THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 384/03

In the matter between:

THE WASSERMAN BATE TRUST 1st Appellant
WASCON SIVIEL CC 2nd Appellant

and

THE PREMIER, FREE STATE PROVINCIAL GOVERNMENT Respondent

Coram: *Navsa, Brand, Van Heerden JJA, Erasmus et Comrie AJJA*

Date of hearing: **17 September 2004**

Date of delivery: **29 September 2004**

Summary: **Interpretation and application of a Road Ordinance (Free State) authorising a provincial authority to enter upon and take possession of land for the purpose of excavating for and removing road-building materials – the acquisition and nature of such rights – whether a separate preceding act of expropriation necessary.**

JUDGMENT

NAVSA JA:

[1] The two appellants are, respectively, an *inter vivos* trust registered in terms of the Trust Property Control Act 57 of 1988 and a close corporation in terms of the Close Corporations Act 69 of 1984. Wouter Wasserman (Wasserman), a civil construction contractor, is the only trustee of the first appellant, the only member of the second appellant and the driving force behind each entity. It is common cause that he was the principal actor on their behalf in respect of material events relevant to a determination of the present appeal.

[2] The appellants applied to the Bloemfontein High Court for an order prohibiting the respondent, the Premier of the Provincial Province of the Free State, in her capacity as Chief Executive Officer, from mining for and removing from the Remainder of the farm Springfield 261, district Bloemfontein (the property), stone, gravel, sand, lime or any other road construction material other than from an existing fenced-off quarry (the quarry).

[3] On 7 March 2002 Hancke J dismissed the application with costs. The present appeal, with leave of the court below, is directed against that order.

[4] For the sake of convenience I will refer to the first appellant as the Trust, the second appellant as the CC and the respondent as the Province.

[5] The question before the court below was whether the Province had acquired the right to take possession of and to remove gravel from an area on the property far greater in extent than (but including) the quarry. That question was answered in the affirmative in favour of the Province.

[6] The background against which this appeal is to be decided is set out hereafter.

[7] It is common cause that a substantial part of the property, over and above the quarry, is suitable for the recovery of gravel. It is estimated that the property contains 1, 200 000 m^3 of gravel worth approximately R6 million.

[8] According to Wasserman the size of the quarry is between one and two hectares. According to the Province it was approximately three hectares in extent during 1989/1990 and it presently extends to an area of approximately five hectares.

[9] On 4 August 1999 the Trust purchased the property, in extent 175, 6927 (one hundred and seventy-five comma six nine two seven) hectares, from Louis Bantjies (Bantjies) for an amount

of R100 000-00. The property was transferred to the Trust in November 1999.

[10] Before the application was launched in the court below, the CC had won a tender to supply gravel for streets and water-reticulation in respect of a low-cost housing development called Mandela View. The Trust acquired the property to provide the CC with a ready source of gravel. Sixty thousand cubic metres of gravel were required by the CC for the Mandela View development. According to Wasserman, alternative sources of gravel could only have been acquired at a cost of R26-00 per cubic metre which, considering that the tender price had been calculated on a gravel price of R10-00 per cubic metre (to be sourced from the property), would have meant that the CC would have run at a sizeable loss in respect of the Mandela View development had it been constrained to source the gravel elsewhere.

[11] Put differently, the acquisition of the property would have benefited the CC or the Trust or Wasserman, in respect of the Mandela View development alone, to the extent of R960 000-00. This does not include the probable financial benefit from the remainder of the considerable gravel reserves on the property.

[12] During September 2000, after the Province discovered that the CC had been removing gravel from the property, it wrote to

Wasserman demanding that he immediately desist from such operations. The Province informed him that it had in the past acquired the right to take possession of and remove gravel from an area on the property, measuring approximately 50,18 hectares, in terms of the provisions of the Orange Free State Roads Ordinance 4 of 1968 and that the right endured.

[13] The Province's claim was denied by the Trust and the CC. This led to the application in the High Court.

[14] In his affidavit in support of the application, Wasserman stated that he had grown up in the vicinity of the property and that the quarry had been the only part of the property fenced-off during the late 1980's. According to him there had been no excavation in the quarry from that time and it appeared that the gravel deposits in the quarry had been exhausted. He stated further that, to the best of his knowledge, from that time until the present, there had been no road construction work conducted by or on behalf of the Government in the vicinity of the property.

[15] According to Wasserman, the only notice board on the property in terms of which the Province had reserved the right to excavate for and acquire gravel, is located near or at an entry point to a small 'camp' within which the quarry is located. Before us it was submitted on behalf of the appellants that this indicated that

the Province had, in terms of the Ordinance, taken possession of no area of the property other than the quarry.

[16] In opposing affidavits deposed to on behalf of the Province it was submitted that Wasserman had opportunistically 'created' the present dispute.

[17] Johannes van Wyk (Van Wyk), the Acting District Roads Engineer for Bloemfontein-East, stated that during 1989/1990 he had supervised the erection of fences over the entire area in respect of which the Province presently claimed the right to excavate for gravel. He stated that he had caused a gate to be erected to provide access to the entire fenced-off area and that it was a gate different to the one that provided access to the quarry at that time (which gate he had caused to be closed). In fencing off the entire area, prominent protruding steel beacons were used — these are still present and clearly visible. They were put into the ground to delineate the perimeter of the area to which the Province laid claim. Van Wyk had caused the notice board referred to by Wasserman to be placed near the entrance to and within the entire fenced-off area. If regard is had to the fences that can now be seen the notice board is within the quarry area.

[18] The notice board reads as follows:

‘Hierdie terrein is gereserveer vir die uitgrawing van padbou materiaal deur die OVS Paaie Administrasie ingevolge die Ordonnansie op Paaie van 1968. Verwydering van enige materiaal van hierdie terrein is ‘n misdryf ingevolge die Ordonnansie.’

[19] Van Wyk stated that, although he personally had not been involved in testing for gravel deposits on the property, he had found clear signs indicating that such tests were conducted by the Province. There had been test-diggings, which were subsequently filled in.

[20] According to Erika Abell, the Assistant-Director: Land Acquisitions in the Province’s Department of Public Works, Roads and Transport, it is clear that the author of a map on which Wasserman initially relied to indicate that the gate described by him afforded access only to the quarry and not the entire gravel-rich area, had not in fact visited the site. According to Abell the gate is in a position that provides the only access from a public road to the greater area in respect of which the Government claimed the right to excavate for gravel. The notice board referred to in the preceding paragraph is, according to Abell, located close to this entrance and had been intended to relate to the entire gravel-rich area on the property. Van Wyk confirmed these statements.

[21] Deponents on behalf of the Province stated that it is not known who changed the original fencing and introduced new gates and inner fencing other than those put in place by Van Wyk. This included the removal of one of the fences delineating the quarry as a separately fenced-off area and the introduction of a new fence within the disputed area, effectively closing off the camp within which the quarry is located from the whole of the area concerned.

[22] In support of the Province's case, Bantjies, in his affidavit, confirmed that at the time when the area had been fenced-off and beacons placed, as described by Van Wyk, he had been a tenant on the property. He confirmed further that when he purchased the property from the previous owner, Dr van der Merwe (Van der Merwe), it had been explained to him that the Province had acquired the right it now claimed. According to Bantjies he was aware of the demand in the area for gravel and would never have sold the property for R100 000-00 if the Province had not acquired the rights claimed by it – he had been aware that the value of the gravel on the property was in excess of R1 million and that the property consequently would have had a much greater value. In fact, had the Province not acquired the 'gravel rights', he would not have sold the property at all, as he himself was a civil contractor.

[23] Although Bantjies could not recall the precise circumstances, he stated that he was convinced that he had communicated to Wasserman that the Province had acquired the right to excavate for gravel. This was strenuously denied by Wasserman and was one of the issues the appellants urged the court below to refer to oral evidence. For reasons that will become apparent it is not an issue that requires to be addressed.

[24] It is common cause that gravel is a scarce commodity in the greater Bloemfontein area. It is the Province's case that, as early as 1975, it took possession of the quarry in terms of the provisions of the Ordinance to acquire gravel for road building purposes. Later, when a major roadway was planned and proclaimed for Bloemfontein, it was estimated that more than 2 000 000 cubic metres of gravel would be required and it became necessary to extend the excavation for gravel beyond the quarry. To that end the Province entered into negotiations with Van der Merwe to acquire possession of substantial parts of the property, which it could exploit for gravel. It ultimately paid Van der Merwe an amount of R150 000-00 in this regard (despite the fact that at that time the provisions of the Ordinance did not oblige the Province to pay compensation). As described by Van Wyk, the Province took possession of the parts to which it now laid claim in terms of the provisions of the Ordinance. A letter dated 15 February 1990

addressed by the Province to Van der Merwe confirmed that an agreement had been reached that a total of 50,18 hectares (including uneconomic areas) of the property would be taken into possession by the Province and that an amount of R150 000-00 would be paid as compensation.

[25] I interpose to state that the description by Van Wyk of the manner in which he had fenced off the entire area and placed the beacons, notice board and gates was unchallenged. His description of how he found indications that tests had been conducted for gravel deposits was not contested. It is common cause that the beacons are still present and visible.

[26] During May 1992 the present s 26(7) of the Expropriation Act 63 of 1975 (the provisions of which are set out in para [29] below) was enacted and, on 21 September 2000, the Province, in terms thereof, requested the Registrar of Deeds to make an endorsement in his register indicating that the entire gravel-rich area had been taken into possession in terms of s 17 of the Ordinance. He complied with this request. This, of course, occurred after the present dispute had arisen.

[27] Section 17 of the Ordinance, in terms of which the Province claimed to have acquired the right to excavate for and remove

gravel from the property, has the following heading:

‘Entry and taking possession of land, and the removal of material, for road building purposes.’

Subsections 17(1) and 17(2) of the Ordinance (which are the provisions relied on by the Province) read as follows during 1989/1990:

‘17 (1) The Director may, after consultation with the owner or occupier of land, enter upon such land-

(a) to take measurements or make surveys or observations or carry out any other inspections for the purpose of the construction or maintenance of a road or pont or for any purpose incidental thereto: and

(b) take possession of so much thereof as may be necessary for the construction or maintenance of a public road or pont or for any purpose incidental thereto.

(2) The Director may enter upon any land and there take, without compensation save as otherwise provided by this Ordinance, so much stone, gravel, sand, lime, water or other material as may be necessary for or in connection with the construction or maintenance of a public road or pont or work incidental thereto and may for this purpose make such excavations, sink such boreholes for water and carry out such other works as he may consider necessary: . . .’

Section 17 of the Ordinance has subsequently undergone some changes which for present purposes are of no consequence.

[28] Sections 54(*e*) and (*f*) of the Ordinance at that time

(1989/1990) provided as follows:

'Any person who ─

…

(*e*) without the permission of the Director ─

(i) excavates or removes stone, gravel, sand, water or other material from any quarry, gravelpit, bore-hole or other works opened up and in use in terms of section 17; or

(ii) excavates or removes stone, gravel, sand or other material from land beaconed off by the Director on which there is a notice in a conspicuous position to indicate that such land is intended for the *future* excavation of stone, gravel, sand or other material for road-building purposes: or

(*f*) hinders or interferes with the Director or an officer or employee of the Administration in the exercise of a power or the carrying out of a duty in connection with the construction or maintenance of a public road, pont, stock-path, outspan, rest or road camp or other work incidental thereto,

shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment.'

(emphasis added).

The present s 54 is in substantially the same terms.

[29] Section 26(7) of the Expropriation Act 63 of 1975 (as inserted in 1992) reads as follows:

'An executive committee may, in respect of any land which was prior to the commencement of this subsection declared to be a road, request the Registrar of Deeds concerned to have such an endorsement made in his

registers as is contemplated in subsection (3)*(b)*, notwithstanding that the executive committee is not required to do so.'

The applicability and impact of the Expropriation Act are dealt with in paras [37] to [40] below.

[30] In the following four paragraphs I set out the main submissions by the appellants and thereafter deal with each in turn.

[31] As can be seen from what is set out above, the Trust and the CC adopted the attitude that the Province had not, in accordance with s 17 of the Ordinance, physically taken possession of gravel-rich parts of the property.

[32] Before us it was submitted on behalf of the appellants, with reference to *Fink and Another v Bedfordview Town Council and Others* 1992 (2) SA 1 (A), that before the right referred to in s 17(2) could be exercised there had to be a preceding separate valid act of expropriation.

[33] Furthermore, counsel for the appellants submitted that the provisions of s 17 only permit excavation and removal of gravel for *immediate* road construction and maintenance needs and use and not for contemplated *future* use. This meant that the Province could not in the circumstances claim any rights — it had

‘appropriated’ the property in circumstances where there was not an immediate need to acquire materials for road-building or road-maintenance purposes.

[34] It was contended in the appellants’ heads of argument that, in view of the fact that there had been no notice to third parties of the rights purportedly acquired in terms of s 17 and more especially to the Trust as a successor in title, the latter was not bound to submit to them. In essence, the argument was to the effect that, because of its failure outwardly to maintain its possession, the Province could rightly be said to have abandoned any rights which it might have acquired in respect of the property. During oral argument, counsel for the Trust and the CC made certain concessions in this regard, which I will deal with in due course.

[35] I turn first to deal with Wasserman’s claims that the Province had not taken the property into physical possession in terms of the subsections in question. It will be recalled that Van Wyk’s description of how he found traces of tests conducted for gravel deposits and of how he positioned fences, beacons, gates and the notice board was unchallenged. It was not disputed that the beacons are still present and visible. To my mind, there can be no doubt that the Province entered upon and took possession of the

relevant part of the property and continued to maintain that possession in terms of subsecs 17(1) and 17(2).

[36] The appellants' reliance on the *Fink* case is misplaced. That case dealt with the provisions of a Transvaal Ordinance and national legislation relating to a declaration of designated land as a road. At 12D-G the following appears:

'The fifth respondent has the power to declare a public road in terms of s 5 of the 1957 Roads Ordinance by notice in the *Provincial Gazette*. Does he by such declaration "acquire" a right in the nature of a road servitude?

Section 4 of the 1957 Roads Ordinance provides that:

"All public roads within the Province shall be under the control and supervision of the Administrator."

Upon proclamation of a public road the fifth respondent accordingly acquires the control of such road. In my opinion the fifth respondent, by acquiring the control of the public road, in effect acquires the use of the land. 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 905C-D:

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

It was held that what had been 'acquired' in terms of the relevant statutory provisions was a right in the nature of a road servitude. If

anything, as will be shown later, the *Fink* case is against the appellant.

[37] There is nothing in the clear wording of s 17(1) or s 17(2) that presupposes a preceding act of expropriation. The Expropriation Act itself, in s 26(1), states that its provisions should not be construed as derogating from any power conferred by any other law to expropriate or take any property or to take the right to use property temporarily.

[38] The provisions of the Ordinance and the statutory scheme relating to the acquisition of the right to enter upon and remove materials from land for road-building purposes are clear. There is an understandable sequence and logic to subsecs 17(1) and (2). Once Province has identified land as potentially useful for road-building purposes it may, after consultation with the owner or occupier, enter upon the land and do whatever is necessary to confirm that initial view. When that has been done it may take possession of such land in terms of s 17(1)(*b*) for the purposes set out therein. As set out in s 17(2), it may enter upon the land in question and take so much gravel or other specified materials as may be necessary for or in connection with the construction or maintenance of a public road or work incidental thereto. The

provisos set out in subsecs 17(2)(*a*)-17(2)(*e*) are, for present purposes, irrelevant.

[39] Following on s 17, s 18 (as amended in 1998) presently provides for compensation when land is 'acquired' in terms of s 17 of the Ordinance without such land having been expropriated in terms of the Expropriation Act. This section provides that compensation is nevertheless to be calculated in terms of s 12 of the Expropriation Act. The provisions of s 18(1)(*f*) read as follows:

'In the case of land which is acquired for the declaration, construction or maintenance of a public road, pont or outspan or the exercise of a power in terms of section 12(2), 15, 17 or Chapter IV of this Ordinance without such land being expropriated, the following provisions shall apply:

…

(f) the date on which the Administration becomes liable for the payment of compensation in terms of the provisions of the Ordinance in question shall be regarded as the date of *expropriation*; . . .'

(emphasis added).

As can be seen s 18(1)(*f*) expressly considers the acquisition of land in terms of s 17 as an act of expropriation.

[40] Like s 26(7) of the Expropriation Act, s 18 provides for the making of an endorsement in the Deeds Registry where land has been declared to be a road.

In s 1 of the Expropriation Act ‘road’ is defined as follows:

‘ “road” means a road as defined in the relevant provincial Ordinance and includes any land acquired or used for quarries, outspans or camps or other purposes in connection with such a road.’

In s 18(4)(*b*) of the Ordinance it is defined as follows:

‘ “road” means a road as defined in this Ordinance and includes any land acquired or used for quarries, outspans or camps or other purposes in connection with such a road.’

The legislation providing for endorsement in the Deeds Registry of rights relating to land acquired in connection with roads makes it clear that such rights are enforceable real rights.

[41] Section 54 of the Ordinance, the provisions of which are set out in para [28], protects the rights acquired by the Province in terms of s 17, by imposing criminal sanctions when such rights are infringed.

[42] Section 5(2)(*a*) of the Minerals Act 50 of 1991 provides that a provincial administration shall not require any authorisation for the searching for and the taking of sand, stone, rock, gravel, clay and soil for road-building purposes under the laws applicable to them. It provides further that a provincial administration shall in such a case be deemed to be the holder of or applicant for a prospecting permit or mining authorisation, in respect of the mineral and land concerned.

[43] As can be seen from the statutory matrix discussed in the preceding paragraphs, the rights to enter upon land and to take possession of so much thereof as is necessary for road-building purposes and the right to remove materials to be used for the same purpose in terms of s 17 of the Ordinance clearly approximate rights of expropriation. Section 18 regards them as such. The rights acquired in terms of subsecs 17(1) and 17(2) are more than a servitude (as in the *Fink* case) ─ the rights in question extend to the Province becoming owner of the materials so removed. These rights are statutorily protected. They are enforceable real rights.

[44] I turn to deal briefly with the submission that the rights in question are acquired only temporarily, ie where there is an immediate need or use for the road-building materials concerned. It has not been suggested that the Province's future planning was flawed or that the Province took possession of the property with an ulterior purpose or was not serious about reserving and later utilising a scarce resource for the public benefit. There is nothing in the words of the subsections in question that supports the restrictive interpretation contended for. In fact, s 54(*e*)(ii) in terms contemplates *future* excavation. Following the interpretation contended for by the appellants would lead to absurd results and would render future planning by Provincial authorities nugatory.

[45] It was rightly conceded on behalf of the appellants that, in the event of this court holding that, in acting in terms of s 17(1) and s 17(2), the Province had acquired a real right, there would be no need for an enquiry into the question of the necessity of notice to third parties (and particularly to successors in title). In any event, against the background of the notice board announcing the Province's rights and the visible and prominent beacons, that enquiry, if necessary, would in all probability not have resulted in a favourable conclusion for the Trust and the CC.

[46] Counsel for the Trust and the CC rightly conceded that an argument for the abandonment of rights by the Province could in the circumstances not be sustained.

[47] In the light of the conclusions reached it follows that the appeal should fail.

[48] The appeal is dismissed with costs.

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MS NAVSA
JUDGE OF APPEAL

CONCUR:	Brand	JA
	Van Heerden	JA
	Erasmus	AJA
	Comrie	AJA