THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case no: 199/2002

In the matter between:

RAND WATER BOARD Appellant

and

ROTEK INDUSTRIES (PTY) LTD Respondent

Coram: ***Vivier ADP, Olivier, Cameron, Navsa and Conradie JJA***

Date of hearing: **13 March 2003**

Date of delivery: **26 March 2003**

Summary: Application of section 21A of the Supreme Court Act 59 of 1959 –

growing misperception that there has been a relaxation of the fundamental principle that courts will not make determinations which will have no practical effect.

JUDGMENT

NAVSA JA:

[1] On 13 March 2003 this appeal was heard and dismissed with costs by this Court in terms of section 21A (1) of the Supreme Court Act 59 of 1959 ('the SC Act'). Upon issuing the order it was indicated that reasons would follow. These are the reasons.

[2] The background facts are the following. The Respondent company instituted action in the Witwatersrand Local Division of the High Court against the Appellant ('the Board'), a statutory public water authority which at all material times exercised its authority in terms of the now repealed Rand Water Board Statutes (Private) Act 17 of 1950 ('the Act'), seeking an order directing the Board to remove all pipelines belonging to it from the respondent’s land situated in Rosherville, Gauteng.

[3] Sooka AJ was called upon to adjudicate the matter in the form of a stated case and was required to answer two questions. The first was whether section 24(j) of the Act, which on the face of it gave the Board expansive powers in respect of laying water reticulation pipes on private land, could be exercised on its own or whether it had to be read in conjunction with the powers to expropriate a servitude for pipeline purposes in terms of section 24(h). Put differently: Could the Board lay pipelines on private land without first acquiring a servitude?

[4] The second question was:

'Does section 24(j) under the circumstances of the present case (i.e the powers were duly exercised, the pipes were laid and were, and are, used for an authorized purpose) confer upon the Board a power, as defined in the sub-section, against all subsequent owners including the plaintiff, without any necessity for transfer or registration?'

[5] I interpose to state that of the extensive network of five pipelines installed over many thousand hectares of the respondent's land, four were installed before the respondent acquired ownership.

[6] The Court below heard argument on 4 September 2000 and delivered judgment on 15 June 2001. The learned judge answered the first question in favour of the Board but held that the powers conferred in terms of section 24(j) of the Act were not enforceable against successors-in-title and issued an order that the Board take such steps as are necessary in terms of section 81 of the Water Services Act 108 of 1997 ('the WSA') within a period of one year to

acquire by expropriation such land or rights therein as may be reasonably necessary to maintain the relevant pipes on the respondent's property. The Board was ordered to pay the respondent's costs. (The WSA repealed the Act but in section 84 preserved the former statutory powers of water authorities like the Board. The WSA and the National Water Act 36 of 1998 now regulate the provision of water services in the Republic).

[7] On 21 March 2001, before judgment was delivered in the Court below, the Board served a notice of expropriation on the respondent in terms of the provisions of the WSA. On 8 November 2001, after judgment, the parties reached an agreement recorded in a notarial deed of servitude in terms of which the Board, against payment of the agreed sum of R942 430-00, acquired 'the rights in perpetuity to convey and transmit water over the property by means of pipelines already laid and which may hereafter be laid'. The question of costs of the litigation in the Court below was not settled. The rights of the Board as recorded in the deed are extensive.

[8] The Board previously in 1994 adopted a policy that over and above exercising its powers in terms of section 24(j) of the Act it would prospectively endeavour to register servitudes over private land entitling it to install and maintain pipelines.

[9] Notwithstanding the agreement reached between the parties and in the face of its policy of registering servitudes the Board persisted in appealing against the judgment by Sooka AJ and agreed with the respondent, in terms of Rule 8(8) of the rules of this Court, to submit the second question posed in the Court below as the only one to be addressed by this Court.

[10] After heads of argument on the merits were filed in this Court the parties were requested to prepare argument on the question *in limine*, whether the appeal was not liable to be dismissed in terms of section 21A of the SC Act, the relevant subsections of which read as follows:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature

that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

. . .

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs'.

[11] There are numerous pronouncements of this Court on the application of this section.

[12] In *Premier*, *Mpumalanga, en 'n Ander v Groblersdal Stadsraad* 1998 (2) SA 1136 (SCA) this Court dealt with the purpose of the section.

At 1141D Olivier JA said the following:

'Die artikel is, myns insiens, daarop gerig om die drukkende werkslas op Howe van appèl, insluitende en miskien veral hierdie Hof, te verlig. Dit breek weg van die destydse vae begrippe soos 'abstrak', 'akademies' of 'hipoteties', as maatstawwe vir die uitoefening van 'n Hof van appèl se bevoegdheid om 'n appèl nie aan te hoor nie. Dit stel nou 'n direkte en positiewe toets: sal die uitspraak of bevel 'n praktiese uitwerking of gevolg hê? Gesien die doel en die duidelike betekenis van hierdie formulering, is die vraag of die uitspraak in die geding voor die Hof 'n praktiese uitwerking of gevolg het en nie of dit vir 'n hipotetiese toekomstige geding van belang mag wees nie.'

The appeal was dismissed in terms of section 21A (1) of the SC Act.

[13] In *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) the *Groblersdal Stadsraaad* case, above, was referred to and at 875A the following appears:

'As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing. In the case of *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441 it was said as follows by Innes CJ:

"After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important." '

[14] In the *Coin Security* case, above, counsel for the appellant sought, without success, to rely on *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA). In the *Coin Security* case this Court said the following at 875 G:

'. . . [E]very case has to be decided on its own facts. It follows that efforts to compare or equate facts of one case to those of another are unlikely to be of assistance. The section confers a discretion on this Court. *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) para [13] at 687. In the light of this fact a comparison of the type urged upon us is not appropriate.'

[15] This Court in the *Coin Security* case stated emphatically (at 875

G-I) that the *Gould* case on the facts did not reveal a different approach to that adopted in the *Groblersdal Stadsraad* case, above. In the *Gould* case it was considered that the disturbing divisions between rugby union members and the uncertainty concerning their constitution and the manner in which their affairs were to be regulated were such that a determination of the appeal would undoubtedly have a practical effect.

[16] In *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) Howie JA stated the following at 83 E-F:

> 'I shall assume, without deciding, that the practical effect or result referred to in s 21 is not restricted to the position *inter partes* and that the expression is wide enough to include a practical effect or result in some other respect.'

[17] In the *George* case, above, this Court dismissed the appeal in terms of section 21A of the SC Act. In doing so it dealt with the argument that a determination of the question posed would serve as a practical guideline for the solution of similar legal questions in future. Howie JA considered that the legislation in question had been repealed by a statute that restructured labour relations and that the position would not be comparable under the new statute. In the last paragraph of the case the warning in the *Groblersdal Stadsraad case,* above, namely, that practitioners keep the provision of section

21A in mind not only at the stage of an application for leave to appeal but also thereafter, was reiterated.

[18] In *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) Brand JA considered the following dictum by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, Ex Parte Salem*

[1999] 2 WLR 483 (HL) at 487H ([1999] 2 All ER 42 at 47c):

'. . . I accept . . . that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*.'

[19] In the *Smit* matter there was on appeal no longer any dispute or *lis* between the parties. This Court assumed without deciding that where the public interest is affected it has a discretion to entertain the appeal. On the facts of that case the appeal was nevertheless dismissed in terms of section 21A of the SC Act.

[20] The following passage by Lord Slynn of Hadley in the *Salem* case, above, should, in my view, not be lost sight of in a debate about the application of section 21A when a public law issue presents itself.

At 47d-f (All ER) the following appears:

'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[21] Counsel for the Board relied on a passage from *The Merak: S Seamelody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (A) at para 4 in an attempt to persuade us to hear the merits of the appeal. That passage indicates that the questions of law at issue were likely to arise frequently and the facts of that case are therefore entirely distinguishable from the facts of the present case.

[22] Against the background of the decisions set out in the preceding paragraphs I return to the facts of the present case. Counsel for the Board submitted that the issue we are called upon to decide was still alive between the parties. I do not agree. It is clear that the agreement set out in the servitude has the effect that the plaintiff is unable to obtain the relief sought in the present action. The

legality of the presence of the pipeline on the land is no longer in issue. There is no longer any dispute between the parties and the issue we are called upon to decide can have no practical effect on the erstwhile dispute between the parties.

[23] Even assuming without deciding that the meaning of ‘practical effect’ in section 21A is wide enough to cover a practical effect beyond the parties to the dispute, there is nothing on record to indicate that that there are pending or expected disputes that may benefit from a determination of the question posed in terms of rule 8(8) of the Rules of this Court. Counsel for the Board was unable to state from the bar that there were cases pending or expected. Furthermore, in the light of the Board’s policy of seeking registration of servitudes as a matter of course, it is difficult to see what practical effect a determination might have.

[24] We were urged by counsel for the Board to take into account that the Board in fulfilling its public function may come across obstructive landowners who in negotiations in relation to the acquisition of servitudes may demand outrageous sums for the right to install and maintain pipelines. The answer is that in such an instance, apart from litigation, there is no reason why the Board might

not resort to the expropriation powers it has in terms of the WSA or any other legislation.

[25] The WSA came into operation on 19 December 1997. Prospectively, the provisions of the WSA will come into play. The Board served the expropriation notices referred to earlier in this judgment on the respondent in terms of the provisions of the WSA. We have not been called upon to determine the Board's powers in terms of any of the provisions of the WSA. Instead we have been asked to deal with the provisions of a now repealed Act without any indication that the Board's powers preserved by the WSA might be called into question in any *single* case in the future.

[26] The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle spelt out in the *Groblersdal Stadsraad* case, above, namely that courts will not make determinations that will have no practical effect.

[27] Returning to the facts of the present case it is abundantly clear that no practical effect would be achieved by a determination of the question posed. For these reasons the appeal was dismissed with

costs.

MS NAVSA

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JUDGE OF APPEAL

CONCUR:

VIVIER ADP

OLIVIER JA

CAMERON JA

CONRADIE JA