Case No: 338/92
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NIGO MPISI Appellant

and

GRANT TREBBLE Respondent

SMALBERGER, JA:-

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CORAM: HOEXTER, BOTHA, SMALBERGER, EKSTEEN, JJA, et HARMS, AJA

HEARD: 16 NOVEMBER 1993

DELIVERED: 30 NOVEMBER 1993

J U D G M E N T

SMALBERGER, JA:-

In January 1988 the appellant erected a wood and iron structure on property, in the Inanda district in Natal, belonging to Effingham Quarries (Pty) Ltd ("the owner"). The structure was built from materials purchased by him and was occupied as a dwelling by himself and his family. I shall refer to it, without

intending to do it any injustice, as "the shack". The appellant had no rights in or to the property in question, nor did he have the consent or permission of the owner to erect the shack. There were a number of other families living on the property in similar circumstances. All the persons living there (including the appellant and his family) were what are colloquially known as "squatters".

In terms of a written power of attorney dated 24 June 1988 the owner authorised the respondent to give the appellant and the other squatters notice to vacate the property and, if necessary, to take whatever steps were required physically to remove them and their structures from the property. On 14 July 1988 the respondent gave the appellant written notice, apparently with the provisions of sec 3B of the Prevention of Illegal Squatting Act 52 of 1951 ("the Act") in mind, to:

"(1) Demolish the dwelling occupied by you;

(2) Remove all building material from the property;

(3) Vacate the property together with all persons claiming occupation through you."

The appellant failed to comply with the notice. This resulted in the shack being demolished at the instance of the respondent on 16 August 1988. A meeting of squatters was subsequently held to discuss their position on the property. The appellant was informed at the meeting by an official of the Natal Provincial Administration that he could rebuild the shack as agreement had been reached with the owner in this regard (presumably as a temporary measure). He proceeded to do so using the same materials as before. On 26 August 1988 the respondent again caused the (reconstructed) shack to be broken down. Thereafter the constituent materials and the contents of the shack

were set alight and destroyed. (The structures and possessions of most of the other squatters suffered a similar fate.) The facts which have been set out above are either common cause or not in dispute for the purposes of the present appeal.

Consequent upon the destruction of his property the appellant instituted action against the respondent in the Verulam magistrate's court for damages in the sum of Rl 631-66. The respondent raised a special plea that the court lacked jurisdiction to entertain the appellant's action by virtue of the provisions of sec 3B(4)(a) of the Act. He also put the appellant to the proof of the damages claimed by him.

The trial magistrate, after hearing evidence, upheld the respondent's special plea and dismissed the appellant's claim with costs. The appellant noted an appeal to the Natal Provincial Division. That court

(BOOYSEN, J, with whom MAGID, J, concurred) held that sec 3B of the Act provided no statutory justification for the burning and destruction of the contents of the shack and that the court's jurisdiction was not ousted in respect of any claim arising therefrom. The appellant was accordingly entitled to recover the value of so much of the contents as belonged to him. The court was divided on the question of whether or not the burning and destruction of the materials comprising the shack was authorised by sec 3B. It held, however, that it was unnecessary to decide the point as the appellant had failed to prove that he had suffered any damages in consequence thereof. In this respect it held that the appellant had not established (a) that the shack was a movable and therefore his property, and (b) what the value was of the materials after demolition of the shack and before their destruction. In the result it allowed the appellant's appeal in part, with costs,

and altered the magistrate's judgment to one for the appellant in the sum of R571-07 with costs. The judgment of the court a quo is reported - see Mpisi v Trebble 1992(4) SA 100(N) ("the judgment").

The court a quo refused leave to appeal, but the appellant was subsequently granted the required leave by this Court to appeal against the disallowance by the court a quo of part of his claim. Heads of argument were filed by the respondent, but there was no appearance on his behalf at the hearing of the appeal.

Three issues arise in the appeal. They are (1) the proper interpretation of sec 3B(l)(a) read with sec 3B(4) (a) of the Act, and more particularly the meaning of the word "demolish"; (2) the nature of the shack i e whether it was a movable belonging to the appellant or a permanent structure adhering to the property of the owner; and (3) whether the appellant proved the quantum of his loss consequent upon the

destruction of the shack. I shall deal with each issue seriatim.

Sec 3B(l)(a) of the Act provides:

"(1) Notwithstanding the provisions of any law to the contrary -

(a) but subject to any law under which he is compelled to demolish or remove any building or structure, the owner of land may without an order of court demolish any building or structure erected or occupied on the land without his consent, and remove the material from the land."

In terms of sec 3B(4)(a) of the Act (as it read at the relevant time):

"It shall not be competent for any person to ask for any order, judgment or other relief in any civil proceedings of whatever nature in any court that are founded on the demolition or intended demolition or the prevention of the demolition under this section of any building or structure, or on the removal or intended removal or the prevention of the removal of any material or contents thereof from the land on which the building or structure was or is situated, and it shall not be competent for any court to grant or give such order, judgment or other relief, unless such person first satisfies the court on a

> balance of probabilities that he has a title or right to the land on which the building or structure was or is situated, by virtue of which right he may lawfully occupy the land." ("the ouster provision")

As appears from its wording, the ouster provision only excludes the jurisdiction of a court in respect of civil proceedings founded on the demolition of a building or structure (or the removal of any material or contents thereof) "under this section" i e provided such demolition or removal is authorised by sec 3B(1), it being the only relevant provision (see Nqqulunga and Another v Minister of Law and Order 1983(2) SA 696(N) at 698G; Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568(A) at 584D-I, 586B-F). Accordingly, if the destruction of the appellant's shack at the instance of the respondent was not permitted by that section, the ouster provision would not operate as a bar to the appellant's action. Whether or not the respondent was entitled to act as he

did depends, having regard to the facts of the present matter, upon the proper meaning to be ascribed to the word "demolish" in sec 3B(l)(a).

Before proceeding further in this regard it would be appropriate to say something about the relevant canons of statutory construction which fall to be considered and applied. The primary rule of statutory interpretation is to arrive at the intention of the Legislature having regard to the ordinary, grammatical meaning of the words of the enactment under consideration within their contextual setting. The mischief at which the Act aims is the unlawful occupation of land or buildings (Vena and Another v George Municipality 1987(4) SA 29(C) at 50J). While it is not unnatural to feel sympathetic towards a landowner who has squatters living on his land against his will, such landowner does not have the right to take the law into his own hands. It is a fundamental principle that

he may only act in a manner, and within the limits, authorised by law, be it the common law or statute. In the words of DIEMONT, J, in Fredericks and Another v Stellenbosch Divisional Council 1977(3) SA 113(C) at 118D, in matters relating to the eviction of squatters "the Supreme Court should state firmly and clearly that the law must be obeyed to the letter". The fact that a squatter is in unlawful occupation of another's land cannot per se deprive him of his rights in movable property he has brought onto such land. Nor can his possession be disturbed without the necessary legal authority to do so. In this respect MILNE, JA, said the following in George Municipality v Vena and Another 1989(2) SA 263(A) at 271E-G:

> "The right of any person in possession of property, whether movable or immovable, not to be disturbed in his possession except by legal process, is one recognised by most civilised systems of law. In America, for example, it is guaranteed by the Fourteenth Amendment to the Constitution. It is also a fundamental principle in our law. This

> ordinary principle of law may, however, be altered by Parliament, which may confer a right to act without due process of law. Such a right is in the words of WILLIAMSON,
> J, (as he then was) '..... one which obviously must be conferred in clear language . . . . ' - Sithole v Native Resettlement Board 1959(4) SA 115(W) at 117D."

MILNE, JA, went on to say (at 272D-E) that :

> " (A) section which empowers any owner of any land without due process of law to demolish any building, occupied or unoccupied, which has been erected or occupied without his consent must be narrowly construed, and construed in a way which
>
> > '.... gives rise to the least deprivation of the citizen's right subject to effect being given to the express intention of the Legislature'
>
> S v Tayob 1962(3) SA 421(T) at 423C

A proper application of these principles would require, in the event of any ambiguity, that the word "demolish" in sec 38(1) (a) be construed in favour of the person whose rights have been affected or who has suffered loss.

The Shorter Oxford English Dictionary defines the word "demolish" as "to destroy by disintegration of the fabric of; to pull or throw down, reduce to ruin". Black's Law Dictionary (5th Ed) gives its meaning as "to throw or pull down; raze, to destroy the fabrication of; to pull to pieces; hence to ruin or destroy". Webster's Third New International Dictionary speaks of "to pull or tear down (as a building)" as well as "to do away with : put an end to : destroy". (It would seem, from the example given, that in the latter respect the word is used in a non-physical sense e g to demolish an argument.) From these definitions it is apparent that "demolish" can have both a wider meaning (to destroy) and a narrower meaning (to pull or tear down) . The fact that the word can be construed in more than one way gives rise to ambiguity. In order to resolve such ambiguity, and to determine which of the meanings the Legislature had in mind, regard may be had to the

Afrikaans version of the Act (Peter v Peter and Others 1959(2) SA 347(A) at 350D; Steyn: Die Uitleg van Wette : 5th Ed at 142).

The Afrikaans text uses the words "sloop" and "sloping" for "demolish" and "demolition". The meaning of "sloop" according to HAT is "afbreek"; uitmekaar haal", while the Verklarende Afrikaanse Woordeboek of Kritzinger and Labuschagne (7th Ed) gives its meaning as "met die grond gelyk maak, afbreek, sleg; uitmekaar haal, aftakel; uitput, ondermyn." Neither of these definitions embraces the notion of "destruction" (vernietiging). As the two texts are capable of reconciliation by giving "demolish" its narrower meaning, it is that meaning which should prevail, there being no contextual considerations necessarily indicating the contrary. (See New Union Goldfields Ltd v Commissioner for Inland Revenue 1950(3) SA 392(A) at 406G-H: Mphosi v Central Board for Co-

operative Insurance Ltd 1974(4) SA 633(A) at 643E-F.) The context of sec 3B(l)(a) in fact supports such approach. It speaks of "demolish any building or structure .... and remove the material from the land". The use of the conjunctive "and" necessarily implies that the Legislature had in mind that after demolition there would be material capable of removal, which signifies that "demolition" was not intended to mean "destruction". The narrower meaning of "demolish" is also consonant with the need for a restrictive interpretation in accordance with the principles enunciated earlier.

On a proper interpretation of sec 3B(l)(a) the respondent was therefore only entitled to demolish the appellant's shack in the sense of pulling or tearing it down. That would require the use of such force and means as would be reasonable in the circumstances. The pulling or tearing down would have to be done without

causing any greater damage to the constituent materials of the building or structure than was reasonably necessary for, or incidental to, that purpose. The right to demolish conferred by the section relates to a building or structure and does not contemplate or sanction wanton or unnecessary damage to or destruction of its fabric. It did not, in casu, entitle the respondent, after pulling the shack down, to burn its component materials. The respondent's conduct did not constitute "demolition under this section" within the meaning of that phrase in the ouster provision. The court's jurisdiction was therefore not ousted and it was not precluded from entertaining the appellant's action for damages against the respondent arising from the destruction of the shack.

The trial magistrate held that the words "remove the material from the land" in sec 3B(l)(a) authorised the burning, after demolition, of the

materials comprising the shack. His decision on this basis was, quite correctly, not supported by the respondent's counsel in the court below (see the judgment at 102I). Nor was the point again raised in the respondent's heads of argument. In view of the conclusion to which I have come it is unnecessary to consider the meaning of those words and what they permit.

The second issue (whether the shack was a movable or permanent structure) can be disposed of briefly. A perusal of the pleadings and the record of evidence makes it abundantly clear that this issue was never properly raised on the pleadings or at the trial. The matter appears to have proceeded on the assumption that the shack belonged to the appellant. The issue surfaced for the first time on appeal in the court a quo. Notwithstanding this I shall assume, in favour of the respondent, that it was, and still is, open to him

to raise it.

The court a quo pointed out that it was "incumbent upon [the appellant] to prove that the structure was his property". It held that "nowhere does he allege that the structure was a movable"; that "prima facie he built it as a permanent dwelling"; and that while the intention of the builder of a structure was often decisive "there was no evidence of what that intention was" (see the judgment at 103G-I). These findings are not justified. The whole tenor of the appellant's case was that the shack was a movable structure that belonged to him. The relatively flimsy nature of its constituent materials, the apparent ease with which it was demolished, re-erected very soon thereafter and then demolished again point to the shack being no more than a temporary, movable structure which did not adhere to the soil. It is, furthermore, clear from the evidence that efforts were being made to find

alternative land for the appellant and the other squatters on which to erect their structures. This must have been known to the appellant. He could therefore never have believed or intended that his sojourn on the owner's property would be anything other than temporary. On the probabilities the shack was not erected by the appellant with any intention of permanency, nor was it attached to the land in such a manner that it can be said to have acceded to it (cf Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council 1961(2) SA 669(A) at 677H-678C).

The third issue relates to the proof of the appellant's damages arising from the destruction of the materials of the (demolished) shack. The appellant testified that he purchased masonite, flat-iron and windows for the erection of the shack in January 1988. The total cost involved was R950-00. His evidence in this respect was not challenged. The amount of R950-00

can therefore be accepted as representing the fair and reasonable market value of those items in January 1988. The appellant further testified (taking his evidence in its proper context) that the reasonable value of these items prior to the demolition of the shack on 26 August 1988, was the same amount of R950-00. This evidence was also allowed to pass unchallenged. Nor was the competency of the appellant to give evidence to establish the value of his own property ever disputed (cf Bondcrete (Pty) Ltd v City View Investments (Pty) Ltd 1969(1) SA 134(N) at 136A-G).

The appellant was not present when the shack was demolished and the materials and contents set alight. It appears from the evidence that the burning followed almost immediately upon the demolition. The appellant stated at the trial that on his return to the site later that day "I only saw the ashes and the planks had been charred". When asked under cross-examination

what had happened to the flat-iron he replied "It was burnt" . He went on to explain that by this he meant to convey that it was buckled. The whole tenor of his evidence was that after the fire there was nothing left that had any residual value. Again, no specific challenge was directed at his evidence in this regard.

The attitude taken up by the respondent on the issue of damages was that the appellant had failed to prove what the value was of the materials after the demolition of the shack. This approach proceeded on the premise that the respondent was lawfully entitled to demolish the shack and that the appellant (assuming he had a valid claim) could only claim the value of what remained after demolition and before burning. The court a quo upheld this line of argument (see the judgment at 103I-104E). It accordingly found that the appellant had failed to prove his damages.

Mr Nicholson, for the appellant, contended

that it was inappropriate to distinguish between the demolition and the subsequent burning. There was unrefuted evidence of certain remarks made by the respondent which suggest that before demolition commenced his aim was the destruction, not merely the demolition, of the illegal structures on the property. Thus, argued Mr Nicholson, the demolition and burning was in effect a single unlawful transaction effected with intent to destroy the squatters' property. It was as if their structures had been doused with petrol and set alight. It was entirely artificial to seek to divide the events into two distinct stages, the one lawful and the other not. The appellant was therefore required to prove no more than the value of the materials before the demolition and destruction of the shack.

The argument is an attractive one bearing in mind the obvious difficulties which might confront

someone in the appellant's position in attempting to prove the value of materials after demolition. Unlawful conduct such as that of the respondent should not, after all, be allowed to stand in the way of just compensation to those affected by it. The wrongdoer cannot be allowed to reap the benefit of his own wrong. It is, however, unnecessary to decide whether Mr Nicholson's argument is correct in principle. I am prepared to assume, in favour of the respondent, that the appellant was only entitled to be compensated for the value of the materials after the demolition of the shack. In my view the appellant has succeeded in establishing such value.

I have already mentioned that the appellant was not present when the shack was demolished and the remains set alight. He was therefore unable to testify specifically to the condition of the materials immediately after demolition or to assess their value.

Nor was it possible for him to adduce any other evidence in this regard bearing in mind that the burning followed almost immediately upon the demolition. On a realistic approach the appellant placed whatever evidence was available to him on the damages issue before the court. We are bound to arrive at an assessment of damages on such evidence. In this respect the following dictum in Hersman v Shapiro & Co 1926 TPD 367 at 379/80, which has been followed and applied in this Court, is apposite:

> "(I)f it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it:."

(See Esso Standard SA (Pty) Ltd v Katz 1981(1) SA 964(A)

at 970F; Minister of Community Development and Another v Koch 1991(3) SA 751(A) at 764F-I.)

I turn now to consider the evidence before the trial court. There is the unchallenged and acceptable evidence of the appellant that he paid R950-00 for the masonite, flat-iron and windows in January 1988. They were destroyed some seven months later. It is not unrealistic to accept that they would have retained their value despite that lapse of time and the earlier demolition. Whatever weathering and depreciation there might have been of each item is likely to have been offset by inflationary tendencies in the price of materials. A demand for such items could be expected in a squatter community which would sustain their value. The appellants's unchallenged evidence that prior to the demolition and burning of the shack their value was R950-00 can accordingly be accepted.

The earlier demolition had apparently left

these items virtually unscathed. The appellant testified that the only damage sustained on that occasion was six broken cups. The same items were used to rebuild the shack. Despite such demolition, their reasonable value remained what the appellant had originally paid for them, as appears from the appellant's evidence to which I have already alluded. If, as was the case, the earlier demolition was carried out without causing significant damage, it is reasonable to conclude that the later demolition should not have brought about a different result. On the probabilities, therefore, the items in question, even allowing for the fact that they might have suffered some minor, inconsequential damage, would not have had a lesser market value after the later demolition than before. The appellant's evidence as to their reasonable market value before the later demolition may therefore be taken, on the facts of the present matter, to

approximate their value after such demolition. The appellant therefore succeeded in establishing damages, in this respect, in the sum of R950-00. This amount needs to be added to that of R571-07 already awarded to the appellant in terms of the judgment of the court a quo.

The appeal is allowed with costs. The magistrate's judgment is altered to one of judgment for the plaintiff (appellant) in the sum of Rl 521-07 plus costs.

J W SMALBERGER
JUDGE OF APPEAL

HOEXTER, JA)
BOTHA, JA)
EKSTEEN, JA) CONCUR
HARMS, AJA)