172/88

Case No.444/86

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE EAST LONDON WESTERN DISTRICES FARMERS' ASSOCIATION	1st Appellant
SILVERDALE FARM (PTY) LTD	2nd Appellant
D W PEINKE AND SONS	3rd Appellant

and

THE MINISTER OF EDUCATION & DEVELOPMENT AID	1st Respondent
THE MINISTER OF CONSTITUTIONAL DEVELOPMENT AND PLANNING	2nd Respondent
SOUTH AFRICAN DEVELOPMENT TRUST	3rd Respondent

CORAM: VILJOEN, HOEXTER, NESTADT, VIVIER et STEYN JJA

HEARD: 15 February 1988

DELIVERED: 1 December 1988

J U D G M E N T

HOEXTER, JA.....

HOEXTER, JA,

I have had the advantage of reading the judgment prepared by VILJOEN, JA. I disagree, with respect, both with the reasoning adopted by him and the conclusion at which he arrives. In my judgment the appellants have established that the settlement on the farm "Needs Camp" resulted in an unlawful invasion of their rights, as the owners or occupiers of properties adjacent to "Needs Camp", to the ordinary use and enjoyment of such properties; and I consider that the appeal should succeed.

In the Court below the respondents raised the defence that, to the extent that any interference with the private rights of the appellants might have resulted from the settlement on Needs Camp, such interference was authorised by the provisions of sec 10 of the Development Trust and Land

Act, ...

Act, No 18 of 1936 ("the Act"). KROON, J upheld the defence of statutory authority and therefore discharged the rule nisi earlier obtained by the appellants. My Brother takes the view that it was unnecessary, and indeed quite inapposite, for the Court below at all to have considered the defence of statutory authority; that the appellants misconceived the remedy open to them; and that in law the appellants could have asserted their rights, if any, only by way of review proceedings based on allegations of gross unreasonableness or mala fides. It seems to me, with respect, that in the Court below KROON, J was obliged by law to determine the fate of the application by reference to the defence of statutory authority raised by the respondents; but I take the view that the learned Judge erred in deciding in favour of the respondents that that defence had been established. I am further of the opinion that the appellants were not confined to seeking relief by way

of review proceedings and that they were entitled to the grant of an interdict.

To the exposition of the facts contained in the judgment of VILJOEN, J there may usefully be added one or two details affecting the nature and extent of the property rights which the appellants sought to protect by their application to the Court below. The first appellant is a voluntary association representing the interests of organised agriculture and farmers in the region extending westwards from the Buffalo River, where it flanks East London on the southern side, to the Chalumna River which forms the boundary between the Republic of South Africa and the Ciskei. This region includes the area known as Kidds Beach. The second appellant, which withdrew its appeal before the hearing thereof, is a member of the first appellant. In the Kidds Beach area the second appellant is the owner of the farm

"Silverdale".....

"Silverdale" which adjoins "Needs Camp". In addition the second appellant is the owner of five other farms within the first appellant's region. The third appellant is a partnership which either owns or occupies fifteen farms within the said region. These include the farm "Mount Pleasant" which adjoins "Silverdale". For the purposes of the present appeal our law would properly regard the owner of "Needs Camp" and the appellants as neighbours. Into this legal relationship certain reciprocal rights and obligations are imported. In Regal v African Superslate (Pty) Ltd 1963(1) 102 (A) - to which reference is hereafter made as "the Superslate case" - STEYN, CJ made the following general observations (at 106H/107A) -

> "As algemene beginsel kan iedereen met sy eiendom doen wat hy wil, al strek dit tot nadeel of misnoeë van 'n ander, maar by aangrensende vasgoed spreek dit haas vanself dat daar minder ruimte is vir onbeperkte regsuitoefening. Die reg moet 'n

reëling.....

> reëling voorsien vir die botsende eiendoms- en genotsbelange van bure, en hy doen dit deur eiendomsregte te beperk en aan die eienaars teenoor mekaar verpligtinge op te lê."

Our law recognises as one of the intrinsic rights of a landowner or lawful occupier of land his right to the reasonable enjoyment of such land; and it provides him with a remedy against those who unjustifiably interfere with that right. Van der Merwe & Olivier, Die Onregmatige Daad in die SA Reg, (5th ed) put the matter thus (at 504) -

> "Die bevoegdheid tot ongestoorde besit en genot van jou eie grond is een van die inhoudsbevoegdhede van eiendomsreg. Word op hierdie bevoegdheid inbreuk gemaak, het 'n mens met skending van die eiendomsreg te doen. Die uitdrukking 'nuisance' of 'oorlas' dui dus eenvoudig aan dat 'n herhaalde inbreukmaking op eiendomsreg plaasvind.....
>
> Wil die benadeelde slegs die oorlas beëindig, is die gepaste remedie 'n interdik ..... So moet die applikant bewys dat die respondent die oorlas veroorsaak het en dat die respondent se handeling onregmatig was of is. Die skuldvraag kom egter glad nie ter sprake nie."

In .....

In South Africa the word "nuisance" has been used in countless decisions of our courts and it is often encountered in legislation (see, for example, Cape Act 2 of 1855; secs 4, 6 and 9 of the Slums Act, No 53 of 1934; sec 122 of the Public Health Act, No 36 of 1919; secs 2, 181 of Ord 20 of 1974 Cape)). In English law the term of art "public nuisance" has a specialised meaning. In South Africa, however -

> "....the term does not have exactly the same meaning or content as in English law. In the main this is because much of what is designated as a public nuisance in English common law, in South African law has been statutorily proscribed or is regarded as a distinct nominate offence.
>
> In the result the term 'public nuisance' in South African law has the simplified meaning of an ordinary nuisance so extensive in its effect or range of operation as to discomfort the public at large."

(LAWSA vol 19, sv "Nuisance" by J R L Milton, par 227 p 139)

It .....

It need hardly be said that when an individual is able to establish that his proprietary rights have been infringed by a public nuisance he may sue in his own right: LAWSA op cit, par 230 p 140. Contrasting the remedies respectively available in English law and Roman-Dutch law Professor T W Price writes in 1949 (vol 66) SALJ 377 ("Nuisance: The Carnarvon Municipality Case") at 383/4:-

> "Any disturbance or interference, whether by threat or by overt act, of the right to the reasonable enjoyment of property was treated in Roman-Dutch law as a disturbance of possession, entitling the complainant to the summary redress given by the possessory remedies; which redress was based upon the interdict. There was no attempt, for there was no need, to classify these complaints under such headings as Trespass, Nuisance, Disturbance of Servitudes, etc. These are complications existing in English law, due to the particular historical development of that system, and principally to the development of the Action of Trespass and the remedy derived from it by interpretation and analogy, the Action of Trespass on the Case ..... All this, however interesting, is quite irrelevant

to .....

> to our law, both in the past and the present ...
> .....
> in Roman-Dutch Law the complainant was always entitled to his interdict, and it is clearly recognised in South Africa by an avalanche of authority that the interdict and the declaration of rights are still the basic remedies for any infringements of the right to the reasonable enjoyment of property....."

In the Superslate case (supra) RUMPFF, JA observed (at 120F/G) -

> "Wesenlik is dit, wat onder hinder in die Engelse reg ingesluit word, by ons die volgende:
> 1. die aantasting van 'n persoonlikheidsreg en wel die reg om onbelemmerde genot van 'n saak te hê, hoofsaaklik onroerende eiendom, en waarby 'n interdik gegee kan word selfs by 'n versteuring sonder skuld of opset, en
> 2. die aandoen van vermoënsregtelike skade, waarby m i skuld of opset vereis word."

In the instant case the appellants do not claim damages for patrimonial loss and the delictual liability of the respondents is not in issue. The inquiry is confined to the

question.....

question whether there has been unreasonable interference with the rights of the appellants to the enjoyment of their property.

In the judgment of the Court below the affidavits filed by the parties were subjected to a careful and critical examination. KROON, J found that in relation to the farm "Good Hope" the appellants had failed to prove that the settlement thereon constituted a public nuisance. In regard to "Needs Camp", however, the learned Judge recorded the following conclusions:

> ".....I find that the applicants have established that the settlement at 'Needs Camp' has given rise to an increase in certain criminal activities perpetrated by persons residing in the settlement which has cognizably adversely affected the ability of the applicants .....to utilise their farms for farming purposes and their enjoyment of their farms and which has given rise to a justifiable apprehension on the part of the farmers about the safety of themselves and their families. And, it seems to me that despite the disclaimer on behalf of the
>
> respondent.....

> respondents in the papers, the authorities recognise that this state of affairs has developed; hence the taking of such measures as requiring the Gately Commando to patrol the affected area twice daily and once nightly.
>
> The situation which has developed as a result of the establishment of the settlement at 'Needs Camp' must, in my judgment, be regarded as a public nuisance and it is a direct result of the establishment of the settlement at 'Needs Camp'. The activities complained of are unreasonable in that they are unlawful and are a public nuisance because they prejudice the rights of the farmers in the respects referred to above. It is no answer, as Mr van der Merwe, for the respondents, sought to argue, to say that the respondents cannot be held to account for the criminal activities of other persons. The position is not that the respondents are being held vicariously liable for the wrongdoings of others. Relief is being sought against them on the basis of a situation which has developed as a direct result of action taken on their part."

Suffice it to say that upon an examination of the affidavits filed in the Court below I am in entire agreement with the findings by the learned Judge reflected in the passage from his judgment quoted above. In argument before this Court

counsel for the respondents had difficulty in challenging the correctness of the finding that the settlement on "Needs Camp" constituted a public nuisance, but a further argument based on causality was pressed upon us. It was said that, irrespective of the merits of the defence of statutory authority, the appeal should fail for the reason that the appellants had failed to establish any real causal nexus between the act of the third respondent in effecting the settlement on "Needs Camp" and the nuisance which is the basis of the appellants' complaint. It was said that the villain of the piece was the Ciskeian Government which had expelled the displaced persons from Ciskeian territory and had dumped them on a South African road reserve. It was contended that in these circumstances the true creator of the ultimate nuisance was in truth the Government of Ciskei. It could not be suggested, so the argument proceeded, that the respondents should have been content to leave the displaced

persons.....

persons on the road reserve; and in consequence it would be wrong in law to hold the respondents liable for the presence of the displaced persons on "Needs Camp". In my opinion there is no merit in this argument. No doubt the action of the Ciskeian Government in dumping the displaced persons on South African soil precipitated a real emergency which had somehow to be met by the South African Government. But a recognition of the emergency in question cannot alter the position that it was in fact the third respondent in concert with the first and second respondents which decided to settle the displaced persons on "Needs Camp"; and that such action was the real and proximate cause of the nuisance.

Before dealing further with the findings of the Court a quo and the correctness of its conclusions derived therefrom, it is convenient at this juncture to consider the legal propositions set forth in the judgment of VILJOEN, JA. In the course of his judgment my Brother expresses the view

that.....

that:-

> "...the Act places no statutory duty on the State to effect a settlement of Blacks on land purchased by the Trust in a way or on a scale so as not to detrimentally affect the farming operations and activities of owners of contiguous land."

It is true, of course, that:-

> "...especially in contemporary conditions, some discomfort or inconvenience or annoyance emanating from the use of neighbouring property must needs be endured."

(per MILLER, J in De Charmoy v Day Star Hatchery (Pty) Ltd 1967(4) 188 (DCLD) at 192A; and see further: Malherbe v Ceres Municipality 1951(4) SA 510(A) at 516A; the Super-slate case (supra) at 110H. But the real question raised in the judgment of VILJOEN, JA is the following. If (as the trial Court has correctly found) the third respondent has created a public nuisance which actually interferes with the property rights of the appellants, are there valid grounds for

holding.....

holding that a claim by the appellants for an interdict is one not cognizable in a competent Court?

VILJOEN, JA holds that the Court a quo erred in applying the principles relating to statutory authority because it failed to appreciate that the case before it involved "administrative acts carried out by an organ of State in the execution of a general policy of Government". The conclusion at which my Brother arrives is stated as follows:-

> "Because the settlement was effected pursuant to the exercise of a policy discretion the attack upon the decision could only be launched by way of review."

I cannot, with respect, share that view of the legal position. In the absence of statutory authority a public body has no greater power to create a nuisance than a private individual. The third respondent, a creature of statute, is empowered by sec 4 of the Act "to do all such acts and things as bodies corporate may lawfully do". It may well be the case, as my

Brother surmises in his judgment, that in practice the third respondent exercises its powers to settle Blacks on trust land subject to ministerial or cabinet approval. This supposition, upon which considerable stress is laid by my Brother, does not appear to me, with deference, to be immediately germane to the issue in the case. Under the State Liability Act, No 20 of 1957, the particular prerogative of State which had earlier prevented it from being sued in the courts was abolished; and within the limits of Act 20 of 1957 the liability of the State is co-extensive with that of the individual citizen. It is true that such co-extensive liability is to an extent qualified in sec 1 of Act 20 of 1957 by express mention of "contract" and "wrong". While contract and delict are thus specifically mentioned it is settled law that these are not intended to be the sole grounds of liability. The State Liability Act admittedly does not abolish all the prerogative.....

gative powers of the State; but here we are concerned solely with an act performed under statutory authority -

> "An act done by virtue of the prerogative is simply an act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us. It does not derive its lawfulness from any vague and elastic notion of executive sovereignty.
>
> Although in describing the category of prerogative powers the word 'discretionary' is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute."

(per SCHREINER, JA in Sachs v Dönges, N.O. 1950(2) SA 265(A) at 306/7).

The point is a short one. I know of no principle in our law which decrees that the Court must decline to redress a violation of individual rights resulting from an administrative act simply because the latter is performed in the words of VILJOEN, JA "in the course of implementing a

general.....

general policy". Neither in oral argument before us nor in the further submissions filed by counsel was any direct authority for such a proposition cited. I am, in particular, unable to discover any sound reason or legal principle in support of such a limitation upon the Court's jurisdiction to grant an interdict; a limitation whose application in cases such as the instant one would represent, I consider, an arbitrary and unwarrantable proscription of a remedy long available in our law to a wronged property owner.

In my view, and irrespective of the precise juridical nature of the exercise of discretion which prompted the settlement on "Needs Camp", the Court below had an untrammelled jurisdiction to hear the application for an interdict; and KROON, J (having found as a fact that the third respondent had interfered with common law rights by the creation of a public nuisance) was bound to determine

the.....

the issue by testing the validity of the defence of statutory authority raised by the respondents. It remains to consider the correctness of the conclusion reached by the Court a quo that the third respondent had discharged the onus of showing immunity under the Act for such interference with private rights.

The legal principles by which the matter falls to be decided are chiefly to be gleaned from the decision of this Court in the oft-cited case of Johannesburg Municipality v African Realty Trust 1927 AD 163 ("the African Realty case") and the observations made thereon by the majority of the Court in the later case of Bloemfontein Town Council v Richter 1938 AD 195. A brief review of these judgments is here necessary.

In the African Realty case (supra) the plaintiff company sued the defendant municipality for an interdict

and.....

and damages. The plaintiff alleged that certain roads, streets and drains constructed by the defendant in certain Johannesburg townships had greatly increased the volume and velocity of water discharged upon and flowing over the plaintiff's property. The defendant pleaded, inter alia, that the works complained of had been constructed under statutory authority without negligence. At 172/3 of the judgment INNES, CJ is reported as having said:-

> "Certain general considerations may be useful but are not necessarily decisive. For instance, the Legislature is not presumed to intend an interference with private rights when no provision is made for compensation. That principle loses much of its force, however, when applied to public undertakings.....But the nature and character of the powers conferred, and of the work contemplated, and the terms of the statute are important. The work authorised to be done may be defined and localised, so as to leave no doubt that the Legislature intended to sanction a specific operation. In such a case, especially if the work were one required in the public interest,

> interest, an intention that it should be duly constructed in spite of interference with common law rights might fairly be inferred..... On the other hand, where the permissive powers conferred are expressed in general terms, where there is nothing in the statute to localise their operation, and where they do not necessarily involve an interference with private rights, the inference would be that the Legislature intended the powers to be exercised subject to the common law rights of third persons. If, however, the nature of the work authorised is such that it may or may not interfere with private rights according to circumstances, then the person entrusted with statutory authority is entitled to show that, under the circumstances of the case, it is impossible to carry out the work without such interference, in which case an inference that an infringement of private rights was sanctioned would be justified. For otherwise the grant of statutory authority would be nugatory.....The enquiry in each instance is whether an interference with private rights is justified. If it is not, there is an end to the matter. If it is, then the exercise of the statutory power is limited by another consideration, namely it must be carried out without negligence."

In the African Realty case the works authorised by the relevant sections of the Ordinance were not localised or defined. That

feature, however, was held not to operate decisively in the matter. At 175 INNES, CJ remarked:-

> "The onus of proving the impossibility of avoiding prejudice is of course upon the municipality; but that onus has clearly been discharged. The facts upon which the proof rests are hardly in dispute..... It is impossible .....to make a single street or a single gutter in the Houghton catchment area without increasing the quantity and quickening the flow of water which finds its way to the lower ground. And under these circumstances I think that the Legislature must be taken to have intended that the reasonable and proper construction of streets and drains should not involve the council in civil liability resulting from concentration."

A further conspicuous example of a case in which the onus of proving impossibility of avoiding prejudice was easily discharged is afforded by the decision in Breede River (Robertson) Irrigation Board v Brink 1936 AD 359. In that case an irrigation board in the exercise of its statutory powers had constructed an irrigation canal which crossed a dry river bed and interfered with the natural flow of the water in times of

extraordinary.....

extraordinary flood. In the course of his judgement DE VILLIERS, JA said (at 366):-

> "It is true that the powers conferred by the Act are expressed in general terms, and are not localised, but at the same time it is clear that they cannot be exercised without interfering with private rights. For it is obviously impossible to carry an irrigation canal for miles across the countryside without interfering with the natural flow (or drainage flow) of surface drainage water."

In Bloemfontein Town Council v Richter (supra) the defendant municipality enjoyed the right by servitude and statute to dam a river for the purpose of obtaining a water supply; and a statutory right to maintain the dam. In maintaining the dam the defendant removed silt by the ordinary method of scouring. The plaintiff, a riparian land-owner, alleged that the scouring had caused his side of the river-bank to collapse and in the Orange Free State Provincial Division he succeeded in a claim for damages and an interdict. The appeal to this Court succeeded. .....

succeeded. This Court found that without the right to remove the silt the rights of the municipality could not be properly exercised; and that the right to remove the silt was one conferred by necessary implication. It further held that it had been proved that the removal of silt, however effected, would cause some damage to the plaintiff's banks, and that therefore the Legislature intended an interference with private rights. In the course of his judgment STRATFORD, JA referred at some length to the principles laid down in the African Realty case, which he described as most apposite to the case before him. However, the learned Judge adverted (at 231) to a "practical difficulty" in applying the law as expounded in the African Realty case. In this connection STRATFORD, JA said the following:-

> "The distinction between exceeding a power and exercising a power negligently is difficult to draw. Is

it.....

it negligence to exercise the power by a method which causes grave injury to another when other methods of its exercise are practicable and possible which will cause less injury? The answer to the last query seems to be in the affirmative and the onus is on the plaintiff to prove such negligence. In other words the position seems to be that if the defendant has proved that all possible methods of exercising the power will cause invasion of the plaintiff's rights, it is for plaintiff to prove defendant has negligently chosen a bad method, in that there was another method 'reasonably practicable' which would, if adopted, have caused less or no injury. This is the effect of the decision in the African Realty Trust case. But it requires little imagination to appreciate the difficulty of drawing the line between the first proof and the second. Defendant first proves 'that the Legislature contemplated an interference with private rights.' How is this to be proved but by showing that using the power in every reasonably practical way injury to others must ensue? And is not this proof an anticipation of the proof said to be on the plaintiff?

However, I think, there is one way of interpreting the decision which can be satisfactorily applied. It is this: It is for the defendant to prove that in whatever way the power is exercised there must result some interference (of the nature complained of) with the common law rights of others. This being proved, the onus is thus upon the plaintiff to prove that by the

> adoption of certain precautions (reasonably practicable) or by the adoption of another method (also reasonably practicable) to achieve the purpose of the power the extent of the interference will be lessened - not entirely avoided, for, if the defendant had discharged his onus, avoidance is impossible."

In a separate judgment CURLEWIS, CJ agreed with the conclusion reached by STRATFORD, JA, but with reference to the African Realty case the learned CHIEF JUSTICE remarked (at 235/6) that he found:-

> "....no difficulty in understanding the principles of law as therein enunciated relative to the exercise of statutory powers, or in applying those principles of law in the decision of the case before us."

As far as the three remaining members of the Court (DE WET, WATERMEYER, JJA & BEYERS, AJA) are concerned the report of the case reflects (at 236) no more than that they "concurred". However, as pointed out in Germiston City Council v Chubb & Sons Lock and Safe Co. (S A) (Pty) Ltd 1957(1) SA 312(A) at 322E, it appears from the original record that in fact the three

remaining.....

remaining judges concurred only in the judgment of STRATFORD, JA. The facts of the last-mentioned case are also instructive in regard to the matter of onus here under discussion. That case involved an action by an adjoining land-owner against a local authority for damages caused by flooding as a result of roadmaking operations. On appeal this Court held that the initial onus on the local authority (of satisfying the Court that the Legislature contemplated an interference with private rights) was, in effect, automatically discharged. Delivering the judgment of the Court SCHREINER, JA remarked (at 323A) that:-

> "....it is established, not as a rule of law but as an unescapable conclusion of fact, that the making of roads on sloping ground necessarily modifies the natural drainage of the locality and so to some extent interferes with the rights of adjoining land owners....So in a case based on flooding as a result of roadmaking operations the discharge of the initial onus by the local authority is in effect automatic."

Against.....

Against the background of the legal principles touched upon above it must now be considered whether, and if so, to what extent, the exercise of the powers conferred upon the third respondent by sec 10 of the Act afforded the third respondent immunity from liability for the nuisance created by the settlement on "Needs Camp".

On behalf of the respondents affidavits were filed by, inter alios, Mr M T Cilliers, the Director of Land Affairs in the Department of Development Aid. In his first affidavit Cilliers states, inter alia -

> "In my hoedanigheid as Direkteur Grondsake van die Departement Ontwikkelingshulp is ek verantwoordelik vir die aankoop van grond namens die Suid-Afrikaanse Ontwikkelingstrust, 'n liggaam met regspersoonlikheid ingelyf in terme van Artikel 4 van Wet nr 18 van 1936. Ek is verder ook verantwoordelik vir die vestiging van mense op trustgronde."

Cilliers deposed to the fact that "Needs Camp" was the only

Trust.....

Trust land in the area which was vacant and not the subject of a lease; that "Good Hope" was the most suitable site on which to settle the Kwelera/Mooiplaas fugitives; and that in fact it was the only choice. The first respondent in his affidavit pointed out that there was a shortage of employment opportunities in the whole district, and that the removal of the people concerned to another area in the district (even if such had been available) would not have resolved the problem of their unemployment. These allegations were made on behalf of the respondents in response to suggestions contained in the affidavits of the appellants that sites other than "Needs Camp" and "Good Hope" should have been selected for the settlement of the displaced persons concerned. The appellants did not, however, attempt to identify any suitable alternative sites. In argument before the Court below counsel for the appellants appears

to .....

to have made a general submission that somewhere in South Africa there should be more suitable sites, but again, without indicating where these might be found. In the course of his judgment the learned Judge concluded that this suggestion by counsel:-

> ".....does not in any way serve to refute the respondents' evidence that 'Needs Camp' and 'Good Hope' were the only practicable areas for the two settlements."

The failure by the appellants to refute the aforesaid evidence by the respondents was, I think, regarded by the Court below as a cardinal factor in the case; and one pointing to the further conclusion that the interference with the private rights of the appellants was legally excused. The ratio of the decision in the Court a quo emerges from the penultimate paragraph of the judgment in which the learned Judge states:-

"As.....

> "As already mentioned, the nuisance complained of by the applicants has, in the result, proved to be an inevitable result of the establishment of the settlement at 'Needs Camp' and the same would fall to be said about 'Good Hope' should the settlement there result in a nuisance. In other words the circumstances are such that the power granted by section 10 to settle the people involved in this case could not have been exercised without an interference with private rights in the form of the nuisance which has resulted. The respondents have accordingly discharged the onus resting on them of proving that such interference was justified and the applicants must suffer same." (My underlining).

From the passage of the judgment just quoted it is clear that the learned Judge considered that the third respondent had discharged the initial onus which it bore, that is to say the burden of satisfying the Court that the provisions of sec 10 of the Act contemplated an interference with private rights. It seems to me, with respect, that in so concluding the learned Judge erred. For the reasons

which .....

which follow I take the view that the third respondent failed entirely to discharge such initial onus.

In the case of certain empowering statutes the intrinsic physical nature of the works or acts authorised is such that their execution necessarily and inevitably involves the disturbance of common law rights. In the case of other empowering statutes the works or acts authorised are not so characterised. Their inherent quality is not such that their performance necessarily entails an encroachment upon or infringement of private rights. Examples of the former class of statutes are afforded in a number of the decided cases already noticed in this judgment. In the African Realty case this Court held that it was impossible to exercise the power conferred (the construction of streets and drains) without increasing the flow of water whereof the plaintiff complained. In the

Breede.....

Breede River Irrigation Board case (supra) it was pointed out that it is impossible to carry an irrigation canal for miles across the countryside without interfering with the natural flow of surface drainage water. In Bloemfontein Town Council v Richter (supra) it was held to be proved on the evidence that the removal of silt from the dam, howsoever effected, would cause some damage to the plaintiff's banks. In Germiston City Council v Chubb & Sons Lock and Safe Co. (S A) (Pty) Ltd (supra) the conclusion of fact was inescapable that the construction of roads on sloping ground must interfere with the rights of adjoining landowners by modifying the natural drainage of the locality concerned.

In my view sec 10 of the Act does not fall into the former class. According to its long title the Act is one -

"To .....

> "To provide for the establishment of a South African Development Trust and to define its purposes; to make further provision as to the acquisition and occupation of land by Blacks and other persons; to amend Act No 27 of 1913; and to provide for other incidental matters."

Chapter III of the Act sets forth special provisions regarding the acquisition, tenure and disposal of land by the Trust and by Blacks, and matters relating thereto. Sec 10 empowers the third respondent, subject to the further provisions of that section, from time to time to acquire land for Black settlement. Sec 10 does not sanction any particular or specific settlement on Trust land. It does not localise the settlement empowered. It confers permissive powers in general terms.

In the light of the authorities to which reference has already been made it was for the third respondent to prove that in whatever way it settled persons on "Needs

Camp".....

Camp" some interference with the common law rights of the appellants through the creation of a public nuisance must necessarily and inevitably result. The fact that there was no alternative and suitable trust land on which the displaced persons could be settled is, I think, somewhat of a red herring in the case. Accepting that "Needs Camp" was Trust land on which the third respondent was empowered to effect a settlement, it seems to me that the third respondent could hardly discharge the initial onus simply by demonstrating (what was self-evident and not in need of proof): that to dump 8000 refugees, many of whom are unemployed and hungry, without providing any housing and other basic facilities, on a single farm in a prime agricultural area would create a nuisance disrupting the lives and livelihood of the farmers on adjoining farms and imperilling their security. I agree with the submission advanced on behalf of the appellants by Mr Leach that the

learned.....

learned Judge here applied the wrong test. In my view the third respondent could discharge the initial onus only by demonstrating to the satisfaction of the Court that the settlement of any number of Blacks on "Needs Camp" would inevitably result in the creation of such a nuisance. That the third respondent failed to do. Its failure is hardly a matter for surprise. The creation of a nuisance to adjoining farmers is clearly not a demonstrably necessary consequence of the mere fact of a settlement, by itself, on "Needs Farm". It is manifestly the very high density of such settlement, and the manner in which it was effected, which in the instant case make that consequence unavoidable.

The power to effect a settlement on Trust land conferred by sec 10 is not a power linked with or referable to any particular number of settlers. In my judgment the third respondent failed to prove that the

act.....

act which the legislature empowered it to perform (the settlement of an unspecified number of Blacks) on "Needs Farm" was impossible of performance without the creation of a public nuisance. It cannot avail the respondents to show that the presence of 8000 refugees on "Needs Camp" must inevitably result in a public nuisance. In order to secure legal immunity therefrom the respondents have to show that the creation of such a nuisance is a demonstrably necessary consequence of any settlement whatever on "Needs Camp" and irrespective of the number (whether it be 8000 or 80 or 8) of settlers. This the respondents are clearly unable to do.

One cannot but have sympathy with the 8000 displaced persons in their unfortunate plight, and at the same time one has a keen appreciation of the quandary in which the respondents found themselves as the result

of.....

of the precipitate and heedless action of the Ciskeian Government. It is clear that in deciding to settle the refugees on "Needs Camp" the respondents were actuated by the best of motives. It must be accepted, furthermore, that the settlement of but a relatively small number of refugees (as opposed to 8000 of them) on "Needs Camp" would have done little to solve the total problem. In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens. The situation no doubt called for prompt action by the respondents. Such action, however, required not merely the alleviation of the lot of the refugees but simultaneously therewith the protection of the farming community into whose midst so many distressed persons were being precipitately introduced. The respondents failed to secure the latter. Indeed, it is a

matter.....

matter for comment that what is said on behalf of the respondents in the affidavits amounts largely to a bland denial that any abnormal conditions arose as a result of the settlement.

For the aforegoing reasons I conclude that the appellants were entitled to an order for an abatement of the public nuisance created by the respondents. During argument counsel for the appellants very fairly conceded that in all the circumstances of the case an order for abatement by the removal of the settlers from "Needs Camp" would be neither realistic nor practicable. In the further written submissions on behalf of the appellants various proposals for a less drastic form of abatement were put forward. One such was an order for the erection of a security fence entirely surrounding "Needs Camp". It is noteworthy that the possibility of erecting a wire fence along the boundary of "Needs Camp" is a notion which occurred to and was considered by the first

respondents.....

respondent's own department. In this connection the first respondent (who is also the nominee of the State President as the trustee of the S A Development Trust) stated the following in the course of his answering affidavit:-

> "Wat betref die veiligheidsituasie is ek bewus daarvan dat die betrokke minister alles in sy vermoë doen ten einde maksimum beskerming te verleen teen onwettige optredes, spesifiek in hierdie gebied. Dit word tans verder oorweeg vanaf die kant van my departement om moontlik 'n draadheining op te rig om die plaas 'Needs Camp'. In hierdie verband sal die wenslikheid daarvan met die Suid-Afrikaanse Polisie bespreek word."

It seems to me that such a fence, if properly patrolled on a regular basis throughout the day and night, should result in an appreciable abatement of the nuisance. An order for its erection will be included in the order to be granted at the end of this judgment.

A.....

A further matter requiring brief mention is this. For the reasons mentioned by EKSTEEN, J (as he then was) when he granted the rule nisi herein, I do not share the concern experienced by my Brother at the non-joiner of or the absence of more direct notification to the settlers of the terms of the rule nisi. Moreover, while the limited relief granted to the appellants in the order which will issue may entail a measure of inconvenience to persons entering or leaving "Needs Camp", it can entail no real prejudice to those of the settlers who are law-abiding and peace-loving.

In the result the appeals of the first and third appellants succeed with costs. The order made by KROON, J on 12 June 1986 is set aside, and the following order is substituted therefor:-

"(1) The.....

"(1) The first, second and third respondents are ordered to abate the nuisance caused by the settlement of persons on the farm Needs Camp":-

(a) by taking all due and proper steps for the preservation of the security of the farms adjoining "Needs Camp";

(b) by taking all due and proper steps to secure the maintenance of law and order in so far as the settlers of "Needs Camp" are concerned, both within and beyond "Needs Camp";

(c) by taking all due and proper steps for the prevention of criminal acts by the settlers of "Needs Camp";

and, ...

and,

without limiting the generality of the aforegoing,

(d) by the erection within three months of the date of this order, along the entire boundary of the farm "Needs Camp", of a stout security fence to permit of entry to "Needs Camp" and departure therefrom solely by means of a gate, such fence and gate to be properly patrolled and maintained.

(2) The first, second and third respondents will pay the costs of the application."

G G HOEXTER, JA

VIVIER, JA)
STEYN, JA) Concur