

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 12 October 1999
before **DODSON J** and **MOLOTO J**

CASE NUMBER: 119/99

In the case between

KANBARAN PILLAY

Applicant

and

TAYLOR-BURKE PROJECTS (PTY) LTD

First Respondent

ENGEN PETROLEUM LIMITED

Second Respondent

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED

Third Respondent

JUDGMENT

DODSON J:

Introduction

[1] This is an application for an interim interdict pending the final determination of a land claim lodged by the applicant in terms of section 10 of the Restitution of Land Rights Act.¹ I will refer to it as “the Restitution Act”. How the respondents came to be involved in the matter is explained below. I will refer to the first respondent, Taylor-Burke Projects (Pty) Ltd as “TBP”. I will refer to the second respondent, Engen Petroleum Ltd, as Engen. The third respondent is the South African National Roads Agency Ltd, a limited liability company established in terms of section 2 of the South African National Roads Agency Limited and National Roads Act.² It is the successor to the South African Roads Board. The State is its sole shareholder. I will refer to it as “SANRAL”.

[2] The applicant’s late father was the owner of land in the Cato Manor area of Durban. He lived on the land and ran a dairy farm there. He also operated a service station in Clare Estate. He was classified as Indian in terms of the Group Areas Act applicable at the time.³ In 1958 he sold the land to a white person, Mr Muller, for the amount of £1000.00. The applicant avers that the sale was a forced sale, pending the inevitable declaration of the area as a white group area,

1 Act 22 of 1994.

2 Act 7 of 1998.

3 Act 77 of 1957.

even though that area had not been declared as such at the time of the sale. Other areas of Cato Manor had by then been declared white group areas, giving rise to expropriations and sales of land owned by persons classified as Indians. The land sold by the applicant's father was later acquired by the then local authority in the area, the Council of the Borough of Westville, consolidated with other properties, and sold to a property developer. The Westville Pavilion Shopping Centre has since been built on the property. I will refer to it as "the Pavilion".

[3] When the applicant's father died in 1973, he took over the service station business in Clare Estate. During the 1980's a new access road was built which has had a permanent negative effect on the service station's profitability. On 18 August 1995, the applicant lodged his claim for restitution based on the alleged dispossession of his father's land in Cato Manor. Implicit in his claim (and subsequently confirmed in the proceedings arising out of the land claim) was an acceptance that the original land sold by his father could not be restored to him. However, in his claim form, he asked that he be given assistance in relocating the service station to "the area adjacent to the Westville Pavilion". In his subsequent dealings with the Regional Land Claims Commissioner,⁴ the applicant indicated that he wished to be awarded alternative State-owned land as an appropriate form of relief in terms of section 35(1)(b) of the Restitution Act. He identified 3 properties adjacent to the Pavilion which ought to be considered for this purpose. Two are owned by the Inner West Local Council, the local authority now having jurisdiction in the area. The other is owned by SANRAL. It is the latter property to which this application relates. I will refer to it as "the subject property".

[4] During 1995 and 1996, the applicant entered into negotiations with Engen with a view to developing a service station on the subject property in anticipation of the land being awarded to him. He avers (although no real reliance was placed on this averment in argument) that these negotiations resulted in the conclusion of an agreement with Engen to develop the site. Engen denies this, saying that its proposed terms were rejected by the applicant. Suffice it to say that the documentation which is put up in support of this contention tends to support Engen's version. The applicant also made enquiries about these three properties with the Inner West Local Council during 1996. In a letter from the Council in response dated 23 July 1996, the applicant was informed that the Council intended to sell its two properties adjacent to the Pavilion, that the subject property was owned by "the Department of Transport" and that they were unaware what the future plans were for this property. This was followed by attempts by the applicant to purchase the Council's properties.

[5] The applicant's first communication with the Department of Transport in connection with the subject property was by way of a fax sent to the Department on 1 June 1998 in which he referred to his claim generally and in respect of the three properties adjacent to the Pavilion and enquired about the possibility of his purchasing the subject property. Apart from an acknowledgment of receipt (and a promise of a reply) from the agent for SANRAL (and for its predecessor), namely Intersite Property Management Services, no proper response was ever received to this proposal. I will refer to Intersite Property Management Services as SANRAL'S agent.

4 These dealings were in terms of the "Cato Manor Agreement" which is dealt with in paragraphs [20] to [22].

[6] During or about July 1998, the applicant eventually heard that the Council was not willing to sell their two properties to the applicant. During December 1998 the applicant heard that a sale of the subject property was imminent. The applicant's attorney wrote to SANRAL's agent and reminded it that a response to the earlier letter was still outstanding. The letter concluded with the following:

“Please let us hear from you as a matter of urgency as my client is considering obtaining an interdict preventing you from selling the property to any other person pending finalisation of his claim.”

No reply was received and no interdict was sought. On 14 July 1999, the applicant's attorney again wrote to SANRAL's agent reminding them that the applicant intended to ask the Land Claims Court to order that he be awarded the subject property and inviting them to attend a pre-trial conference which had been convened by the Land Claims Court for 25 August 1999. The invitation was accepted.

[7] On 12 July 1999, the building of a service station started on the subject property. The applicant appears to have made certain enquiries in this regard which resulted in a letter being sent by the applicant to Engen on 20 July 1999. The letter referred to the alleged agreement between applicant and Engen, asked for clarity about the development and recorded that the applicant wished to take immediate steps to protect his rights. Engen replied 3 days later essentially denying the existence of any binding agreement with the applicant and reserving its rights. The next step in the sequence of events was the launching of the present application on 28 September 1999.

[8] What the opposing affidavits filed on behalf of the three respondents reveal is that the subject property was leased to TBP⁵ by way of a series of written lease agreements. The first was dated 12 February 1992. The second was entered into during November 1992. It has not been explained in these proceedings why this occurred. The important parts of the November 1992 lease read as follows:

“Lease period

- (a) For an initial period of 1 year which shall commence on 1 August 1992 in order to obtain the licences, permits and approvals prescribed or required by any competent authority to enable the Lessee lawfully to develop the PROPERTY. For a further three periods of 9 years and 11 months. Should the PROPERTY or a portion thereof at any given time during the aforementioned lease period be required for road purpose the agreement may be terminated with a three (3) months written notification (sic).

- (b) Rent

No rental shall be payable to the Lessor during the initial period referred to in paragraph (a) above.

After this period, the rental shall be the amount of R850,00 per calendar month which amount shall escalate at a rate of 10% per annum.”

5 At that time, TBP went by a different name, but this is of no significance.

[9] TBP did not get the necessary licences, permits and approvals within a year and then the South African Roads Board took up the attitude that the lease had been breached and they were entitled to cancel it. This gave rise to litigation in the Natal High Court, the outcome of which was a declaratory order that the lease had not been breached and had not been validly terminated.⁶ Accepting the decision of the High Court, SANRAL then negotiated for a higher rental and in return offered TBP a longer lease period. This has resulted in a further written lease agreement being entered into on or about 30 June 1999. The new lease provides for a rental of R10000.00 per month and a lease period of 50 years. The parties to the lease are in the process of having it notorially registered.

[10] All the necessary permissions having been obtained, TBP and Engen have proceeded with the development of a service station on the subject property. TBP is in the process of spending R3 650 000 on the improvements associated with the service station. The completed handover date is scheduled for 26 November 1999. Approximately 65% of the construction is complete. Should construction of the improvements be temporarily stopped, TBP will incur standing time claims of approximately R3000.00 per calendar day during the stoppage.

[11] The applicant seeks an interim interdict, pending the final determination of his land claim, restraining the first and second respondents from continuing with the building of the service station. The approach of the Land Claims Court to interim interdicts has been considered in earlier judgments.⁷ It may be summarised as follows:

“The approach of the Land Claims Court to interim interdicts ... follows the approach adopted in the English case of *American Cyanamid Co v Ethicon Ltd*, which this Court found to be reconcilable with the approach which Holmes JA followed in *Olympic Passenger Service (Pty) Ltd v Ramlagan* and in *Eriksen Motors Ltd v Protea Motors and Another*. . . . On that approach, the applicant for an interim interdict must show that in the proceedings for final relief to which the proceedings for interim relief relate, there is a serious question to be tried. In assessing whether or not there is a serious question to be tried, the Court will not tie itself to a particular degree of proof. Rather it will ensure that the issue raised in the proceedings for final relief is not frivolous or vexatious or devoid of any merit. It will enquire into the balance of convenience. In coming to its decision regarding the grant or refusal of interim relief, and, if granted, the nature of that relief, the Court exercises a discretion. That process requires it primarily to weigh the apparent strength of the applicants’ case in relation to the final relief, on the one hand, against the balance of convenience, on the other. If the balance of convenience strongly favours the second respondent, the applicant will have to show strong prospects of success in relation to the final relief before interim relief will be considered. If the balance of convenience strongly favours the applicants, their burden in relation to the ‘serious question to be tried’ test is diminished.”⁸

6 *Taylor-Burke Projects (Pty) Ltd v South African Roads Board* NPD Case 2926/95, 25 September 1997.

7 *Chief Nchabeleng v Chief Phasha* 1998 (3) SA 578 (LCC); [1997] 4 All SA 158 (LCC), *Manana and Others v Johannes* 1999 (1) SA 181 (LCC) at 184H-185I; *Van der Walt and Others v Lang and Others* 1999 (1) SA 189 (LCC) at 196F-200D; *Hlapi v Le Grange and Another*; *Mlambo v Le Grange and Another*[1999] 3 All SA 125 (LCC)

8 *Hlapi* above n 7 at 130c-131b

[12] Of importance in this matter is the following dictum from the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd*:⁹

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”¹⁰

In the context of this judgment, any pronouncements on disputes of fact or questions of law are for the purposes only of assessing the applicant’s prospects of success in the question to be tried. They represent preliminary and not final views.

Is there a serious question to be tried?

[13] In order to decide this application, the serious-question-to-be-tried test must be applied to the applicant’s land claim, including his claim that the subject property in particular should be awarded to him. In order to make out a claim for some form of relief in relation to a land claim, the applicant must, in terms of section 2 of the Restitution Act, show that:

- (i) he is a direct descendant,
- (ii) of a person dispossessed of a right in land,
- (iii) after 1913,
- (iv) as a result of past racially discriminatory laws and practices;
- (v) a claim for restitution was lodged not later than 31 December 1998; and
- (vi) no just and equitable compensation was received by his ascendant at the time of the dispossession.

[14] Requirements (i), (iii) and (v) are not in dispute. The remaining requirements are placed in dispute, but I will assume (without deciding) that the applicant makes out a serious question to be tried with strong prospects of success in respect of these requirements.

Serious question to be tried in relation to the type of relief sought?

[15] Compliance with the requirements of section 2 of the Restitution Act is not the end of the matter in securing the desired form of relief. It is important to note that the introductory part of section 2 says:

“A person shall be entitled to restitution of a right in land if . . . [the requirements are then listed]”.

9 [1975] 1 All ER 504 (HL).

10 Above n 8 at 510 C - F.

The term “restitution of a right in land” is then defined in section 1 as :

- “(a) restoration of a right in land; or
- (b) equitable redress;”.

These two terms are also defined. The definition of restoration of a right in land makes it clear that it refers to restoration of a right in the land which was the subject matter of the original dispossession complained of. Equitable redress is defined to mean:

“any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including -

- (a) the granting of an appropriate right in alternative State-owned land;
- (b) the payment of compensation;”.

[16] Section 35(1) of the Restitution Act is also important in this regard. It reads:

“35 **Court orders**

- (1) The Court may order -
 - (a) the restoration of land . . .
 - (b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;
 - (c) the State to pay the claimant compensation;
 - (d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
 - (e) the grant to the claimant of any alternative relief.”

Applicant seeks an order in terms of section 35(1)(b) that the subject property be awarded to him as alternative state-owned land.¹¹ What the provisions which I have quoted show is that, once a claim has been shown to comply with the section 2 requirements, there are a wide variety of potential forms of relief. In deciding on which form of relief is appropriate, the Court is accorded a wide discretion. In *Makuleke Community Claim pertaining to Pafuri area of Kruger National Park*¹² this Court said the following about section 35(1):

“The power of the Court to order restitution in one form or another is derived primarily from section 35(1) of the Restitution Act. . . . The use of the word ‘may’ suggests that the Court has a discretion as to whether or not it should make such an order and what the content of that order should be. The discretion, although not unfettered, is a wide one. This is also apparent from the ensuing subsections in section 35

11 I will assume, without deciding the point, that the subject property is State-owned land as contemplated in section 35(1)(b).

12 [1998] JOL 4264 (LCC) at paragraph [8]. <http://www.law.wits.ac.za/lcc/1998/makulekesum.html>

and from section 33 which lists the factors which the Court must consider in ‘considering its decision in any particular matter’.”

[17] In *Blaauwberg Municipality v Bekker and Others*,¹³ Gildenhuys J held as follows:

“it must be remembered that there is no substantive right to any particular form of restitution, be it restoration, alternative land, compensation or some other form of relief. The interim Constitution and the Restitution of Land Rights Act only provide a right to ‘claim’ or ‘enforce’ restitution, in other words, a right to engage in a process. A substantive right to a particular form of restitution only comes into existence when the Court makes a restitution order.”¹⁴

Although the legal regime in respect of restitution claims has changed,¹⁵ this dictum is still accurate because it emphasises that a claimant has no specific right to a particular form of relief, even in respect of the property originally dispossessed. Now, if a claimant has no automatic right to the property which was the subject matter of the original dispossession, it follows that a claimant has no automatic right to alternative State-owned land which he considers appropriate for the granting of relief. This immediately distinguishes this case from interim interdicts sought in the context of vindicatory and quasi-vindicatory claims, to which the applicant sought to liken his claim.¹⁶

[18] A factor which is relevant in assessing the likely outcome of the future exercise of the discretion as to which form of relief is appropriate in this case, is the fact that the applicant is not the only descendant who has submitted a claim arising out of the sale of his late father’s property in Cato Manor. There are a number of descendants. Some have, according to the applicant and the documents relating to the land claim, ceded their rights to claim to the applicant. However one of those who is alleged to have ceded her claim, Mrs Sathiavanie Moodley, has also lodged a claim. The other descendants who have claimed are the 5 children of the applicant’s brother, the late Subramoney Gungaloo Pillay. It is interesting that in all of the documentation which they have submitted to the Commission on the Restitution of Land Rights, they speak of “proceeds” and “compensation” when referring to contemplated relief. This seems to me to be a reference to financial compensation. The applicant says nothing of their attitude or of any plans to include them in his proposed development of the subject property. The stance which those

13 [1998] 1 All SA 88 (LCC).

14 *Blaauwberg* above n 13 at 104d-e.

15 Section 25(7) of the final Constitution, Act 108 of 1996, provides for a clear right to “restitution of [the property dispossessed] or to equitable redress” to the extent provided by an Act of Parliament. Note also that the Restitution Act has been amended since that judgment.

16 See in this regard *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 810–811:

“A vindicatory action is one in which the plaintiff claims delivery of specific property as owner or at any rate lawful possessor. An action is said to be quasi-vindicatory when delivery of specific property is claimed under some legal right to obtain possession.”

The threshold requirements for the grant of an interim interdict are higher when one is dealing with a claim that is neither vindicatory nor quasi-vindicatory. See in this regard *Stern* at 813B.

descendants ultimately adopt in relation to relief may well impact upon the exercise of the Court's discretion. Financial compensation may be far more easily divided among the descendants than land awarded in terms of section 35(1)(b).

[19] The existence of that wide discretion which must be exercised before the applicant might be awarded alternative State-owned land as a remedy (let alone a specific piece of alternative State-owned land) is the first weak point in the applicant's prospects of success in the question to be tried.

Serious question to be tried in relation to the particular property claimed?

[20] Even if the applicant is able to convince the Court ultimately that alternative State-owned land is the appropriate remedy, the next question is whether that particular piece of State-owned land will be awarded to the applicant. At this point it must be mentioned that the applicant is party to an agreement regulating restitution in the Cato Manor area which has been made an order of this Court in terms of section 34 of the Restitution Act.¹⁷ The details of that agreement and its background are dealt with in two reported judgments of this Court.¹⁸ I will refer to it as "the agreement". Suffice it to say that the applicant's claim is affected by clause 8 of the agreement because he has selected alternative state owned land. Clause 8 reads as follows:

"8 Alternative Land Process

- 8.1 The applicant shall within five days of the effective date provide the RLCC with the types of land uses that will be delivered in terms of the development of the area to enable the RLCC to conduct the initial interviews referred to above and to identify:
 - 8.1.1 claimants who choose to participate as a group in order to access the land uses referred to above;
 - 8.1.2 claimants who wish to approach the Minister for the designation of alternative State-owned land.
- 8.2 The Minister when considering the availability of alternative State-owned land for designation shall be requested by the DLA to first consider the availability of alternative State-owned land in the area and only thereafter consider the availability of alternative State-owned land outside the area.
- 8.3 Within five days of concluding the initial interviews, the RLCC shall provide:
 - 8.3.1 the applicant with particulars of all claimants who wish to exercise their claim by participating in a group option and particulars of the type of land use envisaged;

17 Section 34 of the Act allows this Court to order that, in respect of a particular area, restitution will not take the form of restoration of the property originally dispossessed.

18 See *Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another* 1998 (1) SA 78 (LCC) and *Singh and Others v North and South Central Local Councils and Others* [1999] 1 All SA 350 (LCC). The agreement is set out in full at 88-98 of the *Ex Parte North Central* case.

- 8.3.2 the applicant and the DLA with particulars of all claimants who acknowledge that restoration is not feasible and who wish to have alternative State-owned land designated by way of settlement of their claims.
- 8.4 The applicant shall within 10 days of receipt of the information referred to in clause 8.3 above provide the DLA with a report on the availability of land within the area for acquisition by the DLA for the purposes of designation as alternative State-owned land.
- 8.5 The applicant shall conclude an agreement with the DLA for the supply of such alternative State-owned land within the area as it is able to supply for designation by the Minister in terms of this agreement.
- 8.6 Claims for alternative State-owned land shall be processed in accordance with the provisions of the Act and settled in due course by the DLA.”

[21] The references in the agreement to “the applicant” are references to the local authorities having jurisdiction in the area. The applicant in these proceedings is a “claimant” as contemplated in the agreement. The “DLA” is the Department of Land Affairs. The report referred to in clause 8.4 has been provided by the local authorities concerned. The properties mentioned in the report do not include the subject property. The respondents argue in this application that is the end of the matter in so far as the applicant’s claim for the subject property is concerned. The pool of alternative State-owned land has been determined by that report and the subject property has not been included. The applicant argues that the report simply refers to land that the DLA may acquire for inclusion in an ultimate pool of alternative State-owned land which may include additional properties to those mentioned in the report. It is not necessary for me to decide that issue here and I will assume in the applicant’s favour that the subject property will constitute land which might be considered for relief under section 35(1)(b) when the land claim is dealt with.

[22] The matter was argued, on behalf of the applicant, on the basis that the authority which will ultimately decide which State-owned land is to be awarded to the applicant, is the Minister. This is presumably based on an interpretation of clause 8.5 of the agreement which contemplates the designation of land by the Minister. However, clause 8.6 of the agreement also records that claims for alternative State-owned land must be processed in terms of the Act. If they are dealt with in terms of the Act, it seems to me that this Court retains its full discretion in terms of section 35 and, pursuant to that, may have the power in terms of section 35(1)(b) of the Restitution Act to order the State to designate a particular piece of land, notwithstanding the agreement. At the end of the day, however, it does not matter for purposes of deciding this application, who has the final say, the Minister or this Court, because the factors relevant to the discretionary decision will be similar.

[23] For the applicant to show that his prospects of success in the question to be tried are strong, there must be a reasonably strong prospect that the discretion, properly exercised, will result in an award to the applicant of the subject property. In this regard the applicant faces difficulties. There are no express constraints in the Act on how the discretion regarding the selection of alternative State-owned land is to be exercised. The Court must consider the criteria in section 33 of the Restitution Act, but the discretion is once again a wide one. It is so that clause 8.2 of the agreement gives a form of priority to land within the area to which the agreement relates (which includes the subject property). However, if regard is had to the report in terms of clause 8.4 of the agreement, there will still be a substantial pool of properties to choose from inside the

area over and above the subject property. This negatively affects the probabilities of the subject property being awarded to the applicant.

Serious question to be tried in relation to the validity of the leases?

[24] In my view, if the applicant were able to show that the subject property was not subject to a long term lease agreement, this might favourably affect the exercise of a discretion in relation to whether or not to award the subject property to him in terms of section 35(1)(b). The converse applies if the lease is found to be valid. What are his prospects of succeeding in this regard? He has attacked the legal validity of the 1992 leases agreements on various grounds. The 1992 leases were entered into by the South African Roads Board. The Board's powers to let property were at that time to be found in section 5(1)(a) of the National Roads Act¹⁹ which read:

- “5. (1) The commission shall have power -
- (a) to purchase, hire or otherwise acquire, or to hold, or to sell, exchange, let or with the approval of the Minister donate, or otherwise to dispose of or deal with, movable or immovable property for the purposes of this Act . . .”

Based on a comment in the judgment of the Natal High Court referred to in paragraph [9],²⁰ the applicant contends that the original purpose of the 1992 leases was to develop office space (this is disputed by the respondents). He says that this could not have been a letting “for the purposes of the [National Roads] Act”. It would not even serve the purpose of that Act if the intention had always been the development of a service station. There does not seem to be substance in this submission. The power in section 5(1)(a) is very widely couched. It would be extraordinary if the powers of the South African Roads Board would have been limited so that it could not derive, for the benefit of the State's coffers, a return from land which was not immediately required for the purpose of constructing a road.

[25] The next leg of the argument in relation to the invalidity of the 1992 leases was that the procedures of the State Tender Board Act²¹ had not been followed. Section 13(1)(b) of the State Tender Board Act provides as follows:

“13 Regulations

- (1) The Minister may make regulations-
- (a) . . .

19 Act 54 of 1971. The commission's powers were transferred to the South African Roads Board by section 5(1) of the South African Roads Board Act 74 of 1988 read with section 3(1) of the Transport Deregulation Act 80 of 1988.

20 Above n 6 at 2.

21 Act 86 of 1968.

- (b) providing that, subject to the provisions of any Act of Parliament, supplies and services shall not be procured for and on behalf of the State, that the hiring or letting of anything or the acquisition or granting of any right shall not be arranged for and on behalf of the State and that movable State property shall not be disposed of except through the board or in such other manner as may be prescribed in or determined in accordance with such regulations;”. (my emphasis)

In terms of that paragraph, the Minister of Finance promulgated a set of regulations.²² Regulation 2 echoes the wording of paragraph (b) of section 13(1) to some extent:

“Subject to the provisions of any Act of Parliament supplies and services for and on behalf of the State, the hiring or letting of anything or the acquisition or granting of any right for and on behalf of the State and the disposal of movable State property shall be procured, arranged or disposed of only through the Board.”

[26] The first difficulty which the applicant faces with this argument is that there was, when the 1992 leases were signed, a statute which expressly conferred on the South African Roads Board the power to let property. That would seem to bring that Board’s letting activities under the qualification at the beginning of section 13(1)(b) and regulation 2. The second difficulty which the applicant has is that section 13(1)(b) does contemplate the possibility of regulations being passed which, instead of providing for the assumption by the State Tender Board of the functions of other parts of the State involved in these activities, regulate the “manner” in which those activities are carried out. This would allow for a situation where even though a particular statute retained an authority’s power to let, the manner in which they did so could be regulated. The regulations which I have referred to do not, however, go this far and, in the limited time at my disposal, I have not been able to find any which do. None were drawn to my attention by the parties. The subtlety of this distinction between the two possible types of regulation does not, with respect, appear to have been taken into account in the decision which the applicant relied on for support on this point, namely *Akani Msunduzi (Pty) Ltd and Another v The Premier of the Province of KwaZulu-Natal and Others*.²³

[27] The third difficulty with the argument based on the State Tender Board Act is that it is possible that it does not apply to the letting of immovable (as opposed to movable) property. This depends on the meaning to be given to the term “anything” in the portions of the Act and the regulations which I have quoted. There is a separate general statute dealing expressly with the letting, amongst other things, of the immovable property of the State, namely the State Land Disposal Act.²⁴ In the *Akani Msunduzi* case, it appears to have been accepted that the State Tender Board Act did apply to the letting of immovable property. However, that issue does not appear to have been argued.

[28] The final basis on which the lease is attacked is a rather cryptic one. The applicant annexes to his replying papers a letter dated 11 February 1993 from the attorneys for the Town Council

22 The regulations are contained in Proclamation No R. 1237 dated 1 July 1988 and contained in Government Gazette no 11382.

23 Unreported judgment, NPD case 4105/98, 7 June 1999.

24 Act 48 of 1961.

for the Borough of Westville to the Director-General of the Department of Transport. In the letter, serious reservations are expressed about the whole process involving the leasing of the subject property to the predecessor of TBP. The Council's complaints relate to the failure to consult the Council in the decision-making process relating to the lease, where it plainly impacted on matters falling within their jurisdiction, the terms of the lease, the fact that two lease agreements were signed after the Department's representatives had said that no further leases of this nature would be entered into and the delay by the Department of more than a year in honouring an undertaking to provide a copy of a lease agreement. The letter refers to a meeting which took place between representatives of the Council, on the one hand, and the Deputy Director-General of the Department of Transport and other representatives of that Department, on the other. The following paragraph of the letter certainly raises questions:

“Both [the Council's representatives] and the Deputy Director-General expressed considerable surprise at this arrangement [ie the terms of the first lease and the intended use of the property]. However Mr O'Brien and Mr Petzer informed the meeting that a couple of these leases had been entered into by someone no longer with the Department and that they had put a stop to any such arrangement. We were assured that no more such transactions would be entered into.”

However, because this letter was annexed to the replying affidavits, respondents never had the opportunity of dealing with it. There was also no affidavit by anyone who participated in the events to which the letter refers to confirm its accuracy or explain any subsequent developments. In my view it cannot, for these reasons, contribute significantly to strengthening the applicant's prospects of success.

[29] Even if the 1992 leases are successfully attacked, the applicant still has to show over and above this that the current lease is impeachable. The applicant argues that the 1999 lease agreement cannot stand in the way of his claim because SANRAL and TBP had knowledge of the claim in respect of the subject property at the time that that lease was entered into. The applicant argues that this is a consequence of the doctrine of notice. However, that doctrine does not have any application here. The doctrine of notice applies where parties contract with knowledge of the rights of a third party, with the result that the third party's rights must be given effect to.²⁵ As I have already explained,²⁶ the applicant as third party in this case has no rights in respect of the subject property, only a claim for discretionary relief. However, given that the 1999 agreement was premised on the validity of the November 1992 lease, if it were subsequently to emerge that the 1992 leases were in fact invalid for reasons not considered in the Natal High Court judgment, there may be bases in the law of contract or administrative law for questioning the validity of the 1999 lease. The task facing the applicant in this regard is not, however, an easy one. More than that I need not say at this stage.

[30] Having regard to the above analysis, I am of the view that there is a serious question to be tried in relation to the applicant's land claim, even in relation to the particular relief which he seeks. However, on the information available at this stage and for the reasons given, the applicant's prospects of success are at the weaker rather than the stronger end of the spectrum.

25 D Hutchison et al, *Wille's Principles of South African Law* 8th ed (Juta, Cape Town 1991) at 260 and 305.

26 See paragraph [17].

Prejudice to the respondents if the order is granted

[31] The financial implications for the first respondent if an order is granted are severe as appears from paragraph [10] above. This is conceded by the applicant. What must also be taken into account is that the proceedings in relation to the land claim are still at a relatively early stage. Although the matter has been referred to the Court, no trial date has been set. Certain parties have only recently been joined and service is still in the process of being effected on certain interested parties who were identified at the first pre-trial conference. No hearing date has been set. Another pre-trial conference is due to take place on 12 November 1999. The matter will not be heard this year. The holding costs will therefore be substantial. The first and second respondents will also be deprived of an income from the date that the service station would have come into operation. On the papers, this would have been before the Christmas season, which no doubt has the potential to be lucrative. This will also affect the second respondent. No further case is made out for prejudice to the second respondent, save that it points out that it has already installed its underground fuel tanks there. No case is made out for prejudice to the third respondent.

Prejudice to the applicant if the order is refused

[32] The thrust of the applicant's contention regarding prejudice is twofold. First, he points out that in terms of section 35(2)(a) and (b) of the Restitution Act, this Court may require a payment to be made by the applicant as a condition of any grant to him of any right in land. If he is awarded the subject property, it is likely that he will be called on to do so in respect of any improvements that TBP has erected on the subject property. The longer TBP is allowed to continue with the development, the greater the amount. If TBP is allowed to start trading, he may also be required to make a payment in respect of the business as a going concern. Assuming the correctness of this assertion, the difficulty I have with it is that if the applicant is required to make such payments, he will be getting value in return. The development which he will be receiving will be precisely of the type from which he seeks to earn a living. In this respect, his position stands in sharp contrast with that of TBP which has no prospect of recovering losses which it will incur if the order is granted. The applicant does not say that the style and cost of the development which TBP and Engen are busy with is any different from what he would have planned for the subject property.

[33] Secondly, the applicant says he will be prejudiced because the completion of the service station and the commencement of business will make it all the less likely that the Court or the Minister will, in the exercise of a discretion, be willing to consider the subject property for purposes of an order in terms of section 35(1)(b). As was conceded by the respondents, this may be so, but there are other relevant considerations. The applicant has, to some extent, been the author of his own misfortune in allowing the development to reach such an advanced stage before bringing this application. He clearly knew about the development on 20 July 1999 at the latest. Yet proceedings were only launched at the end of September and no mention was made of the issue at the land claim pre-trial conference held on 25 August 1999.²⁷ His only excuse is that he

27 Despite the presence of the attorney for SANRAL's agent and his disclosure of the existence of the lease agreement with TBP.

was not properly advised. That is not a reason why the respondents should be prejudiced by the delay. Another thing that needs to be considered is that the applicant will still be able to raise the argument regarding the invalidity of the leases at the hearing of the land claim just as forcefully, notwithstanding the fact that the improvements may have been taken 35% further to completion. He will also be able to point to the fact that at the time when this application was heard, the attention of all the respondents was drawn to the problem.

Exercise of the Court's discretion

[34] In exercising my overall discretion,²⁸ I take the following into account:

- (i) The relative weakness of the applicant's case in relation to the question to be tried.
- (ii) Weighed against (i), the fact that the balance of convenience strongly favours TBP because of the disproportionate prejudice which TBP will suffer if an order is granted.
- (iii) The applicant urged the Court to follow the course which would preserve the status quo. It is so that this is the preferred approach in most cases of this nature.²⁹ However, my view is that preserving the status quo means recognising the existing leases until there is a proper enquiry into their validity and allowing the parties with rights in terms of those leases to continue exercising them.
- (iv) Until the leases are successfully impugned, TBP, on the face of it, has a real right in the subject property by virtue of its lease which existed long before any land claim was contemplated, and which it is entitled to exploit to its own advantage. If the order is granted, TBP will be deprived of this right on the basis of applicant's claim against the property which at this stage is entirely putative.
- (v) The requirements of justice and equity with due regard to all the circumstances.

[35] Taking these considerations into account, I have decided that applicant is not entitled to an interim interdict.

Costs

[36] Prest in his work *The Law and Practice of Interdicts*³⁰ says the following regarding costs in regard to interim interdicts:

28 See in this regard *Nchabeleng* above n 7 at 600C - G and 176h-177c respectively.

29 In regard to maintenance of the status quo, see *Nchabeleng*, above n 7 at 600H-601B and 177d-g respectively.

30 1ed (Juta, Cape Town 1996).

“ Included in the reasons why costs should be reserved for decision at the trial when an interdict is granted pending action is that some defence or some unconscionable conduct, or some other fact which might affect the decision of the court, might be disclosed at the trial.”³¹

In my view these sentiments may apply equally in the context where an interim interdict is refused. An issue which I would like to hear the parties on in this matter before making a decision on the costs of this application is why SANRAL or its agent failed to respond properly to any of the applicant’s correspondence addressed to the Department and SANRAL’s agent over a period of more than a year. It is interesting that the Town Council of the Borough of Westville had a similar experience with the Department now responsible for SANRAL. It may very well be that if SANRAL’s agent had played open cards with the applicant when the applicant first wrote to the Department on 1 June 1998, applicant would not have felt the need to bring these proceedings. Moreover, if a proper investigation of the leases reveals anything improper on the part of SANRAL’s predecessor, that too may be relevant to the costs of this application. I am therefore of the view that the question of the cost of these proceedings must stand over for determination when the land claim is heard. Engen is not yet a party to the land claim proceedings. The papers are being served on them and they will make a decision later. They have agreed to a proposal which will protect their interests.

Order

[37] The respondents did not oppose the applicant’s request that the prayer seeking the setting aside of the 1999 lease between TBP and SANRAL be adjourned until the hearing of the land claim. I accordingly make the following order:

- (i) The application for an interim interdict as set out in prayer 1 of the amended order prayed is dismissed;
- (ii) The questions of -
 - a whether the lease agreement entered into between the first and third respondents in 1999 stands to be set aside; and
 - b the costs of these proceedings (case no 119/99)
 stand over to be decided simultaneously with the hearing of the land claim filed under case no 1/99;
- (iii) In the event that the second respondent does not become a participating party in the land claim filed under case no 1/99, it may set this matter down, in accordance with the rules and practice directions of the Land Claims Court, for a decision on costs in so far as they affect second respondent;
- (iv) The hearing in relation to paragraph (iii) must take place simultaneously with or after the hearing of the land claim filed under case no 1/99.

31 Above n 30 at 381-382.

JUDGE A DODSON

I agree

JUDGE J MOLOTO

Heard on: 12 October 1999

Handed down: 19 October 1999

For the applicant:

N Singh SC instructed by *Jackson and Ameen, Durban.*

For the respondents:

Adv Troskie instructed by *Du Toit -Schech Inc (1st), De Villiers, Evans and Petit (2nd)* and *Denys Reitz Attorneys (3rd) all of Durban.*