IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

APEX MINES LIMITED .... Appellant

and

ADMINISTRATOR, TRANSVAAL .... Respondent

Coram: CORBETT, NESTADT, VIVIER JJ A,

NICHOLAS et BOSHOFF, A JJ A

Heard: 29 February 1988

Delivered: 30 March 1988

J U D G M E N T

NICHOLAS, A J A :

This is an appeal, with leave, from a decision

of VAN ZYL J, sitting in the Transvaal Provincial Division, on questions of law raised in a special case stated under Rule 33 of the Rules of Court. The facts are fully set out in the judgment of the court *a quo*, which has been reported (*Apex Mines Ltd. v Administrator, Transvaal*, 1986 (4) SA 581 (T)) and which will be referred to as "the reported judgment".

In the action in which the special case arose, the plaintiff was Apex Mines Ltd. ("Apex") and the defendant was the Administrator of the Transvaal ("the Administrator").

Apex has at all relevant times been engaged in coal mining *inter alia* on and under Portions 1, 2 and 3 and the Remaining Extent of the farm Groenfontein in the district of Witbank. Apex became the full owner of Portion 2 on 5 March 1941 and of the Remaining Extent on 19 June 1950.

In 1922 it became the cessionary of a notarial mineral lease, dated 17 September 1896, in respect of Portion 1 and Portion 3, and it became the full owner of Portion 3 on 18 November 1975.

S. 5(1) of the Roads Ordinance, No 22 of 1957 (Transvaal), ("the Ordinance") provided:

"5. (1) The Administrator may by notice in the Provincial Gazette -

(a) declare any road to be a public road after investigation and report by the board concerned;

(b) declare that a public road shall run on land where no road previously existed or where a road previously existed but has been closed, and after investigation and report by the board may define the course of that road;

(c) declare that a main road shall exist where an existing road is or where no road was previously in existence;

(d) close or deviate any public road after

investigation and report by the board: Provided that a public road which has ceased to exist as a public road as a result of a notice, may be used by the public until actually closed by the Administrator by visible means;

(e) act without such investigation or report in the event of the board failing within three months after having been requested to do so, to investigate and report in terms of paragraphs (a), (b) or (d):

...... "

During the period May 1960 to March 1980, the Administrator, in the exercise of his powers under this provision, proclaimed certain public roads which crossed the farm Groenfontein.

The questions in the special case concern the compensation payable to Apex by reason of such proclamations.

The provisions of the Ordinance relating to compensation were secs. 92, 93, 94, and 95:

"92. If in the course of the opening, construction or maintenance of a public road or of a pont by the Administrator, direct damage is done to an orchard, garden or plantation, or to crops, cultivated trees, cultivated land or land under irrigation (not being land which is merely capable of cultivation or irrigation but not so cultivated or under irrigation), or to any other improvement on land, the owner thereof is entitled to such compensation as is agreed upon by the parties. Failing such agreement the matter shall be determined by arbitration as provided for in section ninety-seven.

93. When the Administrator has declared in terms of paragraph (b) of sub-section (2) of section five, that a public road shall exist on land falling within any of the areas referred to in paragraphs (a) and (b) of the proviso to the definition of 'public road' in section one, where no road was previously in existence, or where a road was previously in existence but had been closed and has defined the course of such public road, the

owner of the land in question is entitled, in addition to any compensation which may be payable under section ninety-two, to compensation in respect of the land taken up by such public road, the amount of such compensation to be determined, in case of dispute, by arbitration as provided for in section ninety-seven.

94. When the Administrator has in terms of section three declared the width of a public road to be in excess of one hundred and twenty Cape feet, the owner of the land in question is entitled, in addition to any compensation which may be payable under section ninety-two or section ninety-three, to compensation in respect of land taken up by such excess, the amount of such compensation to be determined, in case of dispute by arbitration as provided for in section ninety-seven.

(S. 3, which was referred to in s. 94, provided that the width of the road reserve of public roads shall be 120 Cape feet in the case of main roads "Provided that the Administrator may, by notice in the Provincial Gazette reduce, or, subject to the provisions of section ninety-four increase such width.")

95. Notwithstanding anything to the contrary in this Ordinance contained, the Administrator may in his discretion authorise by way of equitable relief, the payment of an amount determined by him, if in any case where no payment of compensation is claimable, he is of opinion that serious damage has been or will be caused by the exercise of any power under this Ordinance."

The Ordinance was amended _inter alia_ by sections of the _Roads Amendment Ordinance_, No 2 of 1970 (Transvaal), which came into operation on 26 March 1970. In terms of the relevant amendments,

(a) The following proviso was substituted for the original proviso to s. 3 of the Ordinance:

"Provided that the Administrator may, by notice in the _Provincial Gazette_, reduce or increase such width";

(b) The following section was substituted for s. 92 of the Ordinance:

" 92. (1) Where the Administrator in terms of the provisions of section 3, 5 or any other provision of this Ordinance, by notice in the Provincial Gazette, establishes, widens or permanently deviates a public road, he shall subject to the provisions of subsections (2) and (3), pay to the owner, in respect of the land encroached upon by such establishment, widening or deviation, such compensation as may be mutually agreed upon or, failing such agreement, as may be determined by arbitration in terms of section 97: Provided that the foregoing provisions of this subsection shall not apply to the extent that any such land was previously used as a road.

(2) The compensation payable in terms of subsection (1) shall not exceed the amount which such land, including any improvements thereon, would have realized if sold on the date of promulgation of such notice in the open market by a willing seller to a willing buyer (hereinafter referred to as the market value).

(3) .... / 9

> (3) Where a public road has been permanently deviated within the boundaries of the land on which such road previously existed, compensation shall only be paid in so far as the market value of the land encroached upon by such deviation exceeds the market value of the land previously encroached upon by such road ;

and (c) s. 93 (the subject-matter of which was compensation for land taken for roads in municipalities etc.) and s. 94 were repealed.

The main effect of the amendments was that, in terms of the new s. 92, compensation was payable in respect of all the land encroached upon, and not only in respect of the excess of 120 Cape feet as provided in the now repealed s. 94.

(There have been other amendments, but as these do not affect the matters to be considered in this appeal,

it is unnecessary to refer to them.)

It was common cause that the Administrator has compensated Apex for the value of the surface encroached upon in respect of those portions of the farm of which Apex is the full owner, i.e., Portion 2, the Remaining extent, and, after November 1975, Portion 3. The Administrator has made no payment in respect of those portions in respect of which Apex was not the registered owner but had the right to mine coal under the mineral lease, namely, Portion 1 and, before November 1975, Portion 3.

Regulation 5.3.1 of the Mines and Works Regulations promulgated pursuant to the Mines and Works Act, No 27 of 1956, provides:

"5.3.1 No owner or manager shall carry on any mining operations under or within a horizontal distance

of 100 metres from buildings, roads, railways, or any structure whatever or under or within a horizontal distance of 100 metres from any surface which it may be necessary to protect, without first having given notice in writing to the Inspector of Mines of his intention so to do and obtained his permission therefor."

For the purposes of the special case the Administrator accepted -

" ... that the Plaintiff has been and is being and will in the future be prevented from fully extracting that percentage of coal which it would otherwise have been able to extract

12.1 from beneath the proclaimed road reserves;

12.2 from beneath subjacent areas along the sides of the proclaimed road reserves

in terms of the provisions of Regulation 2.1 as replaced by Regulation 5.3 of the Mines and Works Regulations promulgated pursuant to the Mines and Works Act, No 27 of 1956, and the Government Mining Engineer's refusal of unconditional permission to undermine and to allow such full extraction."

VAN ZYL J summarised the issues to be decided

at pages 587-588 of the reported judgment in the form of the following questions:

"(i) Is the plaintiff entitled, as of right, to claim compensation in terms of s 94 and s 92 of the Roads Ordinance 22 of 1957 as applicable before and as from 1 April 1970 respectively?

(ii) What is the extent of a claim which may be instituted in terms of the said sections?

(iii) Is the damage allegedly suffered by the plaintiff as a result of the restriction of its coal mining activities caused by the proclamation of roads by the defendant or by the exercise of discretion by the Government Mining Engineer in terms of the Mines and Works Act 27 of 1956, and the regulations promulgated thereunder?

(iv) Are the plaintiff's claims which arose before 1 December 1970 subject to the provisions of s 3(2)(c)(vi) of the Prescription Act 18 of 1943, and those which arose as from 1 December 1970 subject to the provisions of s 11(d) of the Prescription Act 68 of 1969?"

After dealing with each of these questions in turn, the learned judge made the following order (reported judgment at 604-605):

"1. The plaintiff is not, as of right, entitled to claim compensation in terms of ss 94 and 92 of the Roads Ordinance 22 of 1957, as applicable before and as from 1 April 1970 respectively, except in its capacity as owner of the surface area of the land in question. In the present instance that would be restricted to a right qua owner of portion 2 as from 5 March 1981, of portion 3 as from 18 November 1975 and of the remaining extent as from 19 June 1950. In respect of portion 1 it has no claim at all, subject to the provisions relating to 'equitable relief' in s 95 of the ordinance, its right being restricted to that of lessee of mineral rights for which the said sections of the ordinance make no provision.

2. The extent of the claim which may be instituted in terms of ss 94 and 92 aforesaid is clearly spelt out therein and is restricted to compensation for the relevant surface encroached upon with the exclusion of compensation for rights, such as mineral rights, injuriously affected by the road proclamations in question. In the case of s 94 claims, applicable prior to 1 April 1970, the surface area in question will be that taken up by the particular road in excess of 120 Cape feet, while

s 92 claims, applicable as from 1 April 1970, relate to compensation for all surface area encroached upon by the road in question.

3. The damage allegedly suffered by the plaintiff as a result of the restriction of its coal mining activities is not caused by the proclamation of roads by the defendant but by the provisions of the relevant regulations (reg2(1) prior to 26 June 1970 and reg5.3.1 as from such date) promulgated in terms of the Mines and Works Act 27 of 1956.

4. (a) A claim for compensation arising before 1 December 1970, in terms of the relevant sections of the Roads Ordinance 22 of 1957 is not an action for damages as envisaged by s 3(2)(c)(vi) of the Prescription Act 18 of 1943, and is not subject to the provisions thereof.

(b) A claim for compensation arising, as from 1 December 1970, in terms of the relevant sections of the Roads Ordinance 22 of 1957, is a claim for a debt as envisaged by s 11(d) of the Prescription Act 68 of 1969, and is hence subject to the provisions thereof.

5. The plaintiff is ordered to pay the costs of this application, including the costs of two counsel."

(It is common cause that the date 5 March 1981 in para. 1 is a clerical error, and that it should read 5 March 1941.)

Apex did not appeal against para. 4(a) of the order and at the hearing of the appeal, Mr. Schreiner, who was leading counsel for Apex, informed the court that, for reasons which are not now germane, he did not wish to proceed with the appeal against para. 4(b). And, as will appear, I shall not be considering the correctness of para. 3.

In regard to paras. 1 and 2, it will, I think, make for clarity if the questions to be decided are reformulated as follows:

(a) Has Apex, qua holder of the mineral rights, locus standi to claim compensation in terms of s. 94

of the Ordinance as applicable before 1 April 1970, and in terms of s. 92 as applicable on and after that date?

(b) Are the coal deposits which underly the proclaimed road reserves "land" such as is described in secs. 92 and 94 of the Ordinance?

(a) The question of locus standi.

The answer to this question depends on the meaning of owner as used in s. 94 (now repealed) and in s. 92.

Owner is defined in s. 1(xiv) of the Ordinance:

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

And eienaar is defined in s. 1(vii) as

" ... die eienaar, huurder of bewoner van 'n stuk grond, of sy wettige verteenwoordiger."

Under the definition, owner bears its ordinary, popular meaning, and an extended meaning which includes the lessee and the occupier. Cf R v Debele 1956 (4) SA 570 (A) at 575 H.

In its ordinary meaning, an owner is the person in whom the dominium of a res is vested. Specifically in relation to land, owner means the registered proprietor thereof. See Buitendach and Others v West Rand Proprietary Mines and Another 1925 TPD 745 at 752, and see also Cromhout v Afrikaanse Handelaars en Agente (Edms.) Bpk., 1943 TPD 302 at 305 per GREENBERG J:

> "'Eiendom', like 'property', has, I think, a definite meaning in relation to fixed property. The only ownership, except perhaps in the case of prescription and possibly inheritance, is the ownership constituted by registration .... "

It was contended by Mr. Schreiner that Apex, as the holder of a real right to mine coal under the proclaimed roads, could be said to be "owner in respect of the land encroached upon". The short answer to this contention is that owner in its ordinary popular sense does not include the holder of the mineral rights. Such holder has a ius in re aliena - a right in property owned by another, who is alone the owner.

It was argued, again, that the fact that owner includes lessee and occupier, shows that the legislature intended that owner should be given an extended meaning so as to include persons (such as the holder of the mineral-rights) who suffer harm of the same kind as that suffered by the dominus: a lessee and an occupier are given a right to claim

compensation .... / 19

compensation, and it would not be consistent to grant the right to compensation to a wide class of people and to confine the meaning of <u>owner</u> in such a way as to exclude the registered owner of a servitude such as a right of way or the registered owner of a real right to mine. That argument cannot be accepted. The definition is exhaustive and there is no warrant for broadening its scope so as to include cases which are said to be analogous, but for which the legislature has made no provision.

Then it was submitted that Apex is the <u>lessee</u> or the <u>occupier</u> of the land.

These words too bear their ordinary, popular meaning.

The use of the word <u>lease</u> to describe the

so-called "mineral lease" or "lease of mineral rights" or "lease of rights to minerals" is inappropriate, since it cannot properly be classified as a lease at common law. (See Wiseman v de Pinna and Others 1986 (1) SA 38 (A) at 47 E to I). In its ordinary sense, a lessee is a tenant under a lease - a contract of letting and hiring. The holder of a mineral lease is not a lessee in that sense: he is not a tenant; and he has no right to occupy the land except insofar as it is necessary for him to search for and mine minerals. (Cf Neebe v Registrar of Mining Rights 1902 TS 65 at 81-82.) Although Apex is, or was the lessee of the mineral rights in portion of the farm, it is not, and was not, the "lessee ... of a piece of land" as provided in the definition.

Nor has Apex established that it is the

occupier or bewoner. The meaning of these words has frequently been considered by the courts. See the cases quoted in Lenz Township Co. (Pty.) Ltd. v Lorentz NO and Others, 1960 (4) SA 341 (W) at 345-346, and the cases referred to in the reported judgment (at 591 E-J). From these authorities it is manifest that to be an occupier or bewoner of property a person should reside on and have control of it.

There is nothing in the facts of the special case to show that Apex is the occupier of the relevant portions of the farm. Apex relies on the mineral lease itself, but that lends no support to its contention. Under the lease, the lessee is given the right to lease the coal rights; the right to lay and use a tramline; and the right to a piece of ground, 30 morgen in extent, for the building of houses the

erection of machinery, etc., as well as the right to water for domestic use and mining activities. He is given nothing more, and clearly he cannot be said, on the evidence of the lease, to be "the occupier" within the definition.

The conclusion is therefore that Apex, qua holder of the mineral rights, is not the owner of the land, nor is it the lessee, nor is it the occupier. It follows that as such it has no locus standi to claim compensation under secs. 92 and 94, and VAN ZYL J was clearly correct in making para. 1 of the order.

(b) Is underlying coal "land" such as is described in s. 94 and in s. 92.

The contention of Apex in the special case

was that

> "On a proper construction of the Ordinance the compensation claimable as of right, both before and after 1st April, 1970, is compensation in respect of the land and/or any real right in respect of minerals adversely affected by the proclamation."

Under the repealed s. 93, compensation was payable according to the English version,

> "in respect of the land taken up by such public road",

or, according to the Afrikaans version

> "ten opsigte van die grond wat deur so'n openbare pad in beslag geneem word."

Under the repealed s. 94, where the Administrator in terms of s. 3 declared the width of a public road to be in excess of 120 Cape feet, the owner of the land in question was, according to the English version,

> "entitled .... to compensation in respect of land taken up by such excess"

or, according to the Afrikaans version,

> "geregtig tot skadevergoeding ten opsigte van die grond wat deur so 'n oorskryding in beslag geneem word".

Under s. 92(1), where the Administrator establishes, widens or permanently deviates a public road, the owner is entitled to compensation, according to the English version,

> "in respect of the land encroached upon by such establishment, widening or deviation"

or, according to the Afrikaans version,

> "ten opsigte van die grond wat deur sodanige instelling, verbreding of verlegging in besit geneem is."

Despite the verbal differences between them, the provisions all convey the same idea: compensation is payable in respect of the land taken up by the road.

Apart from s. 95, under which the Administrator has a discretion to authorise a payment by way of equitable relief, the only provision for the payment of compensation in the Ordinance as it now stands is s. 92. The right of the owner, whose property has been expropriated, to receive compensation, depends upon the legislative provisions which deal with the matter. See Joyce & McGregor, Ltd. v Cape Provincial Administration 1946 AD 658 at 671. Unless, therefore, Apex can bring its claims for compensation in respect of coal under s. 92 or, where that was applicable, under the old s. 94, it will be non-suited. Consequently its right to claim turns on whether the underlying coal is "land" as described in the portions of the sections I have just quoted. It does not depend on whether Apex's real right in respect of coal

has been adversely affected by the proclamation of the roads.

In dealing with the question of compensation under s. 92, the learned authors of Franklin and Kaplan, The Mining and Mineral Laws of South Africa, express the following view at 697:

> "Where the rights to minerals have not been separated from the ownership of the land, due account would have to be taken of the mineral potential in determining the compensation. The word 'land' as used in section 92 must be given its ordinary meaning as including all rights of ownership, including the right to minerals therein. (Erasmus and Lategan v Union Government 1954 (3) SA 415 (O)). It is a well-recognised canon of construction that 'An intention to take away property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms' (Central Control Board v Canon Brewery Co (1919) AC 744 at 752)."

If the effect of an Administrator's Notice

issued under s. 5 of the Ordinance is to expropriate the land comrpising the road reserve, the view of the learned authors is no doubt correct. But the Ordinance does not provide that the Administrator acquires the ownership of the land occupied by a public road. In terms of s. 4 of the Ordinance

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

In terms of s. 20(a) the Administrator has power in respect of the construction, maintenance and control of public roads. Under s. 8(2) as it read before 1981,

> "The Administrator may after notice to the owner, enter upon and take possession of so much of any land as may be required for the opening or construction of a public road .... "

The right to "enter upon and take possession of" the land

is, it is true, a right of expropriation, but it is a right of expropriation of the necessary road-rights, not of the <u>dominium</u> of the land. (Cf <u>Nel v Bornman</u> 1968 (1) SA 498 (T) at 501 F-G; and <u>Thom en 'n Ander v Moulder</u>, 1974 (4) SA 894 (A) at 905 C-D.) In other words, it is an expropriation of something in the nature of a road servitude: a <u>via publica</u> created by proclamation by lawful authority, <u>via</u> being "the right of passage over land belonging to another person for people, their animals and their vehicles" (<u>Shenker Bros. v Bester</u>, 1952 (3) SA 655 (C) at 659).

Coal deposits do, to be sure, form part of the land. But the question is whether the coal underlying a road on Groenfontein is land taken up by the road.

That question must be answered in the negative.

The reason is that a road is a surface feature: it runs on or over the surface of land. Cf Thom en 'n Ander v Moulder (supra) per RUMPFF CJ at 905 A:

> "Vir doeleindes van die Ordonnansie (dws die Padordonnansie 1957 (T)) is dit m.i. duidelik dat 'n pad 'n strook grond is wanneer dit die doel dien om een plek met 'n ander plek te verbind vir verkeersdoeleindes."

"Surface" as used in this context is to be understood, not in the narrow sense of "the mere plane surface" of the land (Cf Pountney v Clayton (1883) 11 QBD 820 (CA) at 839-840), but as including those portions of land which are taken up by road foundations, cuttings, tunnels and the like.

Under s. 5, the Administrator's powers are in respect of the surface. He does not, by the proclamation of a road, acquire any rights in or to the minerals in the land concerned, or

the power to control in any way the exercise of such rights by the holder of the mineral rights. The Administrator does not have the power to prohibit the undermining of public roads, nor does the Ordinance prohibit such undermining. Indeed, s. 86 of the Ordinance provides:

> "86 Where it becomes necessary in the interests of the public to deviate or reconstruct an existing public road owing to the fact that the ground has been undermined subsequent to the creation of the public road, the Administrator may instruct the mining company or other person responsible for such undermining to make safe such public road to the satisfaction of the Administrator, or to provide for the reconstruction of the old road or the construction of a new road at the expense of such person. Failing compliance with such instructions within a reasonable time, the Administrator may undertake the work and recover the cost from such person." (My underlining.)

Thus, a mining company may undermine a public road, but if

it does so in such a way that the road becomes unsafe it is obliged to make the road safe, or to bear the cost of doing so.

Another submission by Mr. Schreiner was that "land" in secs. 94 and 92 means the unit of land shown in the Deeds Registry, and not merely the land occupied by the road as shown in the Administrator's Notice. As I understand the submission, it means that, where for example the road traverses Portion 2 of Groenfontein, compensation is payable in respect of Portion 2, and not merely the land occupied by the road.

The submission is clearly untenable. That is not the meaning of the words used in the provisions in the Ordinance, and it would have the startling result, which the legislature could not have intended, that where a road

crosses a corner of a unit of land, compensation is payable in respect, not of the land occupied by the road, but of the whole unit.

My conclusion is that land in the context of s. 92 (and s. 94 where it is still applicable) means the surface of the land and does not include minerals under the surface. Consequently compensation is not payable in respect of adverse affection of the mineral rights. The result is that the appeal insofar as it relates to para. 2 of the order must fail.

That being so, the court is not called upon to consider the correctness of paragraph 3 of the order, which relates to "the so-called causation problem". (See the reported judgment at 595H to 598 J.) The "causation problem" does

not arise, because compensation is payable under s. 92(1) not in respect "of the land and/or any real right in respect of minerals adversely affected by the proclamation", but in respect "of the land encroached upon by such establishment, widening or deviation". To consider the correctness of paragraph 3 would, therefore, be an irrelevant academic exercise which could lead to no practical result.

The appeal is dismissed with costs, including the costs of two counsel.

H.C. NICHOLAS, A J A

CORBETT, J A)
NESTADT, J A) concur
VIVIER, J A)
BOSHOFF, A J A)