Case no. 152/90

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IN THE SUPREME COURT OF SOUTH FRICA

(APPELLATE DIVISION)

In the matter between:

WILLIAM DAVID FINK	First Appellant
NORMAN CYRIL FINK	Second Appellant
and	
BEDFORDVIEW TOWN COUNCIL	First Respondent
CHAIRMAN, NATIONAL TRANSPORT COMMISSION	Second Respondent
THE MINISTER OF TRANSPORT	Third Respondent
THE REGISTRAR OF DEEDS	Fourth Respondent
THE ADMINISTRATOR OF TRANSVAAL	Fifth Respondent

Coram: BOTHA, MILNE, F H GROSSKOPF JJA, NICHOLAS et HARMS AJJA

Heard:	Delivered:
23 September 1991.	22 NOVEMBER 1981

J U D G M E N T

F H GROSSKOPF JA:

The late William Fink ("the deceased") died on 1 March 1969. The deceased had been the registered owner since 1923 of Holding No 99, Geldenhuis Estate Small Holdings ("Holding 99") situated in the district of Germiston and measuring 9 morgen 326 square roods. During the deceased's lifetime the Administrator of Transvaal ("the fifth respondent") declared a public road over Holding 99 with a view to the construction of the proposed Johannesburg Eastern By-pass ("the Eastern By-pass"). The fifth respondent paid the deceased an agreed sum as compensation for the land taken up and the improvements affected by the proposed road.

After the deceased's death, and in terms of his will, Holding 99 was transferred in undivided shares to his two sons, the appellants. The Eastern By-pass was constructed during the early 1970's and opened to traffic by

about 1973 or 1974. The appellants remained the registered owners of the whole of Holding 99 until 4 October 1985, when the Registrar of Deeds ("the fourth respondent") registered portions 3, 4 and 5 of Holding 99 in the name of the National Transport Commission ("the NTC"). The chairman of the NTC is cited as the second respondent. The transfer was executed by the fourth respondent without the authority of the appellants, but pursuant to a certificate furnished to him under section 31(4)(a) of the Deeds Registries Act 47 of 1937. This certificate was to the effect that the Minister of Transport ("the third respondent") had "designated" portions 3, 4 and 5 in terms of section 3(2)(a) of the National Roads Act 54 of 1971 ("the 1971 National Roads Act") as land whereof the ownership vested in the NTC in accordance with the provisions of section 3(2)(b) of the 1971 National Roads Act. The NTC retained portion 3, being the land over which the road had been constructed, but transferred portions 4 and 5 forthwith to the Bedfordview

Town Council ("the first respondent") as those portions were no longer required for the purpose of the road.

The appellants, as applicants in the Court a quo, applied to the Witwatersrand Local Division for an order setting aside as null and void the designation of portions 4 and 5 by the third respondent, and for an order directing the fourth respondent to cancel the respective deeds of transfer in terms whereof portions 4 and 5 were transferred to the NTC and the first respondent. The application was dismissed by **Hartzenberg J**, but he granted the appellants leave to appeal to this Court.

A number of legal issues were raised on appeal, but before dealing with them I shall set out some of the factual background.

As early as 19 October 1953 the deceased was informed by the office of the fifth respondent that it was investigating the possibility of establishing the Eastern By-pass. The deceased was advised that "a servitude for road

purposes" would be required over Holding 99 and he was asked whether he had any objections thereto and what compensation he considered should be paid for the proposed servitude.

On 28 August 1957, and acting in terms of section 7(2)(b) of the Roads Ordinance 9 of 1933 (Transvaal), the fifth respondent by Administrator's Notice no 237 of 1957 ("the 1957 Proclamation") declared a public road on land which fell within the municipality of Bedfordview where there had been no road previously in existence. On 27 February 1959 the Governor-General under Government Notice no 31 of 1959, and acting in terms of section 4(1)(a) of the National Roads Act 42 of 1935 ("the 1935 National Roads Act"), declared the said public road to be a national road. This was the proposed Eastern By-pass which was to traverse Holding 99.

On 6 November 1961 the Director, Transvaal Roads Department ("the Roads Department"), informed the deceased by letter that it was intended to widen the road and that

more of the deceased's land might be required for road-making purposes. The Roads Department addressed a further letter dated 3 April 1963 to the deceased advising him that more land would indeed be taken up by the road and that certain improvements, details whereof were set forth in the letter, would be affected as a result of the proposed realignment of the Eastern By-pass. It was then estimated that an area of 4,258 morgen of the deceased's land ("the 4,258 morgen") would be taken up by the road. An engineer's sketch plan was annexed to the letter depicting the road and a traffic interchange on Holding 99. It was indicated on this plan how the deceased's property would be affected by the proposed road and traffic interchange. The deceased was requested in the letter to furnish the Roads Department with his claim for compensation in respect of the land to be taken up and the improvements to be affected by the road.

On 19 June 1963, and in terms of sections 3, 5(1)(c) and 5(2)(b) of the Roads Ordinance 22 of 1957

(Transvaal) ("the 1957 Roads Ordinance"), the fifth respondent under Administrator's Notice no 386 of 1963 ("the 1963 Proclamation") declared a public main road over land which included Holding 99. It is common cause that the 4,258 morgen which was mentioned in the correspondence was in fact proclaimed for road purposes under the 1963 Proclamation.

Further correspondence passed between the deceased and the Roads Department and the question of compensation was eventually settled between the parties. On 3 February 1965 the fifth respondent paid the deceased an amount of R55 832,00 in full and final settlement of his claim for compensation in respect of the 4,258 morgen and the improvements affected by the road. The compensation also included an amount of R4 800,00 claimed by the deceased for loss of income on his dairy business. It is common cause that this compensation was paid wholly from the National Road Fund ("the Fund") established in terms of section 5 of the 1935 National Roads Act.

On 18 March 1966 the State President, acting in

terms of section 4(1)(a) of the 1935 National Roads Act, declared the road proclaimed as a public road under the 1963 Proclamation to be a national road.

It was the firm intention of the fifth respondent up to 1967 to construct a traffic interchange on Holding 99, and it was for that reason that the 4,258 morgen was required. There was a subsequent change in the planning of the Eastern By-pass and on 25 August 1967 the NTC decided that the traffic interchange should be constructed elsewhere along the road. In the result only part of the 4,258 morgen which had been proclaimed for the road was in fact required for that purpose. The actual construction of the Eastern By-pass commenced during the early 1970's. This was after the death of the deceased and at a time when Holding 99 had already been transferred to the two appellants. Only the middle section of the 4,258 morgen of land was eventually used for the road. At that stage Holding 99 had not yet been subdivided and the 4,258 morgen could not be registered in

the deeds registry as a separate entity. It was only in 1983 that the Surveyor-General approved three diagrams depicting respectively portions 3, 4 and 5 as separate entities. These three portions are adjacent properties, and when regarded as a single unit they correspond substantially to the 4,258 morgen as far as locality, shape and size are concerned. It is common cause that there are slight discrepancies in size and shape, but counsel agreed that we should not concern ourselves with those small differences. Only portion 3, which corresponds to the middle section of the 4,258 morgen, was eventually used for the purpose of road construction. Portions 4 and 5 were part of the land initially required in connection with the road, but in the end no road construction took place on those two portions.

Despite the fact that compensation had been paid from the Fund on behalf of the NTC to the deceased for the 4,258 morgen which later comprised portions 3, 4 and 5, all of that land remained registered in the name of the

appellants as part of the original Holding 99. The Director-General, Transport, addressed a number of letters to the appellants during the period November 1984 to March 1985 notifying them of the third respondent's intention to designate portions 3, 4 and 5 in terms of section 3(2)(a) of the 1971 National Roads Act as land to which the provisions of section 3(2)(b) would apply. The actual designation was signed by the third respondent on 14 March 1985, and 1 May 1985 was determined as the date on which ownership of this land was to vest in the NTC. The appellants were duly notified of this designation on 28 March 1985. They were requested to forward their title deed to the department in order that the three portions could be registered in the name of the NTC, but the appellants failed to comply with this request. The fourth respondent consequently transferred portions 3, 4 and 5 to the NTC after a certificate confirming the designation had been furnished to him in terms of section 31(4)(a) of the Deeds Registries Act, 1937.

It is the appellants' case that the third respondent's designation of portions 4 and 5 in terms of section 3(2)(a) of the 1971 National Roads Act should be set aside as invalid; that the consequent transfer of portions 4 and 5, first to the NTC and then to the first respondent, should accordingly be cancelled; and that the appellants' deed of transfer should again reflect the appellants as the registered owners of portions 4 and 5. The appellants did not seek to attack the designation and transfer to the NTC of portion 3 in view of the fact that it was the portion over which the Eastern By-pass had been constructed. The appellants offered, upon cancellation of the deeds of transfer of portions 4 and 5 in the names of the NTC and the first respondent, to repay the second respondent the sum of R55 832,00 which had been paid as compensation to the deceased.

Section 3(2)(a)(i) and (ii) and section 3(2)(b) of the 1971 National Roads Act provided as follows at the time

of the designation in March 1985:

> "3(2) (a) The Minister may in writing designate as land to which the provisions of paragraph(b) shall apply, any land -
>
> (i) which was acquired for the purpose of or in connection with a national road before the commencement of this Act against compensation paid wholly from the fund; or
>
> (ii) of which the use was so acquired for that purpose against compensation so paid which in the opinion of the Minister represented the full value of the land for its owner at the time of the acquisition; or
>
> (iii) .....
>
> (b) The ownership in land so designated shall vest in the commission on a date fixed by the Minister and mentioned in the designation."

These provisions were introduced to enable the NTC, under certain circumstances, to become the owner of land paid for from the Fund before the commencement of the 1971 National Roads Act. Section 3(2)(a)(ii) deals specifically with the designation of land of which only "the use" was acquired for

the purpose of a national road, but where compensation representing the full value of such land was paid from the Fund. Where land which has been paid for from the Fund is no longer required for the purpose of a national road, as in the present case, the NTC can do nothing with such land unless it can acquire ownership thereof. The NTC is empowered by section 3(3)(a) of the 1971 National Roads Act to deal with or dispose of such land, or to use it for another purpose, but in order to do so, the NTC must first become owner of the property. The object of section 3(2)(a) is to make this possible, particularly in the case of land which is no longer required for the purpose of or in connection with a national road. I cannot, therefore, agree with the appellants' submission that the requirement of a national road purpose in section 3(2)(a) had to continue until the time of designation.

It is common cause that the fifth respondent, by means of the 1963 Proclamation, intended to acquire only "the

use" of the land and not the land itself, and that paragraph (a)(ii) of section 3(2), and not paragraph (a)(i), is therefore the appropriate provision; that if such use was in fact acquired it was acquired "before the commencement" of the 1971 National Roads Act; and that the compensation which was paid to the deceased was paid "wholly from the fund".

The appellants, however, contended that the designation in terms of section 3(2)(a)(ii) was invalid inasmuch as some of the jurisdictional facts were lacking or were not proved. The two main aspects which have to be considered in this regard are the following:

(a) Whether the use of the land was "acquired".

(b) Whether the third respondent formed the "opinion" that the compensation which had been paid represented "the full value of the land for its owner" at the time of the acquisition. The appellants submitted that the onus was on the respondents to prove that the third respondent actually formed such opinion.

(a) The acquisition of the use of the land:

It is necessary to determine at the outset what is meant by the expression "the use of the land", and then to decide what the fifth respondent had to do to "acquire" it. To acquire "the use of the land" for roads purposes is to acquire "something in the nature of a road servitude" (per Nicholas AJA in Apex Mines Ltd v Administrator, Transvaal 1988(3) SA 1(A) at 17 I/J), or "the necessary road-rights" (per Trollip J in Nel v Bornman 1968(1) SA 498(T) at 501F-H).

It was recognised in Transvaal Investment Company Ltd v Springs Municipality 1922 AD 337 at 341 that the word "acquire", when used in relation to fixed property, need not necessarily mean the acquisition of the dominium of the land, but may also be used in a wider sense so as to include the acquisition of a right to obtain the dominium. (Cf. Corondimas and Another v Badat 1946 AD 548 at 558). The word "acquire" is used in section 3(2)(a)(ii) of the 1971 National

Roads Act in relation to the use of the land. In my view that connotes the acquisition of a right in the nature of a road servitude, and not of the **dominium** of the land.

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

Section 4 of the 1957 Roads Ordinance provides that:

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

Upon proclamation of a public road the fifth respondent accordingly acquires the control of such road. In my opinion the fifth respondent, by acquiring the control of the public road, in effect acquires the use of the land. It was held by **Rumpff CJ** in **Thom en h Ander v Moulder** 1974(4) SA 894(A) that the proclamation of a public road was essentially an act

of expropriation of certain rights. The learned Chief Justice remarked as follows at 905 C-D:

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

The question considered by this Court in **Mathiba and Others v Moschke**, **supra**, (one of the cases referred to by the Chief Justice in the above passage) was whether the Government of the former South African Republic had a right to expropriate a certain area for the purpose of a "location". In deciding that question the Court held that although the word "expropriate" was not used in the relevant Volksraad Besluite the language thereof authorised an expropriation. In support of its conclusion the Court referred to the old Cape Roads Act of 1858 which likewise did not use the word "expropriate", but the term "to enter upon and take possession of land". However, the Court was not

concerned in that case with the exact moment when expropriation took place, but with the question whether the authorities had the necessary power to expropriate.

Section 8(2) of the 1957 Roads Ordinance, as it read before an amendment in 1972, also used the expression "to enter upon and take possession of ... land." Section 8(2) conferred the right upon the fifth respondent, after notice to the owner, to enter upon and take possession of so much of any land as might be required for the opening or construction of a public road, or for any purpose incidental thereto. It should be observed that section 8(2) did not oblige the fifth respondent to enter upon and take possession of the land; it merely provided that he "may" do so. In my opinion the fifth respondent's entry upon the land to take possession thereof was accordingly not a prerequisite to his acquisition of the use of the land. It seems to me that section 8(2) empowered the fifth respondent to give effect to his acquisition of the use of the land by allowing him to

enter upon and take possession of the land, for instance for the purpose of construction where the owner refused or failed to part with the use of the land which had been acquired by the fifth respondent. (Cf. **Nel v Bornman**, **supra**, 501 F-G.) I may add that there is no evidence to suggest that the deceased in the present case ever refused or failed to part with the use of the land which had been acquired by the fifth respondent over Holding 99.

In **Nel v Bornman**, **supra**, (the other case referred to by the learned Chief Justice in the passage quoted above) the Court found that the owner of the land had consented and agreed to the acquisition of the necessary road-rights over his farm prior to the publication of the fifth respondent's proclamation in the Provincial Gazette. The question which had to be decided in that case was when the owner's right of action for compensation had arisen and accrued. The Court found that the owner had waived compliance with the formalities as a prerequisite to the fifth respondent's

acquisition of the road-rights, and it was accordingly held that the owner's right to claim compensation had arisen and accrued before the actual proclamation of the road. It was not necessary for the Court in that case to decide whether the fifth respondent would otherwise have acquired the necessary road-rights upon proclamation of the public road.

The case of Apex Mines Ltd., supra, dealt with the question whether the holder of mineral rights was entitled to claim compensation under the 1957 Roads Ordinance arising out of the declaration of a public road over certain land. In the course of the judgment **Nicholas AJA** remarked as follows at 17 H-I:

> "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 dominium of the land. (Cf Nel v Bornman 1968(1) SA 498(T) at 501 F-G; and Thom en h Ander v Moulder 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 via publica created by proclamation by lawful authority, via being 'the right of passage over land belonging to another person for people, their

animals and their vehicles' (Shenker Bros v Bester 1952(3) SA 655(C) at 659)."

The Court in that case was considering what had been expropriated, and not what effect the proclamation had. The Court, however, referred to the above quoted passage in Thom's case where it was said that the proclamation was an act of expropriation.

I cannot conceive that the legislature intended that the actual expropriation would be effected by such an informal act as the entry upon the land by some official; or that the extent of the land expropriated would depend upon how much of the land had been taken by such official. In my judgment, therefore, the fifth respondent acquired the use of the land upon due proclamation of a public road, and it was not necessary for him to enter upon the land to acquire such use.

I am of the view that the evidence in any event justifies the conclusion that the fifth respondent entered

upon and took possession of the deceased's land. In January 1964 the Roads Department allowed the deceased to remove certain refrigeration equipment from the buildings affected by the proclaimed road. This permission suggests that the Roads Department had already acquired possession of the buildings at that stage. On 21 December 1964 the deceased wrote to the Roads Department and informed it that he had decided to accept the compensation which it had offered him. In the same letter the deceased also asked the department's permission to store some of his machinery in the buildings on the land. In my view the deceased thereby acknowledged that the fifth respondent had acquired the use of the land and had indeed taken possession thereof.

It should further be pointed out that the question of entering upon and taking possession of the land was never placed in issue by the appellants; it was the validity of the proclamation that was disputed by them. In the circumstances the fifth respondent cannot be blamed for not

setting out fully what steps he had taken to enter upon and take possession of the land. Fourie, who made an answering affidavit on behalf of the fifth respondent, stated as follows:

> "In soverre dit relevant mag wees bevestig ek dat die Vyfde Respondent, nadat 'n openbare pad oor gedeeltes 4 en 5 verklaar was op geen ander wyse met die grond beskryf as gedeeltes 4 en 5 gehandel het nie."

That statement was not made in answer to an allegation that the fifth respondent did not enter upon and take possession of the land, and cannot be interpreted as an admission to that effect. In my view Fourie was probably referring to road construction on portions 4 and 5.

Another argument raised by the appellants was that there was no valid proclamation of a public road in existence, while such a proclamation was a necessary prerequisite to the acquisition of the use of the land. The appellants contended that the requirements of section 3(2)(a)(ii) of the 1971 National Roads Act were accordingly

not properly complied with and that the designation in terms of that section was invalid.

The public road over Holding 99 was first declared under the 1957 Proclamation. Thereafter the Governor-General declared the road to be a national road in 1959. The 1957 Proclamation was subsequently superseded by the 1963 Proclamation, while the 1959 declaration of a national road was cancelled by the 1966 declaration of a national road. The appellants submitted that the 1966 declaration of a national road impliedly repealed the 1963 Proclamation of a public road, inasmuch as the same stretch of land could not be both a public road and a national road at one and the same time. In my view this argument is founded on the false premise that a national road is not a public road.

In support of his argument in this connection counsel for the appellants referred us to certain differences between the powers under the 1935 National Roads Act in respect of a national road and the powers under the 1957

Roads Ordinance in respect of a public road, for instance with regard to control, supervision, creation, closure and funding. There are such differences, but in my view that does not show that a national road is not also a public road. Both of them are roads and indeed public roads.

There is no provision in either the 1935 National Roads Act or the 1957 Roads Ordinance to suggest that the proclamation of a public road automatically becomes invalid upon the declaration of a national road, as is submitted by the appellants. If the declaration of a national road were to have such an invalidating effect upon the proclamation of a public road, it would follow that any acquisition of the use of the land on the strength of that proclamation would also become invalid. In my judgment the legislature could never have contemplated such a result.

The appellants attacked the validity of the proclamation on other grounds as well. A valid proclamation of a public road by the fifth respondent was indeed a

necessary prerequisite to the State President's declaration of a national road in terms of section 4(1)(a) of the 1935 National Roads Act, since only a public road could be declared to be a national road. A lawful and valid proclamation of a public road was also a necessary prerequisite to the acquisition of the use of the land.

The appellants submitted that there was no lawful and valid proclamation of a public road. They contended that the fifth respondent was not empowered by the 1957 Roads Ordinance to proclaim a public road which he did not want, merely to pave the way for a national road which he could not declare. According to the appellants there was no provision which permitted a joint use of powers by the State President and the fifth respondent so that together they could seek to achieve the result of a national road. The appellants even went so far as to suggest that the fifth respondent acted **in fraudem legis** by professing to use his statutory power for the purpose of proclaiming a public road, while in truth he

was only assisting the State President in declaring a national road. I do not agree with these submissions. Section 4(1)(a) of the 1935 National Roads Act empowered the State President to declare a national road on the recommendation of the NTC, "made after consultation with any administrator affected by such recommendation". The particular Administrator was, after all, responsible for the construction, reconstruction, repair and maintenance of such national road (section 10(1)(a) of the 1935 National Roads Act). In my view these and other provisions of the 1935 National Roads Act show that the legislature envisaged a close liaison and co-operation between the fifth respondent and the NTC, on whose recommendation the State President declared national roads.

Mr **Wulfsohn**, who appeared for the appellants, was obliged to concede that on his argument the State President could never declare a national road over land where no road previously existed, since on his argument the fifth

respondent was not empowered to proclaim the necessary public road over that land in order to pave the way for the proposed national road. It is inconceivable in my opinion that the legislature could ever have contemplated such an absurd result. In my judgment the 1963 Proclamation was lawful and valid. The fifth respondent thereby duly proclaimed a public road over land where no road was previously in existence for the purpose of or in connection with a national road.

I therefore hold that there was a valid acquisition of the use of the land for the purpose of a national road, as required by section 3(2)(a)(ii) of the 1971 National Roads Act for a proper designation by the third respondent.

(b) <u>The question of onus, and whether the third respondent formed the opinion that the compensation represented the full value of the land for its owner</u>:

The appellants submitted that they had owned

portions 4 and 5; that the third respondent deprived them of their ownership by way of designation and subsequent transfer; that such conduct was **prima facie** wrongful; and that the **onus** was therefore on the respondents to justify the designation and transfer.

The appellants relied in the first instance on the principle enunciated in **Graham v Ridley** 1931 TPD 476 at 479, where **Greenberg J** held that proof that the plaintiff is the owner of property and that the defendant is in possession thereof entitles the plaintiff to an order for ejectment. The **onus** would then be on the defendant to justify his possession. (See also **Chetty v Naidoo** 1974(3) SA 13(A)). In my view this principle does not apply to the present case where the issue is the ownership of portions 4 and 5. The appellants did not approach the Court as the registered owners of the property. The ownership no longer vested in the appellants, but in the first respondent.

The appellants further sought to draw an analogy

between those cases where a person has been deprived of his liberty, for instance by an arrest, and the present case where the appellants were allegedly "deprived" of their property. The appellants contended that where there is an intrusion upon a person's liberty against such person's wishes, and the right so to intrude is challenged, such intrusion is **prima facie** wrongful, and must be justified. Reliance was placed, **inter alia**, on **Minister of Law and Order and Others v Hurley and Another** 1986(3) SA 568(A) at 589 E-F; **Minister van Wet en Orde v Matshoba** 1990(1) SA 280(A) at 284 E-I, 295F-296D; **During NO v Boesak and Another** 1990(3) SA 661(A) at 663 G, 679G. It was held in **During NO v Boesak**, **supra**, at 663 G that:

> "where the lawfulness of an arrest is in issue, the onus is on the functionary to prove not only that he held the requisite opinion but also that it was properly formed."

The appellants submitted that the **onus** was, likewise, on the respondents in the present case to justify the alleged

taking of their property. This analogy is unsound. There is nothing here which is **prima facie** unlawful. The passing of ownership of property in these circumstances is in any event not comparable to the deprivation of a person's liberty, and the legal principles applicable to the latter do not apply to the former.

It should also be borne in mind that the appellants were informed in advance of the proposed designation, but that they took no steps to try and prevent it. The appellants were subsequently notified of the third respondent's designation, but they waited for another two and a half years before bringing their application.

The appellants also sought to rely on the case of **Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, S A Polisie, Noord-Transvaal** 1972(1) SA 376 (A) at 394 A-H. The police in that case seized and attached the appellant's machines. The Court held that the **onus** was on the police (the respondent) to prove justification for the seizure or

attachment that would otherwise be wrongful. However, the court went on to find that the issue to and possession by the police of a warrant to search for and seize the machines would legally justify their action and would ordinarily serve to discharge "the onus of proof initially resting upon the respondent". In such a case the warrant should first be set aside. In my view the same principle applies by analogy to the present case where the change of ownership and consequent transfer of the property were authorised by the designation signed by the third respondent, which was prima facie lawful. In applying to set aside the designation the appellants bear the onus. In my view, therefore, there was no onus upon the third respondent to prove that he formed the requisite opinion.

Section 3(2)(a)(ii) of the 1971 National Roads Act provides that the third respondent must be of "the opinion" that the compensation paid "represented the full value of the land for its owner at the time of the acquisition". The

appellants conceded that the opinion required of the third respondent is not objectively justiciable, but submitted that there was no evidence to show that the third respondent did have the requisite opinion. As pointed out above, the third respondent did not bear the onus in this regard. The appellants are faced with the further difficulty that this point was never foreshadowed in their application. The third respondent was accordingly not called upon to state under oath that he formed such opinion.

In the result I am satisfied that the Court a quo was correct in dismissing the application.

The appeal is dismissed with costs, which costs are to include the costs of two counsel.

F H GROSSKOPF JA

BOTHA JA
MILNE JA Concur.
HARMS AJA

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APPELLATE DIVISION

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NORMAN CYRIL FINK	Second Appellant

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CHAIRMAN, NATIONAL TRANSPORT COMMISSION	Second Respondent
THE MINISTER OF TRANSPORT	Third Respondent
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THE ADMINISTRATOR OF TRANSVAAL	Fifth Respondent

CORAM: BOTHA, MILNE, F H GROSSKOPF JJA,
NICHOLAS et HARMS AJJA

HEARD: 23 September 1991

DELIVERED: 22 November 1991

J U D G M E N T

NICHOLAS, AJA.....

NICHOLAS AJA:

I have read in draft the judgment prepared by F H GROSSKOPF JA ("the main judgment"), and I agree with the conclusion and, except in regard to the matters now to be discussed, with the reasons therefor.

To the extent that it is relevant for present purposes, Administrator's Notice No 386 dated 19 June 1963 read as follows:

> "OPENING - OPENBARE GROOTPAD, DISTRIKTE GERMISTON EN KEMPTON PARK
> Dit word hiermee vir algemene inligting bekendgemaak dat die Administrateur, na ondersoek, goedgekeur het dat 'n openbare grootpad van afwisselende breedtes, met aansluitings oor Geldenhuis Kleinhoewes, en die dorpsgebiede van Oriel en Wychwood, distrikte Germiston en Kempton Park, soos aangetoon op bygaande sketsplan en skedule van ko-ordinate aangetoon word, ingevolge paragraaf (b) van subartikel (2) en paragraaf (c) van subartikel (1) van artikel VYF en artikel DRIE van die Padordonnansie, No. 22 van 1957 sal bestaan."

In issuing this notice, the Administrator was acting in

collaboration with the National Transport Commission with the object that the public main road there referred to should be declared a national road under s.4(1)(a) of the **National Roads Act**, 42 of 1935.

There was uncontradicted evidence that the sketch plan referred to in the notice included the land, 4,258 morgen in extent, which came to be described as portions 3, 4 and 5 of Holding No 99 Geldenhuis Estate Smallholdings.

After the publication of the notice there followed correspondence between the Transvaal Provincial Administration ("the TPA") and the late Mr W Fink ("the deceased") culminating in an offer by the TPA, dated 23 November 1964 and made with the approval of the National Transportation Commission, to pay to the deceased an amount of R 51 032,00 as compensation, plus R4 800,00 as equitable relief (that is, R55 832,00 in all), in full and

final settlement of his claim for compensation for the 4,258 morgen of his property with improvements thereon to be taken up by the road. The deceased accepted the offer by letter dated 21 December 1964 in which he stated:-

> "The National Transport Commission approved that I be paid the sum of R55 832,00 in full and final settlement for compensation of 4.258 morgen of my land which will be known as the JH'burg Eastern bypass, which I accept."

The amount of R55 832,00 was duly paid to the deceased on 3 February 1965.

Portions 4 and 5 were not in the event used in the construction of the road, which was built only over portion 3. A decision was taken on 25 August 1967 that the traffic interchange which it had been planned would be built on portions 4 and 5, would be built elsewhere.

One of the questions for decision in the appeal, is whether portions 4 and 5 constituted land of which the

use was acquired for the purpose of a national road within the meaning of s.3(2)(a)(ii) of the **National Roads Act** 54 of 1971.(Section 3(2) is quoted on p.12 of the main judgment and it is unnecessary to repeat it here.)

On the facts of the case, such use could have been acquired only by the expropriation from the deceased by the Administrator of Transvaal of "something in the nature of a road servitude." (cf. **Apex Mines Ltd v Administrator, Transvaal** 1988(3) SA 1 (A) at 17 H-J). My learned colleague considers that the Administrator acquired such right by virtue of the declaration of a public road in Administrator's Notice No 386. I respectfully disagree.

The imposition on land of a burden in the nature of a servitude constitutes a drastic interference with the rights of the owner of the land. It is a well-established principle that a statute is not presumed to take away existing rights unless that clearly appears from its

terms. (see L C Steyn, **Die Uitleg van Wette** 5th ed. pp 103-105). In **Rigg v South African Railways and Harbours** 1958(4) SA 339 (A) STEYN JA said at 349B:-

> ".....dit kan nie veronderstel word nie dat die Wetgewer, al geld dit ook die onteieningsbevoegdheid van die Staat self in die openbare belang, groter of meer beswarende inbreuk op gevestigde regte wil doen of magtig as wat met duidelikheid uit sy woorde blyk nie...."

The right of an owner to enjoy the full use of his property is not to be held to have been impaired save by express words or plain implication. Cf **Wellworths Bazaars Ltd v Chandler's Ltd and Another** 1947(2) SA 37(A) at 43. In **Belinco (Pty) Ltd v Bellville Municipality and Another** 1970(4) SA 589(A), HOLMES JA said at 597 C that he did not consider that an implication could be said to be plain "if it has to be astutely winkled from contextual crevices."

S.5(1) of the **Roads Ordinance** 1957 as it was originally enacted 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;"

(By definition a "main road" means a public road declared a main road in terms of sec 5. In this case there was no road previously in existence.) The declaration of a public road may have the effect of trenching on existing rights under specific provisions of the Ordinance (see secs 22, 23, 34, 37, 71 and 74), but there is nothing in sec 5 to suggest, even remotely, that a declaration of a public road or a main road shall have the effect **per se** of imposing road servitudes on the land affected thereby.

I do not think, **pace** F H GROSSKOPF JA, that this can be implied from s.4, which provides -

> "4. All public roads within the Province shall be under the control and supervision of the Administrator."

"Roads" in the context of this section must mean existing roads. The Shorter Oxford English Dictionary gives as the relevant meanings of **control**, as a substantive, "1. The fact of controlling, or of checking and directing action....", and as a verb, "3. To exercise restraint or direction upon the free action of...." The meaning of **supervision** is given as "The action or function of supervising; oversight, superintendence." The words "control" and "supervision" are appropriate words to use in regard to things which are **in esse**, but would not be apt in connection with things not yet in existence but merely in contemplation. Moreover, a power to control and supervise roads does not in itself imply the possession

of real rights over the land traversed thereby. Compare a direction that "The school shall be under the control and supervision of the headmaster."

Usually (if not invariably) statutes which authorize expropriation make provision for the giving of notice to the person to be expropriated. Indeed, it is repugnant to fundamental ideas of fairness that a person should be deprived of proprietary rights by an administrative act without notice. Thus, s.7 of the **Expropriation Act** 55 of 1965 provides that where it is decided to expropriate any property in terms of s.2 of the Act, an appropriate notice shall be served upon the owner, which shall contain a clear and full description of the property in question, and which shall state the date of expropriation. The absence of any provision for the giving of notice is a strong indication against a legislative intention to authorize expropriation.

There is nothing in s.5 which requires the giving of notice to persons whose rights of ownership may be affected by the declaration of a public road. As originally enacted, sec.5 did not even require that the Administrator's Notice should contain information regarding the course of the road declared or the land affected. This became a requisite only upon the insertion of a new section 5A by Ordinance No 7 of 1974, which provided:

> "5A (1) Where, in terms of any of the provisions of this Ordinance, the Administrator is required to issue a notice for the purpose of declaring -
>
> (a) that a public road or any deviation of a public road shall exist on any land; or
>
> (b) that the width of the road reserve of a public road shall be reduced or increased,
>
> such notice shall, subject to provisions of subsections (2) and (3), contain such information, whether by way of a sketch plan or otherwise, as the Administrator may deem sufficient to indicate the general direction and situation of any such road or of any such deviation or the extent of any such reduction or increase and where such reduction or increase

applies.

(2) No notice referred to in subsection (1) shall be issued by the Administrator unless he is satisfied that the land taken up by the public road or the deviation or the reduction or increase concerned, is shown on a plan which is available for inspection by any interested person or that such land has been demarcated by the erection of beacons or other suitable means.

(3) ....."

In **Thom en h Ander v Moulder** 1974(4) SA 894(A)

RUMPFF CJ said at 905 C:-

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

This **dictum** is with respect not ideally clear, but I do not think that it is to be understood as laying down that a declaration by the Administrator of a public road over the property of a private person constitutes an act of expropriation **per se**. There was no occasion to state such a principle, and it does not appear to have been

addressed in argument. The question for decision in **Thom's** case was this:

> "....of die Administrateur die bevoegdheid gehad het om, in 'n geval soos die onderhawige, 'n openbare pad te verklaar wat twee plekke verbind oor 'n stuk grond waarop daar reeds 'n pad bestaan wat daardie twee plekke verbind, veral wanneer die verklaarde pad en die bestaande pad die twee plekke onmiddellik verbind." (See p.905 B-C)

Nel v Bornman 1968(1) SA 498 (T), to which the learned Chief Justice referred with apparent approval, was a judgment by TROLLIP J, who as a judge of appeal was to concur in RUMPFF CJ's judgment in **Thom en 'n Ander v Moulder.** TROLLIP J said at 501 F-G:-

> "Sec 8(2) (sc. of the 1957 **Roads Ordinance**) vests the power in the Administrator to expropriate the necessary road-rights from the owner who refuses or fails to part with them. The right to "enter upon and take possession of" the land is a right of expropriation in such circumstances. (See **Mathiba and Others v Moschke**, 1920 A.D. 354 at p. 363)..."

"The necessary road-rights" were what RUMPFF, CJ referred to as "sekere regte." In the context, RUMPFF CJ could not, in the **dictum** which is quoted above, have intended to lay down a rule that the issue of a notice by the Administrator declaring that a main road shall exist constituted **ipso facto** an expropriation of the necessary road-rights.

For these reasons I respectfully disagree with the conclusion at p.21 of the main judgment that the Administrator "acquired the use of the land upon due proclamation of a public road, and without necessarily having entered upon the land."

As it read in 1963, Sec 8(2) of the 1957 Roads Ordinance provided -

> "8.(2) 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, or for any purpose incidental to the discharge of the

> duties or powers imposed or conferred in this Ordinance in respect of such road."

The passage in **Mathiba and Others v Moschke** 1920 AD 354 at p.363, to which TROLLIP J referred, reads as follows:

> "No doubt the word "expropriate" is not used in either of these (Besluite): but that is not essential if the language of the Legislature in effect authorizes the expropriation. Thus neither in the Cape Roads Act No 9 of 1858, nor in the Cape Railway Act No 19 of 1874 which incorporated the powers under the former Act, is the word "expropriate" used: the terms are "to take land," "to enter upon and take possession of land," and it was held in **Grimbeek v The Colonial Government** (17 S.C. 200) that the taking of land under the said Railway Act was an expropriation and that upon such expropriation the land became vested in the Government."

(See also **Apex Mines Ltd v Administrator, Transvaal (supra)** at 17.)

It was contended on behalf of the appellants that, as later events showed, portions 4 and 5 were not required for the opening or construction of a public road,

and that the Administrator had not entered upon and taken possession of portions 4 and 5 before the decision of 25 August 1967. Consequently, so it was argued, those portions had not been expropriated, with the result that their use had not been acquired within the meaning of sec 3(2)(a)(ii) of the 1971 **National Roads Act.**

This contention did not form part of the case of the applicants as formulated in their affidavits. Nor does it appear from the judgment of HARTZENBERG J that it was raised in the Court **a quo.** It is essentially counsel's point, raised for the first time on appeal. Its only basis is a statement in the Administrator's answering affidavit, which was deposed to by Mr J H Fourie, a director in the service of the TPA. He said:-

> "19. Insoverre dit relevant mag wees bevestig ek dat die Vyfde Respondent, (sc. die Administrateur) nadat 'n openbare pad oor gedeeltes 4 en 5 verklaar was, op geen ander wyse met die grond beskryf as gedeeltes 4 en 5 gehandel het nie."

There is no context from which it can be inferred that Fourie's mind was directed to the question whether the Administrator entered upon and took possession of portions 4 and 5. The statement did not arise out of anything contained in the applicants' affidavits, and it was apparently not regarded by them as being relevant, since in the replying affidavit Mr Fink said only:-

> "3.2.9. **Ad Paragraph 19:** The contents of this paragraph are noted."

Consequently I do not think that Fourie's statement in para 19 can bear the weight which it is now sought to attach to it. The deceased, by his conduct in accepting payment of R55 832,00 in full settlement for compensation of 4.258 morgen of his land for the Johannesburg Eastern By-pass, admitted that the TPA had acquired rights to use that land. It is vain to argue, more than 20 years later, and on the strength only of Fourie's statement, that the

deceased's admission was erroneously made.

I accordingly concur in the order dismissing the appeal with costs, including the costs of two counsel.

H C NICHOLAS, AJA