basis by the Applicant wherein the following relief is sought:

(a) An order directing the First Respondent to remove the encroachment constituted by the National Road N2 constructed over the Applicant's property described as *"Erf 1982, Wilderness, Township Extension, Municipality and administrative district of George, measuring 2846 square meters"* transferred to the Applicant under Deed of Transfer number T27558/2004 dated 20 January 2004, within 120 days of the date of this order.

(b) in the alternative to the above (in the event that the Court is to find that relief sought above is not competent, an order directing the Second Respondent to;

(i) expropriate the land encompassed by the above encroachment

in terms of the provisions of section 41 (1) (a) of the South African National Roads Agency Limited and the National Roads Act 7 of 1998 ("the Act"); and

(ii) provide to the Applicant an undertaking to pay compensation calculated in terms of the provisions of, *inter alia*, section 12 of the Expropriation Act 63 of 1973 ("the Expropriation Act"), and without derogating from the above, upon the basis that the value of the Applicant's land without any encroachment thereon, be taken as the pre-expropriation value thereof.

[2] The Applicant is an adult businessman resident in Aandblom Street, Durbanville, Western Cape and conducting business from corner of Third Avenue and Nineteenth Street, Elsies River, Western Cape. The First Respondent (the South African National Road Agency Limited) is an agency incorporated as a public company with share capital in terms of the provisions of section 3 of the South African National Roads Agency Limited and National roads Act 7 of 1988 (hereinafter "the Act") with registered address at Ditsela Close, 124 Park Street, Hatfield, Pretoria. The Second Respondent is the Minister of Transport in the National sphere of Government in his/her capacity as contemplated by the Act. Mr. Barnard appeared on behalf of the Applicant, Mr. Tredoux, assisted by Mr. Cutler, appeared on behalf of the First Respondent and Mr. Masuku appeared on behalf of the Second Respondent respectively.

BACKGROUND

[4] The Applicant bought the land described as Erf 1982, Wilderness, in 2004 for an amount of Eight hundred and sixty thousand rand (R860 000.00). At the time he so purchased the extent thereof was set out in the title deed as 2846m². The residence on such property and its immediate surroundings occupy approximately 800m² of the Erf. It appeared to the Applicant that apart from the approximately 800m² of such Erf, a further approximately 2000m² thereof would represent undeveloped land. The Applicant states that he assumed that the undeveloped portion of the land extended to an easterly direction. The title deed of the property made no mention of any encroachment thereon.

[5] During the course of 2006 the Applicant established that the undeveloped portion of the Erf did not extend to an easterly direction (as he had until then believed was the case), but to a southerly direction. He also established that approximately 2025m² of the Erf that extended to a southerly direction was affected by an encroachment caused by the N2 National Road between George and Wilderness. He sought to reach an amicable settlement with the First Respondent relating to such encroachment.

[6] According to the Applicant the Respondent adopted what he termed "the bizarre" attitude that the encroachment over Erf 1986 had existed since approximately October 1986 and that since the "National Road" had no value to the Applicant, the First Respondent

intended expropriating such property without payment of any compensation. Since such attitude was allegedly taken in 2008, the First Respondent has not relented in the attitude. Paradoxically, and despite intimation from it that necessary steps would be taken to expropriate the Applicant's land, nothing in such regard has eventuated to date hereof.

[7] Arising from the above, the applicant launched an application against the Respondents seeking the removal of the encroachment, alternatively an order directing the Second respondent to expropriate the land affected by the encroachment. It is common cause that upon the filing of Opposing papers the Applicant somewhat changed his relief. Accordingly the Applicant does not persist with the prayer for the removal of the encroachment (being the N2 National Road). He now seeks the remaining prayer identified in the Notice of Motion as prayers 3.1, 4, 5 and 7:

(a) Directing the Second Respondent to expropriate the land encompassed by the encroachment in terms of the provisions of section 41 (1) (a) of the South African national roads Agency Limited and National Roads Act 7 of 1998 (prayer 3.1);

(b) Declaring that the Applicant's letter dated 13 February 2009 (Annexure "A" to the Founding papers) constituted the demand required by section 14 (3) (b) of the Expropriation Act 63 of 1975, and declaring the Applicant entitled to forthwith institute the actions contemplated by section 14 (3) (a) of such Act (prayer 4).

(c) Directing that, in the event that the Second Respondent fails/neglects to expropriate the land within sixty (60) days of the

date of this order, prayer 1 of the Notice of Motion (directing the removal of the encroachment) shall serve as an order of Court (prayer 5);

(d) Directing the Respondents to pay the costs of this application (prayer 7).

[8] Due to the nature of this matter it is compellingly necessary to also set out background information with regard to how and by virtue of which authorization did the N2 National Road which is described in the Applicant's papers as constituting an encroachment come about. The National Roads Act 42 of 1935 applied when the National Road which is built over Erf 1982, was constructed and proclaimed during 1952. The National Roads Act 54 of 1971 repealed Act 42 of 1935 with effect from 1 October 1971. This Act deemed all National Roads proclaimed in terms of previous legislation to have been so proclaimed under it. The 1996 Constitution includes public transport and road traffic regulation in Schedule 4. This means that the National and Provincial governments have concurrent legislative competence. A Provincial legislature has legislative competence in respect of any matter outside these functional areas which is expressly assigned to a Province by national legislation. A Province may make laws reasonably necessary for or incidental to the effective exercise of a power concerning any matter listed in Schedule 4. The legislative competence of National government includes the power to pass legislation with regard to any matter including a matter which falls within a functional area listed in Schedule 4.

[9] The South African National Roads Agency Limited and National Roads Act No. 7 of 1998 ("the SANRAL Act") is a national Act which, inter alia, prescribes measures and requirements with regard to the Government's policy concerning National roads, and with regard to the declaration of National Roads by the Minister of Transport, and the use and protection of National roads. The section 40 (5) of the SANRAL Act, which came into effect on 1 April 1998, expressly provides that all National Roads which were in existence at the commencement of the said Act "will be regarded and treated for all purposes as if it had been declared a national road under section 40 (1) of the SANRAL Act".

[10] Consequently the road which has been constructed over Erf 1982 is a National Road, and has enjoyed this status since 1952. The SANRAL Act established the South African National Roads Agency Limited (the First Respondent in this application) on 19 May 1998. The First Respondent (as mentioned *supra*) is a public company wholly owned by the State, and its purpose is to take charge of the financing, management, control, planning, development, maintenance and rehabilitation of the South African National Roads system. In terms of section 7 (2) of the SANRAL Act the First Respondent succeeded to all of the assets of the National Roads Fund, including:

(a) the immovable property of the South African Roads Board consisting of land, and any servitudes on or over land, on which National Roads are situated;

(b) land and any servitudes or other real rights with regard to land (including any right to use land temporarily), acquired by the

South African Roads Board or the state in terms of the National Roads Act (the "previous Act") for the purposes of or in connection with National Roads;

(c) any other immovable property of the South African Roads Board acquired in terms of the National roads Act from moneys made available from the National Roads Fund;

(d) any state land on which a National Road is situated, or any servitude or other real right with regard to land held by the state for the purposes of or in connection with a National Road situated on the latter land.

In addition to the First Respondent's main powers and functions it is empowered to purchase, hire or otherwise acquire, and hold, and sell, exchange or let, or, with the minister's approval, donate or otherwise dispose of or deal with, movable or immovable property for the purposes of the SANRAL Act.

THE DECLARATION OF A ROAD TO BE A "NATIONAL ROAD"

[11] For the importance of the present litigation the distinction between a National Road which was in existence before the SANRAL Act was promulgated, and the establishment of a new National Road cannot be stressed too much. The procedure for the establishment of a new National Road is set out in section 40 (3) of the SANRAL Act. In essence:

(a) The minister may from time to time by notice in the Government Gazette in terms of section 40 (3) of the SANRAL Act declare any existing road, or any route of which the boundaries have been fixed by survey, to be a National Road.

(b) Such declaration must be on the recommendation of the First Respondent, with the agreement of the Premier of each Province in which the road is situated, in the case of an existing road that is to be declared a National Road.

(c) Within a prescribed period after the date of which a National Road was declared, the First Respondent must in writing request the registrar of deeds who has jurisdiction to endorse the fact of that declaration on the titled deeds of the land affected by the declaration.

(d) Such an endorsement may be made in any manner considered fit by that registrar of deeds.

[12] Section 40 (5) of the SANRAL Act preserves existing National Roads. In other words, existing National Roads do not have to be declared to be such in terms of section 40 (3) of the SANRAL Act. Instead section 40 (5) provides that any road or route which under section 4 (1) (a) of the National Roads Act 54 of 1971 had been declared a National Road for the purposes of that Act, and which immediately before the incorporation date – i.e. 19 May 1998 – existed as a National road under the National roads Act, will be regarded and treated for all purposes as if it had been declared a National Road under section 40 (1) of the said Act. This is the case insofar as the National road built over Erf 1982 is concerned: it was *in situ* when the SANRAL Act was promulgated. However, the road in question was built before the National Roads Act 54 of 1971 was promulgated, at a time when the National Roads Act 42 of 1935 applied. Section 29 of the National Roads Act 54 of 1971 contained a

similar saving provision which deemed *inter alia* National Roads proclaimed prior to the promulgation of the 1971 Act to have been proclaimed under that Act.

[13] The chain is therefore unbroken: the National Road over Erf 1982 was built in terms of the 1935 Act, and it functioned as such thereafter. When the National Roads Act 54 of 1971 was promulgated the status of the road as a National Road was preserved. When the SANRAL Act was promulgated the status of the road in question was again preserved. It is still a National road, and is an important road as it is the main route along which traffic travels from George to Knysna and beyond.

EXPROPRIATION FOR THE PURPOSES OF A NATIONAL ROAD

[14] If the Minister is satisfied on reasonable grounds that the First Respondent reasonably requires any land for a National Road or for works or other purposes connected with a National Road he may expropriate same for the First Respondent, subject to certain restrictions. The First Respondent becomes the owner of expropriated land on the date of expropriation in terms of section 41 (4). Section 41 (2) provides that the Minister may not exercise the said powers of expropriation unless the First Respondent is unable to acquire the land etc by agreement with the owner.

[15] The provisions of subsections 7-24 of the Expropriation Act 63 of 1975 apply to the expropriation. Section 25 (2) of the Constitution of the Republic of South Africa, 1996 provides that expropriation of

land must be effected in terms of a law of general application, for a public purpose and in the public interest and against payment of compensation. It is in terms of the above legislation that the Applicant seemingly sought the relief that either his whole property or portion thereof (on which there is an encroachment) must be expropriated. It is so that he initially sought closure or diversion of a National Road. Sanity prevailed indeed now that such a drastic remedy has been abandoned. Closure of a National Road like the N2 is indeed very serious in that it would impede the flow of traffic along the N2 and that would most certainly cause a great deal of inconvenience quite apart from the fact that it would occasion much expense with concomitant strain on the public purse.

[16] I hasten to mention that closure or diversion of a National Road is a power which is reserved to the First Respondent. In terms of section 45 (2) of the SANRAL Act the First Respondent may close a National Road to traffic or divert the roadway of a National Road whenever in its opinion it is necessary or desirable to do so; it is a criminal offence for any other person to do so. It is only the First Respondent which is entitled to take such a drastic step, and then only if in the exercise of its discretion this is "necessary or desirable".

[17] Insofar as the Applicant's property, Erf 1982, Wilderness is concerned, Mr. Tredoux submitted that it is neither necessary nor desirable for the National Road to be closed. Indeed, the contrary is true, as there is no practicable alternative route, and the question of the entitlement of the authorities to utilize the Applicant's property

for the purposes of a National Road appears to have been settled long ago, during or about 1952, and the then owner was provided with such compensation as he was entitled to.

[18] It would appear that the property which now comprises Erf 1982 once formed part of a large tract of land which belonged to the State. The said property was of cause released into private ownership in terms of an original Deed of Grant which is available for anyone's inspection in the Deeds Office, Cape Town.

DISCUSSION AND CONSIDERATION OF SUBMISSIONS

[19] Mr. Barnard submitted that the first Respondent made a concession in its Answering Affidavit namely that "*The request to expropriate will, in due course, be directed on the appropriate authority*". On basis of this, according to Mr. Barnard, no attempt has been made to dispute the Applicant's entitlement to the relief set out in prayer 3.1 of the Notice of Motion. We now know that in prayer 3.1 the Applicant sought an order directing the Second Respondent to expropriate the land encompassed by the encroachment. According to Mr. Barnard, once the obligation/undertaking to expropriate is conceded, the compensation payable to the Applicant falls to be determined by the tribunal provided for by section 14 of the Expropriation Act.

[20] Mr. Barnard also quotes paragraph 6 of the Answering Affidavit filed on behalf of the Second Respondent where the following inter alia appears: *"I...am advised that the only issue in contention as far as relief is sought against the Second Respondent is whether the*

Applicant is entitled to be compensated at all for the encroachment to the land and if so the correct approach to this compensation."

[21] From the aforegoing quoted portions of the Answering Affidavit Mr. Barnard submitted that since the question whether the Applicant "is entitled to be compensated postulates that there has to be a prior expropriation, it is evident that the Second Respondent has now accepted that the expropriation procedures have been invoked. The Applicant in effect approaches this Court for *a mandamus* directing the First Respondent to expropriate the property and to pay the compensation in accordance with the provisions of the Expropriation Act. There are legal requirements in place to be met before a Court can make a mandamus order.

[22] It is perhaps appropriate to quote Mr. Tredoux in his submission particularly concerning Mr. Barnard's contention I have set out above.

"The Applicant has attempted to jury-rig its argument by – unfairly and facilely, with respect – latching onto a statement made by the Second Respondent in paragraph 6 of his Answering Affidavit. The Applicant contends – in paragraph 19 of his Heads of Argument – that the Second Respondent has accepted that expropriation procedures have to be invoked. This contention is facile, and is the equivalent in the Heads of Argument of the primary relief which was sought in the application at the time when the application was instituted. The Applicant's contention moreover ignores what was

actually said: the words of the Second Respondent's deponent have been distorted and taken out of context."

[23] I personally would be slow in accepting that there are any concessions made by the parties in this litigation and particularly on the aspect dealt with *supra*. To hold like that would be to take a simplistic approach to the whole matter. The fact of the matter is that unlike in the usual matters, the Applicant's contention apparently also overlooks the fact that the First Respondent already has the right to use the portion of Erf 1982 on which the National road has been constructed and therefore possibly, does not need to acquire the property for this purpose. I have endeavoured to capture the historical synopsis with regard to this road *supra*. The other defence raised against the Applicant's application is that no notice was given in terms of the Institution of Legal Proceedings against certain organs of State Act 40 of 2002. According to Mr. Barnard the legislation upon which this defence is based relates to a "debt" as set out in section 1 of the relevant Act. A "debt" is defined in such section as "any Debt arising from any cause of action...for which an organ of State is liable for payment of damages."

Whilst it may be legitimately argued that the Applicant does not seek a payment of damages, it can also be legitimately argued that seeking expropriation goes hand in glove with payment of compensation once the expropriation procedures have been gone through. It is, in my view, not necessary to decide this matter on this defence. It suffices to merely mention whether or not such a defence can be properly raised and be sustained remains debatable.

JURISTIC NATURE OF THE RIGHT TO USE LAND FOR ROAD PURPOSES

[24] In ***Apex Mines Ltd v Administrator, Transvaal*** 1988 (3) SA 1 (A) Nicholas AJA held as follows at 17 H-I: G

"The right to "enter upon and take possession of" land is, it is true, a right of expropriation, but it is a right of expropriation of the necessary road-rights, not of the dominium of the land. (Cf Nel v Bomman 1968 (1) SA 498 (T) at 501 F-G; and Thom en 'n Ander v Moulder 1974 (4) SA 894 (A) at 905 C-D). In other words, it is an expropriation of something in the nature of a road servitude: a via publica created by proclamation by lawful authority, via being "The right of passage over land belonging to another person for people, their animals and their vehicles" (Shenker Bros v Bester 1952 (3) SA 655 (C) at 659)."

It was held in ***Fink and another v Bedfordview Town Council and Others*** 1992 (2) SA 1 (A) that:

"To acquire 'the use of the land' for road purposes is to acquire 'something in the nature of a road servitude' (per Nicholas AJA in Apex Mines Ltd v Administrator, Transvaal 1988 (3) SA 1 (A) at 17 I-J), or 'the necessary road-rights' (per Trollip J in Nel v Bomman 1968 (1) SA 498 (T) at 501 F-H).

It was recognized in Tansvaal Investment Co Ltd v Springs Municipality 1922 AD 337 at 341 that the word 'acquire', when used in relation to fixed property, need not necessarily mean the acquisition of the dominium of the land, but may also be used in a wider sense so as to include the acquisition of a right to obtain the

dominium. (Cf Corondimas and Another v Badat 1946 AD 548 at 558). The word 'acquired' is used in s 3 (2) (a) (ii) of the 1971 National roads Act in relation to the use of the land. In my view, that connotes the acquisition of a right in the nature of a road servitude, and not of the dominium of the land."

[25] The Court in ***Fink's case*** *supra* went on to point out that:

It was held by Rumpff CJ in ***Thom en 'n Ander v Moulder*** *1974 (4) SA 894 (A)* that the proclamation of a public road was essentially an act of expropriation of certain rights. The learned Chief Justice remarked as follows at 905 C-D:

"Die bevoegdheid van die Administrateur om 'n openbare pad te verklaar oor die eiendom van 'n privaat person is in wese 'n onteieningshandeling van sekere regte, vgl Nel v Bomman 1968 (1) SA 498 (T), en Mathiba and Others v Moschke 1920 AD 354 te 363."

Fink's case *supra* has more recently been considered as authority for the proposition that what had been 'acquired' in terms of the relevant statutory provisions was right in the nature of a road servitude. No preceding act of expropriation per se was necessary. See: ***Wasserman Bate Trust and Another v Premier, Free State Provincial Government*** (384/03) [2004] ZASCA 88; [2004] 4 All SA 511 (SCA) (29 September 2004)

THE LEGAL BASIS ON WHICH THE SECOND RESPONDENT MAY BE COMPELLED TO EXPROPRIATE LAND IN TERMS OF SECTION 41 (1) (A) OF THE SANRAL ACT:

[26] It is perhaps apposite to quote the relevant sections of SANRAL Act. The order sought by the Applicant is based on section 41 (1) (a) of the SANRAL Act which provides the following:

"(1) Subject to subsection (2) and to the obligation to pay compensation, for which the Agency will be responsible, the Minister, if satisfied on reasonable grounds that the Agency reasonably requires-

(a) any land for a national road or for the works or other purposes connected with a national road, including any access road, the acquisition, excavation, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of any plant, vehicle, machines, equipment, tools, stores or material, may expropriate that land for the Agency."

[27] The Minister's power to expropriate land in terms of section 41 (1) (a) of the SANRAL Act is discretionary. The jurisdictional requirement for exercising the power is that the Minister must be satisfied on reasonable grounds that the Agency reasonably requires the land. Section 41 (1) (a) must be read together with subsection 2 which provides the following:

"(2) the Minister may not exercise a power in terms of subsection (1) unless satisfied on reasonable grounds that the Agency is unable to acquire the land or anything mentioned in paragraph (b) of that

subsection, or the right to use the land temporarily, by agreement with the owner of the land or the holder of any relevant right in respect of the land, as the case may be."

[28] The power to expropriate which the Minister may exercise under section 41 (1) (a) cannot be exercised unless the Minister is satisfied on reasonable grounds that the First Respondent is unable to acquire the land. This means that reasonable grounds must be advanced showing why and in what way the Agency is unable to acquire the land before the Minister may exercise the power to expropriate. It is of paramount importance to also set out section 41 (3) of the SANRAL Act on which the Applicant placed heavy reliance. It reads: *"41 (3) Subject to the obligation to pay compensation, and if satisfied on reasonable grounds that any land is or will be divided by a road contemplated in paragraph (a) of subsection (1) in such a manner that the land or any part of it is or will be useless to its owner, the Minister may expropriate that land or the relevant part thereof."*
Section 41 (4) of the SANRAL Act provides that where the Minister expropriates any land for the First Respondent, it becomes the owner thereof from the date of expropriation of the land concerned. When the Minister expropriates land under section 41 (1) (a) of the SANRAL Act it is an expropriation in the public interest. The power to expropriate in section 41 (1) of the SANRAL Act is subject to section 25 (2) of the Constitution which provides the following:

"25 (1) .....

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) ……"

[29] The Expropriation Act contains a definition of "public purpose" which covers more than what is allowed by "public purposes" and "in the public interest" in the Constitution. The word expropriation in South Africa is taken to mean the process by which an owner is deprived of all or some of his rights to his property, which rights become vested in the state or some other public *persona* that is authorized to acquire those rights. See ***Tongaat Group Ltd v Minister of Agriculture*** 1977 (2) SA 961 (A); ***Harksen v Lane NO and Others*** 1998 (1) SA 300 CC 314.The expression "for public purpose" for which property may be expropriated has been interpreted by our Court. The late Innes JA in ***Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*** 1911 AD 271 at 283-284:

"The word public is one of wide significance, and it may have several meanings, between some of which, in spite of their common origin, there are very real differences. In a broad sense it is commonly applied to things which pertain to or affect the people of a country or a local community. The expression public opinion, public road,

public place, public hall, are instances of the use of a word in that general way. On the other hand it is frequently employed in a more restricted sense to denote matters which pertain not to the people directly but to the state or the government which represents the people. Thus the public accounts signify the government accounts, public revenue and public lands denote the revenue and the lands of the state; and the public service means the government service. Hence, as it seems to me, public purposes may either be all purposes which pertain to and benefit the public in contradistinction to private individuals, or they may be those more restricted purposes which relate to the state and the government of the country- that is, governmental purposes."

[30] South African Courts have considered the expression where statutes have authorized legislation to expropriate for 'public purposes'. The Courts have explained the term to mean *'purposes which pertain to and benefit the public in contradistinction to individuals'*. See: ***African Farms and Townships Ltd v Cape Town Municipality*** 1961 (3) SA 392 (C) 396-7; ***Fourie v Minister van Lande en 'n Ander*** 1970 (4) SA 165 (O) 171-4; ***Ex parte Minister of Justice: in re Bolon*** 1941 AD 345 359-60. The expression "in the public interest" is different to "for the public purposes". The word public can have both a narrow and broad meaning. In the broad sense it means things that pertain to or affect the people of a country or community. In the narrow sense it means matters that pertain to the state or the government. In ***Administrator, Transvaal, and Another v J van Streepen (Kempton Park (Pty): Ltd*** 1990 (4) SA 644 (A) 661B-G.

Smalberger JA considered a Transvaal ordinance that authorized expropriation 'for purposes in connection with the construction...of any road and where property was expropriated as part of a scheme for road alterations and was expropriated to be given to a parastatal company, Sentrachem, producing strategically important materials, for its railway line, which it would otherwise lose and without which it could not operate. He said: *"The fundamental problem, however, still remains – is the Administrator empowered under section 7 (1) to acquire or expropriate the property of one person for what is essentially the benefit of another? Expropriation, generally speaking, must take place for public purposes or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. Non constat that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest. The present instance affords an example of such a situation. In planning the construction of the new road 51, the Administrator would needs have had to take an overall view of all the practical and economic implications of the project as a whole in deciding what would best serve the public interest. He would be entitled and obliged to have regard to the fact that Sentrachem conducted an undertaking which was in the national interest, and what the effect on the national interest would be if Sentrachem lost its rail connection with its*

sources of raw material, thereby disrupting its production of strategically important products. In principle, therefore, the Administrator's power under section 7 (1) can extend to the acquisition of land for what may include the benefit of a third party."

[31] In ***Clinical Centre (Pty) Ltd v Holgates Motor Co (Pty) Ltd*** 1948 (4) SA 480 (W), Roper J in construing section 2 (j) of the Rents Amendments Act 53 of 1947 held:

"In my view a scheme is "in public interest" if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class or portion of the community."

Section 41 (1) (a) provides the Minister with the power to expropriate 'if satisfied on reasonable grounds that the Agency reasonably requires the land'. The expropriation is for the benefit of the Agency, which must provide the minister with a reasonable basis to exercise the power to expropriate. The question is therefore whether the reasonable grounds requirement must relate to public interest. In other words does the Agency have to show that the expropriation of land is in the public interest or is required for public purposes? Does public interest or public purpose qualify as reasonable grounds to trigger the Minister's discretion to expropriate the land?

[32] The answer lies in the SANRAL Act itself. The Agency is a national roads agency for the Republic for the purpose of taking charge of the financing, management, control, planning, development, maintenance and rehabilitation of the South African national roads system as I mentioned *supra*. The functions of the Agency are set out in section

25. It is responsible for and has the power to perform all strategic planning with regard to the South African national roads system, as well as planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic. Additional functions of the Agency are set out in terms of section 26 of the SANRAL Act. It is clear from the provisions of section 41 (1) (a) of the SANRAL Act read together with sections 25 and 26 that only the expropriation of land under the SANRAL Act must reasonably be needed by the Agency. This means that only the Agency has the standing to seek an order of expropriation from the Minister. The Minister cannot expropriate land where such an expropriation is not reasonably needed by the Agency. That also means that the Minister cannot expropriate the land for the benefit of a private entity, like the Applicant. Even if the Applicant had the standing to seek an order compelling the Minister to expropriate the land, the Applicant has failed to meet the jurisdictional requirements for the exercise of discretion to expropriate in that:

(a) The reasons given by the Applicant for the order compelling the Minister to exercise her/his discretionary powers of expropriation are not reasonably related to the purpose for which an expropriation under the Act is done. The Applicant wants an order of expropriation in order to obtain compensation to the value of the property.

(b) The Applicant and not the Agency as contemplated and required by the Act requires the expropriation.

(c) The expropriation is not required for a national road or for works or other purposes connected with a national road. A national road

already exists on the land. It existed probably before the Applicant was born. The Applicant became the owner of Erf 1982 only in 2004. Previous owners of this property never sought to obtain the relief the Applicant prays for.

[33] In addition to the above, the Minister may only exercise the power of expropriation if he is satisfied on reasonable grounds that the Agency not only requires the land, but, is also unable to acquire it for purposes related to its core legislative mandate. Since it is the Applicant that wants an order of expropriation, it bears the burden of showing reasonable grounds that the Agency is unable to acquire the land. On the facts relied on by the Applicant, no reasonable grounds have been shown to exist which would justify the Minister to exercise the powers of expropriation in favour of the Agency. The fact that the Applicant purchased the land on inaccurate and incorrect assumptions as regards its commercial viability cannot be a reasonable basis on which the Minister should lose his discretion and be compelled to exercise his power of expropriation under section 41 (1) (a) of the SANRAL Act.

[34] Moreover if one has due regard to the comprehensive Answering Affidavit, it is patently clear that a claim for expropriation by the Applicant is incompetent for the following reasons which do not appear to be in dispute:

(a) In terms of the Original Deed of Grant, appearing as Annexure "AA.2" in the Answering Affidavit filed on behalf of the First Respondent, Erf 1982 was granted in Freehold with the State

reserving its rights to construct a national road over the property without compensation;

(b) The National Road was established on Erf 1982 in 1952. When the Applicant bought the land, the National road was already in existence.

[35] Compensation was aggressively pursued by the previous owner of the property, Wilderness (1921) Ltd and paid by the State for the land on which the national road was established. The State did not take formal transfer of the land at the time. Expropriation at the time was not legally possible. For this reliance is made on Annexure "AA.4" to the Answering Affidavit of the First Respondent. Paragraph 5 of "AA.4" records that legal opinion had been obtained at the time to the effect that section 4 of Act 42 of 1935 could not be applied to expropriate isolated areas of land such as the ones at issue. Annexure "AA.5" is a memorandum addressed to the Secretary of Transport dealing with the issue of expropriation. It concluded that expropriation was not possible to do at the time given the state of the legislation. As mentioned above under "Background" the Applicant's property was once part of a large tract of land, which belonged to the State. The property was then released into private ownership in terms of an Original Deed of Grant, which is available for inspection in the Deeds Office, Cape Town. The Applicant does not deny that an original Deed of Grant is available for inspection in the Deeds Office.

[36] At the risk of repeating myself, the Original Deed of Grant reserved the right to the State to build, without compensation, a National Road

over what is now the Applicant's property. During 1940s and 1950s, when the National Road was being planned, the then owner of the property (Wilderness 1921 (Pty) Ltd) received *ex gratia* compensation for damage to improvements. In paragraph 85 of the First Respondent's Answering Affidavit, details of ownership are provided as follows:

"Annexure AA.3 hereto is a letter of 3 June 1944 which is addressed to the Resident Engineer, George by Mr. PF Retief, the Acting Provincial Roads Engineer. I quote from this document:

("The property of Messrs. Wilderness (1921) Limited consists of a sub-divided portion of the Crown Land deemed to be part of Lot H 828 morgen, held by G.F. 12.7

The property is subject to the following conditions:

1. *Full power and authority henceforth to possess the same in perpetuity.*
2. *Permission to dispose of or alienate the same, with the approbation of Government in such manner as he may think proper.*
3. *Subject to all such Duties and Regulations as are either already or shall in future be established in regard to such lands.*
4. *Under such conditions as are stipulated in the Deed of Sale.*

(i) *The land will be sold in Freehold;*

(ii) *All roads and thoroughfares running over the said land shall remain free and uninterrupted;*

(iii) *The said land shall be liable without compensation to its proprietor to have any road made over it for public good by order of Government.)*

In view of the above the proprietors are precluded from claiming compensation for the damages arising out of the construction of the National Road over the property. In accordance with the usual practice the Administrator may however be prepared to consider a reasonable ex gratia payment for damage to improvements but a claim in respect of unimproved land will definitely not be entertained."

It follows that the then owner of the property, Wilderness (1921) Ltd was aware of the fact that it was not entitled to compensation for damages caused by the construction of the National road over the property. It was only entitled to an *ex gratia* payment in respect of damage to improvements (which was paid.)

[37] Annexure "AA.4" to the Answering Affidavit of the First Respondent is a letter from the Resident Engineer, Cape Town dated 28 August 1944. Paragraph 1 indicates that it was necessary to excavate the rock on the property in order to build the National road. The paragraph reads:

"It is understood that Mr. Grant, Director of the Wilderness Estates will not permit any construction on the Estates before the Compensation had been satisfactorily disposed of. It is of course certainly to be very complicated and knowing Mr. Grant as I do, negotiations will be very protracted before they be finally accepted by him, and this, if Mr. Grant's contention is correct, will definitely result in delays to the department. In the light, however, of the conditions of grant as quoted in paragraph (4) of your memo N.55/6576 dated 3.6.44, Mr. Grant's contention is not correct and

construction would appear to be legally permitted before Compensation is settled, although the Estate is issued in freehold."

[38] Thereafter a notice was served on Mr. Owen Grant of Wilderness (1921) Ltd, which appears in the Answering Affidavit as Annexure "AA.5". In it the following paragraph bears emphasis *"Your memo N.23/1/496/10716 has had a vey sobering effect."* A series of communication is established between Wilderness (1921) Ltd and the Provincial Roads Engineer about the construction of the National Road and Compensation. On 20 February 1945, and on behalf of Wilderness (1921) Ltd, Raubenheimer and Hartnady Attorneys addressed Annexure "AA.8" to the Provincial Roads Engineer advising that they would be approaching the Administrator under section 198 of Ordinance 13 of 1917 for reasonable compensation in respect of land and materials used. After much correspondence between the parties on the issue of compensation was exchanged, on 10 August 1945 in a letter attached to the Answering Affidavit as Annexure "AA.18" it is recorded:

"We find it extremely difficult to formulate a claim equitable and commensurate with the losses sustained. At the outset, we desire to stress the inequity that private owners should be under the same conditions of title be compensated to the full value of loss sustained whereas, due to the exigencies of current legislation, the treatment allowable to the Company will be on a basis far less generous and much to its advantage... In consequence it appears to us wise to pray the Board to grant a sum as ex gratia compensation rather than

endeavour to compensate in detail which, at its best would be extremely difficult for both sides to frame and assess."

[39] On that, Mr. Grant for Wilderness (1921) Ltd made a proposal for an *ex gratia* payment of 10 000.00 pounds. In September 1946 an agreement was signed with Wilderness (1921) Ltd relating to compensation. It appears as Annexure "AA.28" in the First Respondent's Answering Affidavit. It states in part that *"on the basis that compensation would be paid 'in the sum of 4433.15 pounds...' in full and entire satisfaction and settlement of all and every claim as and for compensation in respect of the damage arising out of the proposed construction of the National Road through the township of Wilderness subject to the terms of the Provincial Roads Engineers minute N23/1/496/11440D15.8.46 to the Secretary, Divisional Council of George."*

[40] Annexure "AA.29" to the First Respondent's Answering Affidavit is a copy of the resolution, which was passed by the Expropriation Committee in terms of which it was resolved to compensate Wilderness (1921) Ltd the amount of 4433.15S.OD. This was, by agreement, compensation on an ex gratia basis. The National road was constructed during or about 1950 as seen in Annexure "AA.42" in which the Administrator specifically informs Wilderness (1921) Ltd about the construction by virtue of section 198 of Ordinance No. 13 of 1917 read together with the Conditions of Title including that:

"4. (i) The land will be sold in freehold;

(ii) All roads and thoroughfares running over the said land shall

remain free and uninterrupted;

(iii) The said land shall be liable without compensation to its Proprietor to have any road made over it for the public good by order of Government."

[41] On 26 February 1945, the Provincial Secretary addressed a memorandum attached to the Answering Affidavit of the First Respondent as "AA.9" to the Acting Provincial Roads Engineer, George Division: The National Road was constructed over Erf 1982, Wilderness during or about 1952 and at all material times remained *in situ*. As part of a development conducted by Wilderness (1921) Ltd certain plots were sold off. The relevant title deeds recorded that the roads, which had been constructed were not included in the land. The Applicant's Title Deed has a similar condition. During 1986 improvements to the National Road across Erf 1982 were effected and prior to 1986 no claim for compensation would have been competent.

INCOMPETENT RELIEF SOUGHT

[42] The Applicant's relief against the Second Respondent is incompetent in terms of section 41 (1) (a) of the SANRAL Act. The Applicant wants this order in exchange for a huge payment, which the Applicant conveniently terms "compensation". On the facts relied on by the Applicant, the order sought would essentially enable him to claim an amount of R4.5 million against the Respondent as 'compensation', which he considers to be the value of the land without the alleged encroachments. It is also unclear on the

Applicant's papers whether the order sought relates to the entire property, Erf 1982 or just the portion that constitutes the national road running through his property. The Applicant, has, however, not specified any details on what form or shape or size the expropriation must take. The relief is simply too vague in its terms and therefore incompetent. The Applicant has also made the assumption in seeking the relief in terms of section 41 (1) (a) of the SANRAL Act against the Second Respondent that the First Respondent needs the land for purposes related to the National Road but is unable to acquire it. The assumptions are incorrect both in fact and law.

[43] Apart from the undeserved commercial benefits, the Applicant has not set out any reasonable grounds on which the Second Respondent should be compelled to exercise powers of expropriation in favour of the First Respondent. The only basis, which can be gleaned from the Applicant's papers, which the Applicant relies on for an order compelling the Second Respondent to expropriate Erf 1982, is the commercial one. An order compelling the Second Respondent to expropriate the land would usurp the discretionary powers of the Minister and in the most intrusive manner encroach into the terrain of the executive sphere of government. The Courts have emphasized a great many times the importance of the principle of separation of powers. This is a manner for which the executive must be left alone to implement its policy involving the expropriation of land. **Hoexter 2000 SALJ** 484 has urged Courts to give due deference in matters which involves the implementation of policy. She states that such an approach would entail "a judicial willingness to appreciate the

legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."

[44] Mr. Masuku has made sound submissions which demonstrated how ill-conceived is the relief sought by the Applicant in the instant matter. In my view, regard being had to all the aforegoing, the Applicant has clearly failed and/or omitted to appreciate the requirements of section 41 (1) (a) of the SANRAL Act in that the Minister has a discretion to exercise his powers to expropriate. The exercise of the discretion is on reasonable grounds shown by the First Respondent (the Agency) that it reasonably requires the land and cannot itself acquire the land in question. An order compelling the Second Respondent to expropriate the property would clearly usurp (or is intended to have such effect) the Second Respondent of its discretionary powers under section 41 of the SANRAL Act. In my judgment, the Applicant has failed to establish a basis on which an order compelling the Second Respondent is reasonably required by the First Respondent. The Applicant has also failed to establish a basis on which an order compelling the Second Respondent to expropriate the property in question is justified under the provisions of section 41 (2) of the SANRAL Act in that there are reasonable grounds that the First Respondent *"is unable to acquire the land or anything mentioned in paragraph (b) of that section 41` (1), or to use*

the land temporarily, by agreement with the owner of the land or holder of any relevant right in respect of the land."

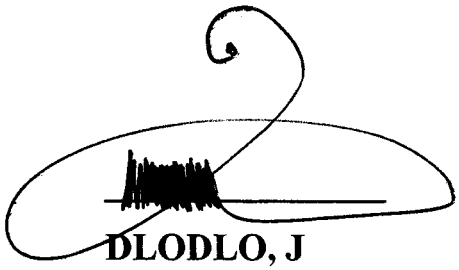
[45] Mr. Barnard relied as well on the Property clause contained in the Constitution. This was an apparent reference to section 25 (1) of the Constitution reading:

"25 (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

The Property clause in the Constitution is intended to protect an individual's or and entity's right of ownership of that particular property. The property at issue in the instant matter, that is Erf 1982, has not been interfered with since the Constitution came into force. The protection contained in the Property clause serves to protect and guarantee property owners that not even State organs will interfere with the status of their properties without following due process. I am not so certain that Mr. Barnard can safely invoke this section in this instance. When the Constitution and its Bill of Rights (which includes the Property clause) were enacted, the N2 National Road was long in existence on Erf 1982. Nobody has sought to change or alter the status of Erf 1982. Nobody therefore may be said to have contravened the Property clause.

[46] On the question of costs, there is no basis why this Court should depart from the general rule namely that the successful litigant is entitled to its costs. In the circumstances I make the following order:

(a) The application is dismissed with costs.



DLODLO, J