G.P.-S.33967—1968-69—1,000.

J. 219.

16/71

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE ~~Provincial~~ Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

DAVID HERMANUS BRINK *Appellant,*

versus

ALFRED McALPINE AND SON(PROPRIETARY) LIMITED *Respondent*

Appellant's Attorney E.G.Cooper & Sons *Respondent's Attorney* McIntyre & v.d.Post.
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate *Respondent's Advocate* T.H. van Reenen
Advokaat vir Appellant L.W.H. Ackermann *Advokaat vir Respondent* L.F. Weyers.

Set down for hearing on
Op die rol geplaas vir verhoor op 19-5-1971

4 J. 7.8.9

Coram: Holmes, Jansen, Rabie, Muller JJ.A. et Corbett A.J.A

TPD 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.40 pm

C. a. v.

Partly 26-5-1971 per Corbett A.J.A.:—
appeal succeeds with Costs. Order as per
written Judgment handed down.

Clerk of the Appellate Court.

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

DAVID HERMANUS BRINK .....Appellant.

AND

ALFRED McALPINE & SON (PTY.) LIMITED ...Respondent.

Coram: HOLMES, JANSEN, RABIE, MULLER, JJ.A. ET CORBETT, A.J.A.

Heard: 19th May, 1971. Delivered: 26th May, 1971.

J U D G M E N T.

CORBETT, A.J.A.:

The appellant in this case sued the respondent in the Transvaal Provincial Division for damages in the sum of R24 500,00. Prior to the hearing of the action it was agreed between the parties that a certain question - the terms of which will be detailed later - be submitted to the Court as the sole issue for decision. This was done and the Court (Hiemstra, J.) dealt with this question under Rule 33(4) and (5). It was answered in favour of the respondent and the Court thereupon gave judgment dismissing appellant's claim with costs. The present appeal lies against the trial Court's ruling on the

2/ question .....

question posed and the consequential judgment given.

In order to appreciate the question and its relevance to the issues in the case it is necessary to make some reference to the undisputed facts, as they appear from the pleadings and the evidence adduced before the Court a quo. It appears that during the period material to this suit the appellant was the lessee of the farm "Donkerhoek", in the district of Bronkhorstspruit, the registered owner (and lessor) of which was a company known as Avondson Trust (Edms.) Beperk - hereinafter referred to as "Avondson". The appellant carried on the business of a sand contractor, that is he sold sand and other soil to the public generally, and he obtained these materials by excavation on the farm itself. His lease specifically entitled him to do so. He was asssisted in this business by his wife, Mrs. E.M.A. Brink, who received orders, saw to it that they were executed and helped generally with the administrative work.

During the year 1967 plaintiff carried out certain work with reference to a particular area of land on the farm. There was situated upon this land a mature plantation of bluegum

trees, approximately 80 years old, and the work consisted of felling the trees, removing the stumps and then clearing away the overburden, or top-soil, to a depth of 2 to 3 feet. The evidence as to the size of this area is somewhat vague but it would seem to have been between one and two morgen in extent. The estimated cost of the work, which took about six months to complete, was approximately R1 000,00.

According to the appellant and his wife (both of whom gave evidence), the purpose of the ~~owrk~~ work was to expose, and gain access to, the soil underlying the overburden. This was a good quality red soil for which there was a large demand, particularly for the surfacing of sports fields. This alleged purpose was to some extent challenged by the respondent in the course of the trial, the suggestion apparently being that the real purpose of the work was to make the overburden available for sale. No specific finding was made by the trial Judge upon this issue but, in my view, the evidence of the appellant and his wife on this point may safely be accepted. It was established - the trial Court made a definite finding in this regard - that the top-soil in a bluegum plantation usually loses its fertility

4/ (becomes .....

(becomes "dead soil", as the appellant put it) and, accordingly, the overburden in question would have had a very limited commercial value. And, in any event, it was very fairly conceded by Evans, one of respondent's main witnesses, that it was obvious that the overburden had been removed by the appellant in order to get to the red sub-soil. In this Court respondent's counsel accepted this to be the position.

This preparatory work had been completed and appellant had actually commenced selling the underlying red soil, when respondent arrived upon the scene. This was in May, 1968. Respondent, a limited liability company, carries on business as civil engineering contractors. It had been awarded a contract to build the new national road between Silverton and Bronkhorst-spruit on behalf of the Administrator of the Transvaal. In terms of certain provisions of the Roads Ordinance, No. 22 of 1957 (Tvl.), as amended - to which fuller reference will be made in due course - the Administrator of the Transvaal is given certain powers in regard to the taking from farms of materials necessary for road construction and maintenance and these powers may be exercised on his behalf by contractors engaged in such work.

Purporting to act in pursuance of these powers, respondent addressed a notice to Avondson, dated 9 May 1968, in which the latter was informed, inter alia, that, acting on instructions from the consulting engineers, respondent proposed to establish a "borrow pit" upon Avondson's property in order to obtain suitable material for road construction. Enclosed with the notice were a form of consent for signature by Avondson and two documents containing relevant extracts from the Roads Ordinance. Copies of the notice were also despatched to J.B. Wouda and C.S.P. Wouda, brothers of Mrs. Brink, who were shareholders in Avondson Trust, and to Mrs. Brink herself. The question whether the notice sent to Mrs. Brink was ever received by her or by her husband, the appellant, was one of the issues in the case.

Thereafter, respondent sank certain trial pits on the farm "Donkerhoek". Appellant objected thereto and, in any event, respondent found the material in that area to be unsuitable. Respondent then turned its attention to the land which had previously been cleared by appellant, and commenced removing red soil therefrom for road-making purposes. According to Mrs. Brink, the first intimation they received of this was when one morning

they noticed a man with two machines digging holes there. Appellant and his wife thereupon interviewed respondent's site agent, one van den Heever. An alternative site was suggested but rejected by respondent upon certain grounds. Eventually as a result of discussions with van den Heever appellant agreed to permit respondent to remove soil from this cleared area. It is appellant's contention that this permission was granted on the express condition that the soil was paid for by respondent at the rate of 35 cents per cubic yard, which was appellant's standard price for soil sold to the public. Van den Heever, who was called as a witness by respondent, admitted having such discussions with the Brinks but denied ever having agreed to pay 35 cents per cubic yard, or indeed any other price. His version was:

> " I said, any compensation will be payable on completion of the contract."

He further pointed out that, prior to this, he had received explicit instructions in writing from Evans, the resident engineer appointed by the consulting engineers, not to discuss compensation with anyone connected with Avondson until, inter alia, all the material required had been taken.

Whatever in fact may have transpired at these

discussions, they evidently had the effect of dispelling appellant's objections because the removal of soil from the area in question thereafter continued apace. A large pit was opened up and the soil was loosened and removed over an extensive area to a depth of about 15 feet. There was some dispute at the trial as to whether or not the area excavated by respondent coincided with the area cleared by the appellant. Appellant and his wife averred that it did. Van den Heever, on the other hand, alleged that the excavations extended over a much larger area than the cleared area: at one stage he suggested that it was twice as large. Closer to the truth, in my view, was Evans, who stated that substantially the areas were the same but that there was slight enlargement by respondent at one point where the overburden and some growing trees had to be removed.

The dispute giving rise to this action eventually arose in December 1968. Appellant wrote a letter to respondent, dated the 9th of that month, recalling, inter alia, that appellant had agreed to allow respondent to take soil from the farm at the usual price of 35 cents per cubic yard and asking in view of the quantity of soil already taken, for a "substantial down-payment." Other correspondence passed between appellant and the

engineering consultants and the Provincial Administration. Ultimately on 6 February 1969 respondent wrote to appellant offering compensation, based on the surface area, in the sum of R300,00 per morgen for the area taken by respondent in excess of that specified in section 23(4)(a) of the Ordinance. (This appears to have been an incorrect reference. The correct one was to section 23(4)(b)(i) of the Ordinance, as amended by section 9(b) of Ord. No. 10 of 1966 (Tvl.). The area so specified is two morgen). Having regard to the probable area actually involved, this offer would appear to be entirely illusory. In any case it amounts to a rejection of appellant's claim based upon a price of 35 cents per cubic yard.

I turn now to the form of action instituted by the appellant and the defence pleaded thereto by the respondent. In his particulars of claim appellant made no reference to the alleged agreement or arrangement with van den Heever that the soil would be paid for at 35 cents per cubic yard. He merely recited the facts ~~covering~~ concerning the farm, its ownership, the lease and the business conducted by the appellant of selling sand and soil from the leased property. The kernel of his cause of action

is contained in paragraphs 7 and 8, which, as amended, read:-

" 7. In the course of preparing for sale soil of a certain type found on a section of the said farm, the Plaintiff expended labour on it.

8. During or about 1968, the Defendant unlawfully and despite Plaintiff's protest, appropriated and removed at least 70,000 (Seventy thousand) cubic yards of the said soil from the said section of the said farm."

The damages claimed are based on the price for which the appellant would have sold the soil at 35 cents per cubic yard. The claim would ~~thus~~ appear to be a delictual one.

To this claim respondent filed a plea which, in essence, merely amounts to the allegation that respondent, acting in its capacity as a contractor engaged in the construction of certain public roads on behalf of the Administrator of the Transvaal, lawfully removed soil from the farm, this soil being necessary for the construction of the aforesaid roads. The appellant is put to the proof of the quantity of soil removed. Certain alternative averments are also pleaded but for present purposes they may be disregarded.

The question which was submitted to Hiemstra, J., for his decision in terms of Rule 33(4), was thus formulated by

the parties:

" whether the taking of 70,000 cubic yards of soil by the Defendant was a lawful taking in terms of the provisions of Sections 22 and 23 of the Roads Ordinance (Transvaal) No. 22 of 1957."

The relevant portions of the statutory provisions referred to in the above-quoted question read as follows:

" 22. Subject to the provisions of section twenty-three the Administrator may take and convey or cause to be taken and conveyed from any farm, agricultural holding or townlands other than surveyed erven any material which, in his opinion, can be applied to the construction and maintenance of public roads.

23(1) The Administrator may select any place which he deems suitable on such farm, agricultural holding or townlands from which to take such material and shall give notice to the owner accordingly where the address of such owner is readily available: Provided that the owner may, within fourteen days of receiving such notice, point out another place for the said purpose and in case such last-mentioned place is found by the Administrator to be as accessible as regards distance, and

as suitable as regards quantity and quality of materials as the place selected by him, the materials shall be taken from the place pointed out by the owner.

(2) The Administrator shall not take possession of any material on which labour has been expended or take stones or other material from any house, stockkraal, walls or werf without the consent of the owner."

At the hearing before the trial Judge three issues relevant to the determination of the question submitted for his decision were raised by the parties. These were:-

(1) Whether respondent was precluded from taking possession of the soil in question on the ground that it was "material on which labour has been expended" within the terms of section 23(2);

(2) If so, whether the taking was nevertheless lawful in that appellant had consented thereto; and

(3) Whether, in any event, the taking was unlawful on the ground that respondent had failed to give proper notice to the appellant in terms of section 23(1).

I shall consider these in turn.

As regards issue (1), the trial Judge held that

the soil was not material on which labour had been expended. His reasons for this conclusion are crisply stated in a passage in his judgment, which after referring to the preparatory work done by the appellant, continues:-

> " This overburden was bulldozed away and an underlayer of red subsoil was exposed. This was the kind of soil which the defendant company needed for road building. Now, this subsoil had never been touched by the plaintiff. It was still there in its natural state and the defendant company was the one which loosened the soil and removed it. It is quite obvious that no labour had been expended on it by the plaintiff or by any other person, up to the time when the defendant began to remove it. The fact that the top layer of covering soil was removed does not affect the issue. On that particular overburden labour had certainly been expended, but that is not the soil which is the subject matter of this case."

As was correctly pointed out by appellant's counsel, it appears from this passage that the trial Judge placed a restrictive interpretation upon the words "material on which labour had been expended" in that the test applied by him would seem to require direct and actual physical contact between the person expending the labour and all the material which is alleged to have

been the object of such labour. Applied to the agricultural scene generally, this interpretation could have far-reaching and, in some cases, anomalous results. Thus, suppose, for example, a farmer had expended labour in order to prepare an area of land for agricultural purposes. Let us imagine that, in doing so, he had, as in the present case, felled trees and removed the infertile top-soil; but that before he could proceed to plough and fertilize the land the Administrator intervened and, without his consent, proceeded to excavate and remove the soil comprising his land to a depth of fifteen feet. On the trial Court's interpretation the Administrator's action would appear not to be in conflict with section 23(2). At all events, I can see no distinction in principle between this hypothetical example and the present case. But let us take the example a little further. Suppose that before the Administrator intervened the farmer had already ploughed and fertilized his land. It might be argued in such a case that, ~~he had~~ by loosening the top layer of soil, he had expended labour upon it, that this top layer could, accordingly, not be removed by the Administrator without consent and that from the practical point of view this would preclude the Administrator from taking possession of the underlying soil

which had been left undisturbed by the farmer's ploughshare. This argument itself reveals some rather startling inconsistencies but, assuming it to be sound, it would involve some nice distinctions; such as, for example, that a farmer who clears land by scraping the entire surface with his bull-dozer does not expend labour on the soil cleared and exposed, while a farmer who ploughs the surface to a depth of, say, twelve inches, does. And so the anomalies can be multiplied by postulating that the Administrator's intervention took place at later stages, e.g. after crops had been planted or permanent fruit-trees established. Moreover, similar problems can be vizualized in regard to other aspects of farming activity.

These problems and anomalies are, of course, by no means a conclusive argument. If the language of the sub-section, properly construed, unambiguously points to the meaning adopted by the Court a quo, the argument must of necessity give way. But does it? Leaving aside such nice points as whether the word "labour", in this context, includes mental as well as bodily toil, and the precise nuances inherent in the word "expend", it seems to me that the enquiry hinges very much around the word "on".

When used prepositionally, "on" has a wide range of meanings. It may be used, inter alia, as:-

> "Indicating the person or thing to which action, feeling, etc. is directed, or that is affected by it. In the construction of many verbs and phrases."

(See the Oxford English Dictionary, s.v. "on", 20). Another series of meanings assigned to the word by the same authority (at p. 22) is:-

> " In regard to, in reference to, with respect to, as to."

The preposition "aan" appearing, in combination with "waar", in the Afrikaans text - the original Ordinance was signed in Afrikaans - would appear to be a word having a correspondingly wide and all-embracing connotation and as bearing, inter alia, the following meaning:-

> " Ter aanduiding van iets ten opsigte waarvan n werking plaasvind of geld."

(See Woordeboek van die Afrikaanse Taal, s.v. "aan").

If the word "on" ("aan") be interpreted in the light of the above-quoted dictionary meanings, then it is clear that the language of the sub-section does not compel one to follow the restrictive interpretation adopted by the Court a quo.

In order to decide upon the correct interpretation it is helpful to consider the history of the legislation and its general scope and object. The earliest enactment upon this topic which I have been able to trace is Law 7 of 1889 of the South African Republic. This gave the Republican Government the right to take from farms the necessary "stones, ground and gravel" for making and maintaining certain roads but this right was hedged in by limitations similar to those existing under the present-day legislation. Thus, the owner had the right to point out the place from which the materials were to be taken (sec. 3); the Government was not entitled to take possession of any material "on which the owner has expended manual labour", save in exceptional cases and then against reasonable compensation (sec. 4); and the Government was absolutely prohibited from removing "stones from house, kraal or boundary walls" (sec. 5). Law 7 of 1889 was subsequently replaced by Ordinance No. 5 of 1912 (Tvl.). The provisions of the new law are broadly similar, save that the subject-matter of secs. 4 and 5 of the old law are combined and the prohibition, now imposed upon the Administrator, appears to be an absolute one (see sec. 19(2) of Ord. No. 5 of

1912 (Tvl.)). Though the wording is slightly different, section 25(2) of Ordinance No. 9 of 1933 (Tvl.) - which replaced Ordinance No. 5 of 1912 (Tvl.) - substantially reproduces the prohibition contained in seetion 19(2) of the earlier Ordinance. Between 1933 and 1957, when the present Ordinance was passed, section 25 of the 1933 Ordinance underwent several amendments, which included the introduction of provision for compensation where a quarry of a certain size was opened upon a farm. This brings one to the present Ordinance and the much-debated provisions of section 23(2). In form this sub-section is very similar to its predecessors but there are three significant changes. Firstly, the word "manual" has been omitted; and, secondly, the reference to "owner" has been omitted. Thus, whereas previously the prohibition applied to materials in respect of which the owner had expended manual labour, under the 1957 enactment it applies simply to materials in respect of which labour has been expended - presumably by anyone. The third change is that the prohibition is made subject to the owner's consent.

The impression created by this brief survey is that it was legislatively recognised in the Transvaal from early

18/ times .....

times that the State should be entitled to obtain road-making materials from privately-owned land, but that, at the same time, it was important to ensure that the land-owner's enjoyment of his land should be interfered with as little as possible. Though various changes were made to these laws from time to time - no doubt as the competing interests, public and private, demanded adjustment - the general pattern has remained fairly constant. One limitation which is traceable throughout is the prohibition, at times a qualified one, against the taking of material upon which labour has been expended and, if anything, the trend has been to extend the ambit of this prohibition.

It is self-evident that the vast bulk of the material which the Administrator would normally take for road-making purposes would consist of sand, soil or gravel lying in situ on the farm, or other land, in question. It would be very exceptional to find such materials conveniently excavated and ready for removal. Consequently, it seems likely that when the Legislature conceived the prohibition, in so far as it relates to sand, soil etc., it must have had in mind such materials, lying in situ, upon which labour had been expended. And, in the case of a

19/ farm .....

farm, one of the obvious forms which such labour could take would be the cultivation of the surface of the soil for agricultural purposes. This brings me back to the problems posed at the start of this enquiry.

Having regard to the various factors mentioned above, I am satisfied that the interpretation adopted by the Court a quo is too narrow a one and that it is not necessary, for the application of the prohibition in sec. 23(2), that there should have been direct and actual physical contact between the person who expended the labour and all the material which is alleged to have been the object of such labour. On the other hand, bearing in mind the nature of the wide language used by the Legislature, I do not think that it is possible, or indeed desirable, to formulate a precise general test as to when the prohibition applies. It may be that in some instances it will become a question of degree. In every case it must depend upon the particular facts and in relation to those facts the question must be posed: has labour been expended in regard to, or with reference to the material in issue?

Adopting that approach, I now revert to the facts

20/ of .....

of the present matter. The work carried out by the appellant has already been detailed. In my view, it was substantial in character; it was undertaken specifically for the purpose of gaining access to the underlying red sub-soil and of exploiting the latter commercially; this could not be done, unless the trees and overburden were removed; and in fact the work involved direct physical contact with, and work upon, at least the top surface of the red sub-soil. It is clear, too, that substantially this same red sub-soil was the material subsequently removed by the respondent. In the circumstances, I am of the opinion that the soil of which respondent took possession was material on which labour had been expended within the meaning of section 23(2) of the Ordinance. It follows that the ruling of the trial Judge upon this issue cannot be upheld.

This brings me to the second issue, viz. whether, despite the above finding, the respondent's taking of the soil in question was rendered lawful by the owner having consented thereto. This involves a number of issues of law and fact and was productive of considerable argument from the bar. It was strenuously contended by respondent's counsel that the evidence

in regard to the discussions which took place between appellant (and his wife) and van den Heever indicated that there had been ~~such consent.~~ ~~In fact counsel went so far as to submit that~~ appellant had misconceived his remedy and that, on ~~this~~ the case made out by him, he should have sued in contract, basing his claim on van den Heever's alleged undertaking to pay 35 cents per cubic yard. Unfortunately, however, there are certain factors which make it very undesirable that this Court should endeavour to deal with this issue. In the first place, the averment of an express consent, as now contended for by respondent, was never pertinently raised on the pleadings. There is only one passage in the pleadings which touches upon the point. This is contained in the further particulars furnished by respondent in respect of its plea. With reference to an allegation in the plea to the effect that respondent lawfully removed the soil, it was asked by appellant, by way of further particulars:-

> " Was the soil removed with or without the permission of the Plaintiff and/or the registered owner? Full particulars are required."

To this the reply came:-

> " Although Plaintiff voiced objections from time to time, the exact dates thereof being

unknown, he permitted the soil to be removed. The registered owner was aware of such removal and did not at any time object."

Although the reply is not clear, it suggests a factual situation in which appellant, despite his earlier objections, passively permitted the removal. This is very different from the express consent now contended for by respondent's counsel.

In the second place, the trial Judge did not make any finding on this issue. This was because his decision in regard to the first issue rendered this unnecessary. He contented himself with observing that the question whether consent was given was "arguable". Having regard to the course which the matter has taken on appeal, this creates a problem because the issue of consent involves questions of fact as well as law. Moreover, in view of the direct conflict in testimony between appellant (and his wife), on the one hand, and van den Heever, on the other hand, as to what transpired at the discussions between them, it is difficult to resolve such questions of fact without the assistance of credibility findings by the trial Judge - of which there are virtually none.

Thirdly, consideration does not appear to have

been given directly to the question of the meaning of the word "owner" in the context of the passage "without the consent of the owner" appearing in section 23(2). (The trial Court considered the meaning of "owner" only in relation to the question of the giving of notice to "the owner" under section 23(1)). Before this Court respondent's counsel submitted that in section 23(2) the word "owner" should be given the meaning contained in the definitions clause, viz. -

> " 'owner' means the owner, lessee or occupier of a piece of land, or his lawful representative."

This meant, so counsel argued, that all that was required by section 23(2) was the consent of one or other of the persons mentioned in this definition, where applicable. Thus, where the land in question was subject to a lease and was in fact occupied by someone other than the lessee, the consent of either the owner or the lessee or the occupier would suffice. I do not wish to express any opinion on this matter. I would merely alert the parties to the fact that there are problems involved in this interpretation. For example, a lessee does not not normally have the right to consume the corpus of the subject-matter of the lease. The removal of large quantities of road-making

material from a piece of land necessarily involves a consumption of part of its corpus and may indeed substantially affect the value of the land, especially where it is material upon which labour has been expended, possibly by the true owner himself. Was it the intention of the Legislature that where the land involved was subject to a lease, the consent of the lessee was all that was required? Similar problems can arise where there is an occupier; or where a consent given by the owner is to the detriment of a lessee's rights. I will pursue the matter no further.

In view of the aforegoing, the most practical course would seem to be a remittal of the matter to the trial Court to enable the latter to come to a decision on the question as to whether the removal of the soil in issue had been consented to by the owner. Having regard to the present state of the pleadings, the parties may wish to make amendments thereto in order to raise more pertinently and specifically the real issues relating to consent and to this end the appropriate leave will be given. Similarly the parties may wish to lead further evidence on these issues and should be permitted to do so.

25/ Next .....

Next there is the third issue previously mentioned, viz. as to whether the taking was unlawful on the ground that proper notice had not been given in terms of section 23(1), quoted above. The trial Judge decided this issue against the appellant on the basis that the evidence and the probabilities established that the appellant had received the written notification sent to Mrs. Brink in May, 1968 and that such notification to appellant, as lessee, constituted sufficient compliance with section 23(1). This decision was challenged by appellant's counsel on the grounds that the Court erred in coming to the conclusion that notice was in fact given to the appellant; and that, in any event, the notice did not comply with the requirements of the section.

This issue also raises a number of questions of law and fact. These include the question as to what meaning should be attached to the word "owner", where it appears in section 23(1), and in this connection problems of interpretation, similar to those already referred to in regard to section 23(2), inevitably arise. Nevertheless, I do not think that the question of notice has a critical bearing on this case. The real out-

-26/ -standing.....

standing question is the one to be remitted for decision by the trial Judge, viz. whether or not the soil was taken with "the consent of the owner" - whatever the precise meaning of that phrase may be. If it was taken without such consent, then the taking was in contravention of section 23(2) and, as far as notice is concerned, cadit quaestio. If, on the other hand, it was taken with such consent, then the taking was not rendered unlawful by section 23(2) and I have difficulty in seeing how the alleged failure to give proper notice could render it unlawful. For, as I would emphasize, it is not sufficient that there should have been a failure to give such notice: it must further appear that because of such failure the subsequent taking of soil was unlawful. It is appellant's case that respondent was obliged, under section 23(1), to give notice to him (appellant). I shall assume, in appellant's favour, that this is so; that the notice required was written notice; and that the written notification sent to Mrs. Brink and to Avondson either was not received by appellant or did not constitute proper notice. Despite this, can the taking of the soil be held to have been unlawful?

The purpose of the requirement as to notice would seem to be to enable the "owner" to point out an alternative

place and, possibly, to satisfy himself that the taking is otherwise lawful. A finding in this case that there had been consent to the taking by the owner, could only be based upon the consent alleged to have been given by the appellant. No other relevant consent has been suggested, either in evidence or in argument. Where an "owner" has actually consented to the taking, knowing what material is to be taken, he can scarcely complain later that he did not get proper notice. Nor can he be allowed, in the circumstamces, to contend that because of the absence of proper notice the taking was invalid. In such a case he would clearly be taken to have waived the absence of proper notice. Consequently, assuming that the appellant consented to the taking of the soil, he cannot contend, that the taking was unlawful for want of proper notice to himself.

Finally, as to costs, there is no doubt that, although this appeal has ended inconclusively, appellant, having achieved substantial success by causing the trial Court's finding on the first issue to be altered, is entitled to the costs of appeal. The costs of the proceedings in the Court a quo must be left for determination by the trial Judge at an appropriate

stage.

It is therefore ordered:

(1) That the appeal succeeds with costs.

(2) That the ruling of the trial Court in regard to the question submitted to it under Rule of Court 33(4) and the Court's judgment, dismissing appellant's claim with costs, be set aside.

(3) That the case be remitted to the trial Court for decision of the issue as to whether or not the soil in issue was taken "without the consent of the owner" within the meaning of section 23(2) of Ordinance 22 of 1957, as amended; and, having decided this issue, to determine the question submitted to it by the parties and to give such judgment or, as the case may be, such directions as to the further hearing of the matter, as may be appropriate.

(4) That the parties be given leave to amend their pleadings, if so advised, at or prior to the resumed hearing of the matter before the trial Judge, any such amendments to be effected, mutatis mutandis, in accordance with the procedures prescribed by the Rules of Court.

29/ (5) That .....

(5) That the parties be granted leave to lead further evidence, if so advised, in regard to the issues remitted to the trial Court for its decision.

CORBETT, A.J.A.

HOLMES, J.A.)
JANSEN, J.A.) concur.
RABIE, J.A.)
MULLER, J.A.)