

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: A464/2011

In the matter between:

GLENN YVES JAMES DOLPIRE

Appellant

and

**THE SOUTH AFRICAN NATIONAL ROADS
AGENCY LIMITED**

First Respondent

THE MINISTER OF TRANSPORT

Second Respondent

JUDGMENT DELIVERED ON: 02 AUGUST 2012

GOLIATH, J:

Introduction

[1] The issue for determination in this appeal is whether second respondent should be ordered to expropriate certain parts of land purchased by the appellant. The appellant launched an application in this Division in September 2009. Prior to the

commencement of the hearing in the court *a quo*, the appellant abandoned certain relief sought but persisted with an order in the following terms:

"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."

[2] The matter was opposed by respondents who adopted the attitude that the appellant purchased a property on which a national road had been proclaimed at least since 1982 and that there was no legal basis to order second respondent to expropriate the land encompassing the road. The court *a quo* dismissed the application, hence this appeal, which is before us with leave granted by the court *a quo*.

Factual Background

[3] In 2004 the appellant bought a property described as Erf 1982, Wilderness, in extent 2846 square meters, for an amount of R860 000. The residence on the property and its immediate surrounds occupy approximately 800 square meters of the Erf. A further 2000 square meters of the land represents undeveloped land and extends in a southerly direction. During 2006 appellant attempted to proceed with development plans for the land. He established that the undeveloped portion of the Erf which he believed extended in an easterly direction, in fact extended in a southerly direction. The correct extension of the land was determined and it became evident that part of

the N2 National Road between George and the Wilderness traversed through his property, affecting a substantial portion of undeveloped land.

[4] No plausible explanation was given by appellant as to why he was under the misapprehension that the property extended in an easterly direction. An examination of the offer to purchase entered into by the appellant and the sellers shows that the appellant bought the property "voetstoots" subject to all conditions and servitudes mentioned in the title deeds thereof. Clause 13 of the agreement provides that the seller shall not be required to indicate to the purchaser the position of the beacons and/or pegs depicting the property. It is therefore inconceivable that appellant failed to determine the exact boundaries of the property prior to the sale.

[5] Although denied by appellant, circumstances strongly suggest that the original deed of grant reserved the right to the State to construct a road over the property without compensation to the owner of the property. The record shows that this condition was accepted by a predecessor in title, Wilderness 1921 Ltd. The authorities notified that owner of their intention to construct a national road which resulted in a situation where 37 of 46 plots owned by Wilderness 1921 Ltd could no longer be used. Mr Grant, on behalf of Wilderness 1921 Ltd, vigorously pursued *ex gratia* compensation, which was eventually settled in an amount of £2477 in and during 1945.

[6] It is common cause that Erf 1982 is made up of a consolidation of erven 72, 73, 74 and 76 which were previously owned by Wilderness 1921 Ltd. It is evident that

provision was made in subsequent title deeds for the recordal of certain conditions for the benefit of all buyers of the property. The appellant's title deed has a similar condition which reads as follows:

"B ONDERHEWIG VERDER aan die volgende spesiale voorwaardes vervat in Transportakte Nr. T 13076/1952, opgelê vir die voordeel van alle kopers en hul opvolgers in titel van dele van die eiendomme gehou deur The Wilderness (1921) Limited, kragtens Transportakte Nr.T 2059/1923, Sertifikate van Geregistreerde Titel Nrs. T 4119/1932 T 4120/1932 en T 4122/1932, Sertifikate van Gekonsolideerde Titel NrT 4125/1932, T 4126/1932 en T 4127/1932 en Sertifikaat van Gewysigde Titel Nr. T 8335/1929, en vir die voordeel van die gemelde The Wilderness (1921) Limited en sy opvolgers in titel van die restant of restante van die gemelde eiendomme, naamlik:

2 ...
3 ...
4 ...
5 ...

6 The Seller retains ownership and control of all roads, streets, paths, avenues, lanes, open spaces or reserves shown on the plan of the estate, as well as the right in its discretion to alter, close, deviate or otherwise deal with any such roads, streets, paths, avenues, lanes, open spaces or reserves."

[7] Subsequent owners such as Mr Owen Wiggins purchased the property with full knowledge of the existence of the National Road. It is alleged that the National Road was constructed during 1952. This fact was not seriously disputed by Appellant. It may therefore be accepted that at the time the appellant purchased Erf 1982 in 2004, first respondent had been continuously and uninterruptedly using the affected area for the purposes of a national road. The road was officially proclaimed as such in 1986. It is therefore common cause that the road was *in situ* when the South African National Road Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act"), 7 of 1998 was promulgated.

Appellant's case

[8] Appellant contends that he is the registered owner of the full extent of Erf 1982 measuring 2846 m² which includes the 2025 m² encroachment constituted by the National Road. After he discovered that the National Road traversed his property he initiated negotiations with first respondent in order to resolve the problem. It was established that the relevant affected portion had never been expropriated. Appellant alleges that respondents conceded the obligation to expropriate. Reference is made to second respondent's contention in his answering affidavit that the only issue in contention between them is whether appellant is entitled to be compensated.

[9] Appellant denies that the conditions in the title deed relate to the National Road on his property since the special condition refers to an "estate" of which the property

currently belonging to the appellant formed part. According to appellant the roads and lanes on such estate had nothing to do with a national road, but envisaged the development within an "estate".

[10] Appellant expressed the view that the Minister had already taken possession of his property more than 60 years ago and that he should be compelled to legitimize such possession by a lawful expropriation. The appellant contends that Respondents' actions, in the absence of a valid act of expropriation after taking possession, have no valid statutory or constitutional basis. Such taking of possession would also not have the effect of transferring the dominium in the property to the State. In the absence of expropriation such use of the national road constitutes "a deprivation" of property as contemplated in section 25(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The appellant says the acquisition by the State of the property without the consent of appellant should comply with all the formalities for a lawful and legal expropriation.

[11] Appellant submits that the court *a quo* erred in finding that Erf 1982 has not been interfered with since the Constitution came into force. He argues that since the affected portion of the property has never been expropriated, the full extent of the entire property had been transferred to appellant by its predecessors in title and, that being the case, any interference with the full extent of such property would fall foul of the provisions of s 25(1) of the Constitution.

[12] He says the fact that *ex gratia* compensation had been paid to Wilderness 1921 Ltd is irrelevant for the purposes of the relief sought and such issue would arise only in relation to the question of whether appellant should be compensated, after expropriation. Appellant submits that the uninterrupted use of the National Road by respondent does not in itself amount to expropriation. The special condition contained in annexure AA3 relating to unfettered permission for "*the State*" to *dispose of or alienate ... (the property) ... with the approbation of government in such manner as he may think proper*" no longer exists and in any event is unconstitutional and incapable of enforcement in the post 1994 constitutional dispensation, given the provisions of sections 25(1) and (2) of the Constitution. Appellant rejects the argument that the obligations to expropriate in section 41 of the SANRAL Act, 7 of 1998 are limited to future use of land. Section 41(3) provides that roads already in existence are also included.

[13] According to appellant second respondent conceded that negotiations had to be entered into with appellant in an attempt to acquire the land affected by the National Road by agreement in terms of section 41(2) failing which second respondent would recommend to the First Respondent that the Second Respondent be requested to expropriate the said portion. Respondents acknowledged and accepted that it was incumbent upon them to comply with the obligations imposed by section 41 of the SANRAL Act, read with the Expropriation Act 63 of 1975 in order to procure a lawful expropriation of the affected parts of the appellant's property.

[14] Furthermore, appellant rejects the suggestion that **Apex Mines Ltd v Administrator, Transvaal** 1988 (3) SA 1 (A) and **Fink and Another v Bedfordview Town Council and Others** 1992 (2) SA 1 (A) are authority for the proposition that "*no preceding act of expropriation...*" was necessary. According to appellant both authorities clearly confirmed that whatever the nature of the property or the right to be acquired by the State was, the acquisition thereof had to be effected by expropriation. Appellant contends that only if the right acquired had been obtained by agreement in terms of section 41(2) of The SANRAL Act, no preceding act of expropriation is necessary. However, where no agreement in terms of section 41(2) can be reached the provisions of section 41(1) direct that expropriation must be effected.

Respondents' principal submissions

[15] The submission on behalf of first respondent is that its predecessors in title had acquired the right to use the affected area for National Road purposes. At least two of appellant's predecessors in title were aware of this, when Erf 1982 was purchased and sold. In support of its submission, first respondent referred to **Apex Mines Ltd v Administrator, Transvaal** (*supra*) where **Nicholas, AJA** held as follows at 17H-J:

"The right to 'enter upon and take possession of' the 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 Bornman 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)."

First respondent pointed out that this view was supported in **Fink and Another v Bedfordview Town Council and Others** (supra) where it was held that in the case of a right acquired in the nature of a road servitude, no preceding act of expropriation per se was necessary. First respondent argues that Wilderness1921 Ltd, as the owner of Erf 1982 during the construction of the road, accepted compensation in the sum of £2477,30 and subsequent owners accepted that they did not have the full use of the land affected by the National Road. Appellant is thus not entitled to a better title than his predecessors.

[16] As to whether respondents' use of the National Road, in the absence of expropriation, constitutes an arbitrary deprivation for the purposes of section 25(1) of the Constitution, first respondent referred to the approach adopted by our courts in **FNB of SA Ltd t/a Wesbank v CSARS**; **FNB of SA Ltd t/a Wesbank v Minister of Finance** 2002 (4) SA 768 (CC). In dealing with the relevant considerations, first respondent contends as follows:

- (a) Firstly, the road was already in place before appellant purchased the property hence he was not deprived of anything.

(b) The road was constructed many years before appellant purchased the property and the original deed of grant made provision for such road to be constructed without compensation to the owner of the property. Appellant never had the use of the affected area and it cannot be said that he owned something which was then taken away from him.

(c) The predecessors of first respondent implemented the condition in the original deed of grant and proceeded to construct the road. It cannot now be alleged that first respondent deprived any party of such property.

(d) It is conceded that a *de facto* deprivation occurred in 1952 when the National Road was built before section 25 of the Constitution was enacted. However, such deprivation for the purposes of a public national road cannot be regarded as arbitrary. Consequently the alleged deprivation is not the deprivation contemplated by sections 25(2)(a) and (b) of the Constitution.

[17] Second respondent contends that appellant incorrectly believes that he has a right to seek an order of expropriation simply because the Minister has already taken possession of the land and has refused or failed to legitimize the possession by lawful expropriation for a period of 60 years. Second respondent further contends that there is no legal basis on which the Minister can be ordered to expropriate land. The history of the land shows that appropriate legal steps were taken to effect possession thereof and compensate the previous owners who had vigorously pursued the issue of compensation. The Minister's act of expropriation is governed and prescribed by law

and cannot be retrospectively exercised to legitimize a previous action of expropriation. On the facts relied on by the appellant, no reasonable grounds have been shown to exist which would compel the Minister to exercise the powers of expropriation, nor has it been established that the SANRAL is unable to acquire it for purposes related to its legislative mandate. A national road already exists on the land and the agency does not require expropriation in fulfilment of its mandate. There is no basis on which the Minister should be deprived of his discretion and be compelled to exercise his powers of expropriation under section 41(1)(a) of the SANRAL Act. The jurisdictional requirements for exercising the powers in section 41 of the SANRAL Act have accordingly not been established to exist.

Legal Aspects

[18] The application is based on the provisions of section 41(1)(a) of the SANRAL Act which provide the following:

*"41 Expropriation of land for purposes of **National Road***

(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** ... may expropriate that land for the Agency";*

Section 41(a) must be read in conjunction with subsection (2) which provides that:

"(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.*"

Section 41 (3) further provides as follows:

"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."

[19] The above provisions must be considered in conjunction with section 25 of the Constitution of the Republic of South Africa, 1996 which prohibits arbitrary deprivation and expropriation of property. Section 25(1) provides that no person may be deprived of his or her property except in terms of a law of general application. The Expropriation Act 63 of 1975 is such a law. Section 25(2) provides that property may only be expropriated for a public purpose or in the public interest subject to payment of compensation. The empowering provisions contained in section 2 of the Expropriation Act 63 of 1975 provide the Minister with the power to expropriate *"any property for public purposes."* It is not disputed that the acquisition of appellant's land was for the purposes of a National Road. The appellant does not allege an arbitrary deprivation of his property. The

appellant's main contention is that the possession of his land should be legitimized failing which continued use of the National Road constitutes a "deprivation" in terms of section 25(2) of the Constitution.

[20] In **Minister of Minerals and Energy v Agri SA** (2012) ZASCA 93 the Supreme Court of Appeal stated that when a challenge is mounted under section 25(1) and 25(2) the first issue to be determined is whether there has been a deprivation of property. In determining this question the court *a quo* found that a previous owner, Wilderness 1921 Ltd, received an *ex gratia* payment for the construction of the road over its property, subsequent owners were aware of the existence of the road and appellant purchased the property with the existing road on it. Appellant's contention that the full extent of the property had been transferred to him, and that accordingly the existence of the National Road on the property constituted an interference of his property rights, is misconceived. Expropriation takes place by operation of law and no transfer is necessary. The fact that appellant retained the *dominium* of the land subject to the right to construct a road is irrelevant. (See **Apex Mines Ltd v Administrator, Transvaal**) (*supra*). The court *a quo* correctly found that the appellant had not been deprived of any property in terms of section 25(2) of the Constitution.

[21] Even if the court *a quo* erred in this regard it would appear that Erf 1982 once formed part of a large tract of land which belonged to the State. That land was sold subject to the reservation of road rights in favour of the State. The right to construct a road on the property remained vested in the State and this condition was incorporated in

all subsequent title deeds, including the appellant's. The State exercised this right at the time when it was owned by Wilderness 1921 Ltd sixty years ago. Appellant's belief that he had been deprived of the property which encompasses the road is similarly misguided. The appellant had clearly not established any rights in respect of the affected property.

[22] The Expropriation Act provides for payment of compensation for land acquired for purposes of public roads. Section 26(3) thereof provides:

"In the case of land which is in terms of an ordinance declared to be a road or acquired for a road without such land being expropriated, the following provisions shall apply, namely –

- (a) Notwithstanding anything to the contrary contained in any such ordinance –*
 - (i) the compensation to which the owner is entitled, shall be calculated, determined and paid in accordance with section 12, as if the land to which the declaration or acquisition relates had been expropriated in terms of the provisions of this Act;*
 - (ii) no compensation shall be paid in respect of land which at the time of the declaration or acquisition already existed, or was being used, as a road;"*

[23] Appellant seeks an order compelling the second respondent to expropriate the land. Appellant contends that in the absence of an agreement in terms of section 41(2) of the SANRAL Act, the provisions of section 41(1) should be invoked and that

expropriation must therefore follow. In terms of section 41 the Minister must be satisfied on reasonable grounds, that the agency requires the land but is unable to do so. In addition to this the obligation to pay must be established. It is not disputed that the National Road in this instance was already in existence for 60 years. Although the issue of compensation is not before this court, it would appear that section 26(3)(a)(ii) does not impose any obligation on the Minister to pay compensation since the land in question was already in existence and used as a road at the time of proclamation. The provisions of section 41 of the SANRAL Act envisage a prospective application and do not apply to land already declared and established as a National Road. In my view the court *a quo* correctly found that the agency clearly does not require the land since the national road is already in existence. Consequently the appellant failed to establish the jurisdictional facts on which second defendant could exercise his discretionary powers to expropriate in terms of section 41(i)(a) of the SANRAL Act.

[24] In any event the court *a quo* held that an order compelling the second respondent to expropriate the land would usurp the discretionary powers of the Minister and intrude in the executive sphere of government. In **Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others** 2010 (4) SA 242 (SCA) the Supreme Court of Appeal considered the question whether a landowner could obtain an order compelling an authority to expropriate land. The Supreme Court of Appeal confirmed the approach adopted by the court *a quo* and held at paragraph [48] of the judgment that courts should in the proper exercise of the judicial function hesitate to intervene in matters involving decisions on what Professor Hoexter called "*polycentric issues*".

(Cora Hoexter "*The Future of Judicial Review in South African Administrative Law*" (2000) 117 SALJ 484 pp 501-2)" The court held that the timing of the decision to expropriate remains within the discretion of the expropriating authority. (See *A Gildenhuys Onteieningsreg* 2nd Ed (2001) at 77).

[25] The Supreme Court of Appeal also dealt with the contentions that it had been conceded that expropriation at some stage in the future was considered and that the issue of compensation was the only issue in contention. At paragraph [48]) the Court said that:

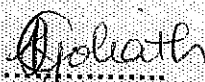
"The fact that an authority having powers of expropriation recognizes the possibility that at some future stage it will have to exercise those powers does not entitle anyone to compel them to do so."

[26] It follows that the appellant is not entitled to the relief sought. In my opinion no factual errors or misdirections were made by the court *a quo*. In a well-formulated judgment in the court *a quo* **Dlodlo, J** conducted an exhaustive analysis of the appropriate factual and legal issues in this matter. After consideration of all the facts on record, and in the absence of any misdirection by the trial court, I am not persuaded that this court is entitled to interfere with the order of the court *a quo*.

[27] In the result the following order is made:

1. The appeal is accordingly dismissed.

2. Appellant is ordered to pay the costs of the First and Second Respondents herein, including the costs of two counsel where employed by the First Respondent.


.....
P L GOLIATH
JUDGE

I agree.


.....
D H ZONDI
JUDGE

I agree.


.....
P A L GAMBLE
JUDGE

It is so ordered.

