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N v H

THE ADMINISTRATOR OF THE TRANSVAAL — First Appellant

SENTRACHEM LIMITED — Second Appellant

and

J VAN STREEPEN (KEMPTON PARK) (PROPRIETARY) LIMITED — Respondent

SMALBERGER, JA

640/88
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE ADMINISTRATOR OF THE TRANSVAAL First Appellant

SENTRACHEM LIMITED Second Appellant

and

J VAN STREEPEN (KEMPTON PARK) (PROPRIETARY) LIMITED Respondent

CORAM: **BOTHA, SMALBERGER, STEYN, EKSTEEN, JJA, et SMUTS, AJA**

HEARD: 22 May 1990

DELIVERED: 28 August 1990

J U D G M E N T

SMALBERGER, JA :-

This is an appeal from a judgment of KRIEGLER, J, in the Transvaal Provincial Division,

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leave to appeal having been granted by the judge a quo. The appeal concerns the validity of Administrator's Notice 1909 of 4 September 1985 ("Notice 1909") issued in terms of the provisions of s 7(1) of the (Transvaal) Roads Ordinance 22 of 1957 ("the Ordinance"). That section provides:-

> "The Administrator may, by notice in the Provincial Gazette acquire any land and cause it to be registered in the name of the State for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road."

For a proper appreciation of the issues involved in the appeal it is necessary to set out in some detail the circumstances which gave rise to the proceedings in the court a quo. In doing so I shall borrow liberally from the judgment of KRIEGLER, J. What follows is either common cause or not in dispute for the purposes of the present appeal.

In terms of s 20(a) of the Ordinance the power in respect of the construction, maintenance and control of any public road in the Transvaal vests (subject to any contrary provision in the Ordinance or in the Road Traffic Ordinance 21 of 1966) in the first appellant ("the Administrator"). By definition (see s 1(v) of the Ordinance) construction of a road includes the planning thereof. As far back as 1973 the Administrator caused investigations to be made with a view to alleviating problems caused by traffic congestion on roads P 91-1 and 51. At the time these two roads intersected on the north-western fringes of the municipal area of Kempton Park. Road P91-1 ran approximately from west to east, connecting the eastern suburbs of Johannesburg (in the west) with Kaalfontein (in the east). Road 51 ran approximately from south to north. It connected Isando and Kempton

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Park (in the south) with the burgeoning black township of Tembisa, and Midrand (in the north). On the south-western corner of the intersection of the two roads stands a piece of land known as Portion 213 of Zuurfontein 33, I R belonging to the respondent, J van Streepen (Kempton Park) (Proprietary) Limited (to which company I shall, for the sake of convenience, continue to refer as "the respondent").

The traffic problems caused by the ever increasing number of vehicles using the roads and the unsatisfactory nature of the intersection, were compounded by the existence of a private railway line adjoining road 51. This line was operated by the second appellant ("Sentrachem"), and ran over land owned by it through one of its subsidiaries. It ran for several kilometres from near Isando, in the south, to a major industrial factory complex owned by

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Sentrachem through one of its subsidiaries (KOP) at Chloorkop, north-west of the aforementioned intersection. Near Isando the railway line crossed road 51 from west to east. From there it ran adjacent and parallel to road 51 to a point close to the Chloorkop factory complex where it crossed over road 51 to the west. Consequently there were two level crossings over road 51 approximately two kilometres apart. Moreover, immediately to the east of the intersection of the two roads there was a further level crossing where road P91-1 crossed the railway line. The railway line in question was a vital part of Sentrachem's industrial undertaking at Chloorkop, where products of national and strategic importance are produced. As then situated the railway line did not traverse any portion of the respondent's property.

The consulting engineers appointed to deal

with the matter examined and reported upon a number of alternative proposals for the resolution of the traffic problems in the area. The retention of a railway line connection for Sentrachem between its Chloorkop factory complex and the sources of its raw materials to the south was at all material times a vital consideration essential to the planning of any new roads. Eventually the Administrator, acting through the appropriate provincial authorities, decided to proceed with the planning and implementation of a combination of two schemes ("the approved scheme"). In broad outline the approved scheme entailed the upgrading of both roads P91-1 and 51 to dual carriageways; the elimination of the level crossings on these roads; the diversion of road P91-1 to the south; and the construction of an interchange approximately a kilometre to the south of the existing

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intersection. It further entailed the relocation of Sentrachem's railway line from its position immediately adjacent to the eastern side of road 51 to a position adjacent to the western edge of the upgraded road 51. In its relocated position the railway line was destined to traverse a section of the respondent's property.

Section 5(1)(b) of the Ordinance provides that the Administrator may by notice in the Provincial Gazette, after certain prescribed procedures have been followed, declare that a public road shall exist on any land. By the end of 1983 the planning of the approved scheme had progressed to the point where the Administrator could exercise his powers in terms of that section. This led to the publication, on 28 December 1983, of Administrator's Notice 2161 ("Notice 2161"). In terms of that Notice the Administrator

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declared "that Public Provincial Road 51 (K117) with varying widths, the general direction and situation of which is shown on the appended sketch plan with appropriate co-ordinates of the boundary beacons, exist(s) within the municipal area of Kempton Park". The appended sketch plan depicted the declared road encroaching on portion of the respondent's property along its eastern boundary. The area so encroached upon was 4454 square metres in extent. Of the respondent's property thus encroached upon 3337 square metres had been included in the declared road to accommodate the relocation of Sentrachem's railway line, which was to be located within the road reserve (the road reserve being wide enough for that purpose).

Work on the approved scheme progressed. Sentrachem's existing railway line was maintained while the new line was being built in order to ensure

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continuity of rail services. The intention was to link up the Chloorkop factory complex with the new line early in September 1985 and then to continue with the construction of road 51's dual carriageway. In about mid-1985 Sentrachem became concerned about its security of tenure of the new railway line. On 8 August 1985 NCP Chloorkop (one of the divisions of Sentrachem) wrote a letter to the consulting engineers in the following terms:

> "Neem asseblief kennis dat NCP Chloorkop nie van sy bestaande reg op hierdie spoorlyn kan afstand doen voor bevredigende bewys gelewer is dat die verskuifde spoorlyn, wat die gevolg is van die padverklaring, juridies beveilig is nie.
>
> Die nuwe spoorlyn kan dus nie in gebruik geneem word voordat sodanige skriftelike bewyse gelewer is dat NCP Chloorkop die nuwe roete kan gebruik onderhewig aan dieselfde onvoorwaardelike regte huidig tot sy beskikking nie.
>
> Kan u asseblief so spoedig moontlik hierdie saak met ons uitklaar."

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Due consideration was given to this letter, and on 30 August 1985 the Transvaal Director of Roads submitted a memorandum to the Administrator-in-Executive-Committee in the following terms:

> "1. Weens die verlegging en verbreding van distrikspad 51 wat kragtens Administrateurskennisgewings 175 van 14 Februarie 1979, 648 van 2 Junie 1982, 2161 van 28 Desember 1983 en 1458 van 15 Augustus 1984 afgekondig is, was dit nodig om Klipfonteinse Organiese Produkte (hierna K.O.P. genoem) se bestaande private spoorlyn te verlê. K.O.P. het eiendomsreg van die betrokke spoorlynreserwe wat oor 'n aantal privaateiendomme gaan. Die spoorlyn is die slagaar van die onderneming deur middel waarvan die grondstowwe vir verwerking na die fabriek vervoer word.
>
> 2. K.O.P. beskik nie oor enige onteieningsbevoegdhede nie en as gevolg van die kritieke tydsfaktor in soverre dit die bou van die pad en die verlegging van die spoorlyn betref, is die Departement genoodsaak om 'n groot gedeelte van die verlegde spoorlyn binne die padreserwe van pad 51 te huisves. Die werk hieraan verbonde is reeds uitgevoer en die oorskakeling na die nuwe spoorlyn is vir 3 September 1985 bepaal en is so beplan dat die bou van die pad sowel as K.O.P. se bedryfsaktiwiteite nie daardeur

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versteur word nie.

3. Voormelde verlegging en verbreding van pad 51 neem ook 'n gedeelte van Gedeelte 213 van Zuurfontein 33 IR in beslag en affekteer die bestaande toegang na die motorhawe op die perseel, soos in oranje op die saamgestelde plan van planne PRS 81/55/7-9Lyn (in bundelsak) aangetoon. Dit het onder die Departement se aandag gekom (p. 279) dat die eienaar van die betrokke eiendom voornemens is om 'n dringende hofinterdik aan te vra om die verklaring van die pad ongeldig verklaar te kry op grond daarvan dat die Aministrateur se bevoegdheid, om spesifiek deur middel van die verbreding van 'n padreserwe die verlegging van 'n private spoorlyn te akkommodeer, aangeveg word.

4. Daar bestaan 'n wesentlike moontlikheid dat 'n aansoek om 'n hofinterdik van voormelde aard mag slaag. Indien dit gebeur sal ernstige finansiële gevolge vir die Departement ontstaan aangesien die konstruksie van die pad dan grootliks belemmer sal word met gepaardgaande verlieseise van die padboukontrakteur wat na raming R250 000,00 per maand kan beloop. Benewens hierdie eise kan baie groot verlieseise van die kant van K.O.P. verwag word indien 'n suksesvolle hofinterdik hom die gebruik van die verlegde spoorlyn binne die verklaarde padreserwe sou ontsê.

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K.O.P. het dus om sy belange te beskerm, 'n brief aan die raadgewende ingenieurs Scott en De Waal gerig waarin daar verklaar word dat hy nie meer bereid is om na die nuwe spoorlyn oor te skakel nie behalwe indien die Administrasie die onbelemmerde gebruik daarvan juridies kan waarborg (p.p. 280 en 281).

5. Artikel 7 van die Padordonnansie, 1957, maak voorsiening daarvoor dat die Administrateur enige grond kan verkry en op naam van die Staat laat registreer vir, onder meer, enige doel in verband met die aanleg en instandhouding van enige pad. Die verlegging van die spoorlyn as 'n noodwendige gevolg van die aanleg van die pad kan dus ingelees word by "enige doel" in verband met die aanleg van enige pad. In die omstandighede van die geval was dit noodsaaklik vir die Departement om die spoorlyn self na 'n ligging binne die padreserwe te verlê en sou dit nie moontlik gewees het om die pad op sy verklaarde belyning te bou nie, indien sodanige verlegging nie toegepas is nie. Dit kom dus voor dat die huisvesting van die spoorlyn binne die padreserwe van pad 51 bo alle twyfel gewettig sal word indien die gedeeltes van die padreserwe wat daarvoor benodig word soos in groen op voormelde plan aangetoon, (in bundelsak) kragtens voormelde artikel 7 verkry word. Die bedoelde strook grond kan dan na oordrag in die naam

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van die Staat aan K.O.P. terugtransporteer word teneinde die status quo te herstel .....

6. Dit word derhalwe aanbeveel dat:

(a) Die gedeeltes van die verklaarde padreserwe van distrikspad 51 soos in groen op die saamgestelde plan van planne PRS 81/55/7-9Lyn (in bundelsak) aangetoon, krag= tens artikel 7 van die Padordonnansie, 1957, verkry word vir doeleindes wat met die aanleg van distrikspad 51 in verband staan en die betrokke gedeeltes na oordrag daarvan in naam van die Staat ..... aan Klipfonteinse Organiese Produkte getran= sporteer word met dien verstande dat, indien van toepassing, die vergoeding betaalbaar aan laasgenoemde vir die grond deur die padreserwe in beslag geneem, dienooreenkomstig aangepas sal word; en

(b) die koste van voormelde oordragte deur die Admini= strasie gedra word."

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The recommendation made in paragraph 6 of the memorandum was duly approved. Pursuant thereto Notice 1909 was published. The Notice stipulates that the Administrator

> "hereby acquires and causes it to be registered in the name of the State, portions of Mooifontein 14 IR, Klipfontein 12 IR and Zuurfontein 33 IR as indicated on the subjoined sketch plan for purposes in connection with the construction or maintenance of a road.
>
> The land so acquired has been physically demarcated."

The sketch plan that accompanied the Notice indicated by means of bold boundaries and stipples the areas in question. The portion of the respondent's property sought to be acquired by Notice 1909 corresponds exactly with the area of 3337 square metres in Notice 2161 which was intended to accommodate Sentrachem's railway line. For convenience I shall refer to the area in question simply as "the respondent's land".

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The respondent, through its attorneys, lodged objections with the Administrator challenging the validity of both Notices 2161 and 1909. Its objections centred on the fact that the Administrator was not empowered by the Ordinance either to declare a road over the respondent's land, or to expropriate such land, for the establishment of a railway line. In addition, it was alleged that Notice 1909 was invalid for want of an adequate description of the respondent's land purportedly expropriated thereunder. Thus the battle-lines were drawn. The Administrator refused to accede to the respondent's demands. This led to the issue of summons by the respondent against the Administrator and Sentrachem, the latter having been joined by virtue of its interest in the matter. It is not necessary to analyse the pleadings. There were numerous claims and alternative claims, all

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vigorously opposed. The parties ultimately agreed to seek an order in terms of Rule 33(4) of the Uniform Rules of Court that certain issues be determined separately. Consequent thereon the following order was made by the judge a quo on 12 July 1988:

> "1. That in the above action the following questions of law and/or fact be decided separately from any other issues:
>
> (a) whether Administrator's Notice 2161 dated 28 December 1983 is valid or invalid;
>
> (b) whether, in the event of Administrator's Notice 2161 being held to be valid, such notice entitled the first defendant to:
>
> (i) carry out works for purposes of constructing a railroad;
>
> (ii) construct, or cause to be constructed, a railroad;
>
> (c) whether Administrator's

Notice 1909 is valid or invalid.

2. That all further proceedings be stayed until the questions in (a), (b) and (c) supra have been decided.

3. That the costs of this application be costs in the cause of the action."

The only evidence led related mainly to the adequacy or otherwise of the description of the respondent's land purportedly expropriated in terms of Notice 1909. In this respect Dr Gerke, a land surveyor, testified on behalf of the respondent, and Mr Whitehorn, a topographical and engineering surveyor, on behalf of the Administrator. In addition the Administrator also led the evidence of a Mr Pemberton, one of the consulting engineers who had been intimately involved in the planning and execution of the approved scheme.

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Judgment was delivered on 12 August 1988, and the following order was made:

"IT IS ORDERED:-

1. THAT Administrator's Notice 2161 of 28 DECEMBER 1983, insofar as it relates to portion 213 of Zuurfontein 33 IR is declared to have been invalid.

2. THAT Administrator's Notice 1909 of 4 SEPTEMBER 1985 insofar as it relates to portion 213 Zuurfontein 33 IR is declared to have been invalid.

3. THAT defendants (i.e. the Administrator and Sentrachem) jointly and severally, the one paying the other to be absolved, pay the costs of these proceedings, such costs to include the fees of two counsel, and the qualifying fees of Dr Gerke."

Subsequently leave to appeal was sought, and granted, against orders 2 and 3 only.

The present appeal raises two issues relative to the validity of Notice 1909. The first is whether the Administrator's purported expropriation (henceforth "the expropriation") of the respondent's land falls within the scope of the powers conferred upon him by s 7(1) of the Ordinance. The second is whether Notice 1909 is invalid for want of an adequate description of the land it was sought to acquire in terms thereof. These issues will be addressed in turn.

In respect of the first issue, the basis of the respondent's attack on the validity of Notice 1909 is that the Administrator expropriated the respondent's land for a purpose not authorised by s 7(1) of the Ordinance. As appears from the factual background which I have outlined, when Notice 1909 was issued in 1985 the respondent's land had already been occupied and the railway line constructed thereon. This had

been done in purported pursuance of, and reliance upon, the declaration of road 51 in terms of Notice 2161. The judge a quo's finding that Notice 2161 was invalid is not the subject of attack on appeal. Mr Osborn, for the respondent, argued that because Notice 2161 was invalid, the Administrator had no right to occupy the respondent's land in 1985, and was in fact trespassing thereon. The real purpose of Notice 1909, so it was contended, was to legitimise such trespass. If this was the true purpose of Notice 1909, then prima facie the Administrator's conduct would have fallen beyond the ambit of his powers in terms of s 7(1) of the Ordinance. To assess the cogency of this line of argument, and to determine the true purpose of Notice 1909, one must perforce have regard to the events which preceded its issue. Only by so doing can one gain a proper perspective of what Notice 1909 sought to

achieve.

It is apparent from the history of this matter that when road 51 was declared in terms of Notice 2161, one of the underlying purposes of the declaration was the accommodation within the road reserve of Sentrachem's railway line. What the declaration sought to achieve, inter alia, was the utilization of the respondent's land for that purpose. It failed in this regard because it was invalid. Notice 1909 was intended to bring about the same result - hence the expropriation of the respondent's land. To take the view that its purpose was simply to legitimise a trespass is to close ones eyes to the realities as evidenced by the history of the matter. In relation to the first issue, therefore, one should approach the matter as if the Administrator's expropriation of the respondent's land had taken place

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in 1983 and not 1985 - in other words, as if Notice 1909 had been issued instead of (or in conjunction with) notice 2161. So seen, the real or main purpose of Notice 1909 (as it affects the respondent) was not to legalise a trespass, but to expropriate the respondent's land for the purpose of accommodating Sentrachem's railway line - in keeping with what the Administrator all along had in mind. The respondent's contention accordingly lacks substance. This immediately brings me to the next point, which is the crux of the appeal on the first issue. As the Administrator has conceded throughout that his purpose behind the expropriation of the respondent's land was the construction of a railway line and not a road, the question arises whether this is a legitimate purpose falling within the purview of s 7(1) of the Ordinance.

Section 7(1) provides for two separate and

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distinct circumstances in which the Administrator may acquire land. He is empowered to do so "for the construction or maintenance of any road" (to which I shall refer as the primary purpose) or "for any purpose in connection with the construction or maintenance of any road" (to which I shall refer as the secondary purpose). It is common cause that the respondent's land was not expropriated for the primary purpose of constructing a road - this is abundantly clear from the terms of Notice 1909. The concept of the "maintenance of any road" plays no role in the present appeal, and can therefore be disregarded with all its possible ramifications. In terms of the definition section of the Ordinance (s 1(xxi)) "road" means

> "any road (other than a railroad) intended for vehicular or animal traffic and includes a bridge or drift traversed by a road and intended for use in connection therewith; and all land reserved or designated as a road under the provisions of some law or other"

"Construction" is defined in s 1(v) as including

> "planning, surveying, laying out, clearing of bush, forming and making of any road and the construction of any bridge, pontoon, ferry, or drift to service such road or proposed road, all road signs and all necessary approaches, excavations, embankments, subways, furrows, drains, dams, curbs, weigh-bridges, fences, parapets, guards, drainage works within or outside such road, and any other work or thing forming part of or connected with or relating to such road, and further includes any alteration, deviation, widening or improvement of such road"

From the definitions of "road" and "construction" it is apparent that the Administrator has wide powers of expropriation in terms of s 7(1).

The competence of a court to adjudicate upon the validity of an Administrator's exercise of his power under s 7(1) of the Ordinance may vary according to whether such power is exercised for the primary or secondary purpose envisaged by that section. When an Administrator decides that land is to be acquired for

the construction of a road, his decision is the product of an opinion formed with reference to a host of often complex considerations. His decision, and the opinion on which it is based, is not objectively justiciable. In Pretoria City Council v Modimola 1966(3) SA 250 (A) BOTHA, JA, stated the following (at 263 G - H):

> "In the absence of a provision prescribing a quasi-judicial enquiry as a pre-requisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act. (Cf. Johnson & Co v Minister of Health, (1947) 2 All E R 395 at pp 398 - 9 and Minister of The Interior and Another v Mariam, 1961(4) SA 740 (A D) at p 751). Where unqualified authority is conferred for the expropriation of land required for public purposes, an opinion by the expropriating authority, if fairly and honestly come to, that particular land is required for such purposes, is all that is required for a valid expropriation of that land."

Although the classification of acts as "quasi-judicial" and "purely administrative" has fallen into disfavour in our law (see Administrator, Transvaal, and Others v

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Traub and Others 1989(4) SA 731 (A)), and Modimola's case dealt with the application of the audi alteram partem maxim in expropriation cases, the views expressed by BOTHA, JA, are applicable to a matter such as the present. Accordingly, where an Administrator has subjectively formed the opinion that land is needed for the construction of a road the merits of that opinion (i e whether or not such opinion is correct or could not reasonably have been held) cannot be adjudicated upon by a Court. Such opinion is only open to attack on review on one or more of the limited grounds recognised in Shidiack v Union Government (Minister of the Interior) 1912 A D 642. (I specifically leave open the question whether the same principle applies when the relevant consideration is that of "maintenance" as opposed to "construction".)

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Although Mr Junod, for the Administrator, did not argue the point, Mr van Rooyen, for Sentrachem, contended that a similar position pertains where the Administrator seeks to acquire land in terms of s 7(1) of the Ordinance for the secondary purpose envisaged by that section. It seems to me that one may validly draw a distinction between the opinion formed by the Administrator with regard to the acquisition of land for the primary purpose of the section, and his decision to acquire land "in connection with" such purpose (i e for the secondary purpose). The former requires an opinion to be formed with regard to considerations which include matters of policy, economic considerations and the public interest (to mention but a few), whereas the latter is merely ancillary in nature. I see no reason in principle why once the purpose for which land is being acquired for

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the secondary purpose has been clearly determined (as is the case here), a court is not entitled to enquire into the question whether such purpose falls within the ambit of s 7(1). For the purposes of the present appeal I shall accept, without deciding, that the court has the power to determine objectively whether the accepted purpose for which the Administrator acquired the respondent's land was one in connection with the construction of road 51, in other words, whether the Administrator had the power to act as he did. One must distinguish between the existence of such power and the manner of its exercise. In the present appeal we are only concerned with its existence, not the manner of its exercise. The manner in which the Administrator exercised his power would only be open to challenge on one or more of the recognized grounds of review (see Johannesburg Stock Exchange and Another v Witwatersrand

Nigel Ltd and Another 1988(3) SA 132 (A) at 152 A - E). No such grounds were raised on the pleadings.

It is clear, both in terms of authority and as a matter of logic, that the words "or for any purpose in connection with the construction ..... of any road" in s 7(1) bring about a substantial widening of the Administrator's power to acquire land in terms of that section. (Secretary for Inland Revenue v Wispeco Housing (Pty) Ltd 1973(1) SA 783 (A) at 793 B). The expression "in connnection with" is one devoid of precise meaning. Its ambit is always a matter of uncertainty. As pointed out in S v Mpetha and Others (1) 1982(2) SA 253 (C) at 257 C - D, the words

> "can quite properly cover the whole spectrum of relationships from a close and direct relationship, at the one end of the scale, to a remote and indirect relationship, at the other end. The term is an elastic one and the context and purpose of the statutory provision must be considered in order to assess the degree of elasticity appropriate to the case."

(See too Rabinowitz and Another v De Beer's Consolidated Mines Ltd and Another 1958(3) SA 619 (A) at 631 G.)

The object of the legislature in enacting s 7(1) of the Ordinance was to broaden the general powers of the Administrator in respect of the construction of roads (as provided for in s 20 of the Ordinance) so as to plan, regulate and control the construction of roads in the most efficient way in the public interest. The words "in connection with" in s 7(1) must be afforded a meaning consonant with such intention. Sight must, of course, not be lost of the fact that one is dealing with an expropriation provision which may call for a restrictive interpretation having regard to the inroads it makes on the rights of private ownership (Rigg v South African Railways and Harbours 1958(4) SA 339 (A) at 349

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A - B). However, this principle would normally only apply in the case of doubt. Where the legislature's intention is clear from the express words used, or follows by necessary implication from the terms of a particular provision, effect must be given thereto.

As previously indicated, the respondent's land was expropriated for the purpose of relocating Sentrachem's railway line. It is correct to say that road 51 could have been physically constructed without the need to expropriate the respondent's land. In that sense the expropriation was not necessary for the construction of road 51. There is, however, no justification for limiting the application of the expression "any purpose in connection with" to what is necessary for the physical construction of a road. Properly interpreted the expression denotes that which is reasonably expedient in relation to the construction

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of a road. This affords the expression, within the context of s 7(1), a relatively wide meaning. In my view it is a necessary inference that the legislature intended it to have such a meaning - bearing in mind that the construction of a road (which includes planning) involves considerations of policy in regard to the regulation of traffic, economic considerations and the benefit of the public generally. To adopt a more stringent test would defeat the object of the legislature. In the circumstances of the present matter the test for reasonable expediency would be satisfied if the purpose for which the Administrator's power of expropriation was exercised was either inextricably associated with the construction of road 51; or was an integral incident of the construction of the road; or was causally connected with the construction of the road. (Cf the

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Wispeco Housing case at 794 A and 794 D.)

In the course of his judgment, KRIEGLER,J, stated, inter alia, that the Administrator's powers are limited and "must remain within the express context of roads" and "should all be directed towards 'any road'". Since the Administrator was concerned with roads section 7(1) did "not afford him authority to expropriate land for the establishment of a railway line". He concluded:

> "As I see the facts Administrator's Notice 1909 of 4 September 1985 was issued for the express and sole pupose of acquiring those portions of land falling within the previously proclaimed road reserve which were intended exclusively for the accommodation of the second defendant's (Sentrachem's) new railway line. A power to expropriate land needed directly for road building or maintenance purposes, or for purposes more remotely connected with such purposes, was purportedly used to acquire land expressly needed for railway purposes. That the first defendant was not empowered to do. Administrator's Notice 1909 of 4 September 1985 is therefore also in my view ultra vires."

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I am constrained to disagree with the learned judge. The expropriation of the respondent's land for the direct or immediate purpose of constructing a railway line on it does not per se invalidate the expropriation. The fact that s 7(1) of the Ordinance is concerned with the acquisition of land for road construction does not necessarily preclude the acquisition of land for other purposes provided the required connection between such purpose and the construction of the road is present. In my view the judge a quo adopted too narrow an approach to the matter. He failed to properly address the real question, viz., was the purpose for which the respondent's land was acquired one "in connection with" the construction of road 51. No doubt at first blush it is a somewhat startling proposition to suggest that

the building of a railway line can be said to be something "in connection with" the construction of a road. To determine whether or not this can be so in the present instance one must have regard to all the relevant surrounding facts and circumstances which the court a quo had before it. These can be gleaned from the pleadings, documents and evidence which form part of the record, and which reflect the history of the matter as outlined above.

It is abundantly clear from the evidence of Pemberton that from the conception of the approved scheme the respondent's land was earmarked for the relocation of Sentrachem's railway line, the "lifeline" of Sentrachem's factory complex at Chloorkop. It frequently occurs in the course of road construction that existing services such as power lines or cables, water pipes, sewerage pipes and the like are disrupted

and have to be relocated. When the road in question is in a developed area there would inevitably have to be a relocation of services. It would be part and parcel of the planning (and therefore the construction) of a new road on or near an existing road to have regard to the possible disruption of such services and to provide for their relocation, bearing in mind that the Administrator acts in the public interest. The question arises whether, in the absence of an express provision to that effect, s 7(1) impliedly empowers the Administrator to acquire land for the relocation of such services. Can he, for example, acquire a strip of land next to a road that is to be constructed for the purpose of relocating a power line? The answer to my mind is an unequivocal "Yes". The legislature must be presumed to have been aware of the fact that road construction frequently or inevitably involves the

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relocation of services, and to have intended to empower the Administrator to deal with such a situation. In the example given the acquisition of land to relocate a power line is "for a purpose in connection with" the construction of the road - the purpose for acquiring the land is inextricably associated with, or an integral incident of, or causally connected with, the construction of the road. The same would hold good for other services provided by public utilities. If services of the kind mentioned can be relocated, and land acquired for such purpose, then as a matter of principle and logic there is no reason why the same should not hold true in the case of a railway line. Section 7(1) of the Ordinance is therefore, in my view, wide enough to encompass the acquisition of land for the relocation of a railway line provided the relevant facts establish that such relocation is "in connection

with" the construction of a road in the sense in which that expression must be understood.

Mr Osborn accepted in principle that the building or relocation of a railway line could be for a purpose "in connection with" the construction of a road. He cited as an example the need to build a railway line (and acquire land for that purpose) to provide materials for a road being constructed over inaccessible terrain. He contended, however, with regard to the present matter, that although the construction of road 51 was a sine qua non for the relocation of Sentrachem's railway line (in the sense that but for the road the railway line would not have had to be relocated), it was not necessary for the construction of the road to relocate the railway line as compensation could have been paid instead. This, as I have already pointed out, is too narrow an

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approach. There is no warrant for interpreting s 7(1) so restrictively. The test is not one of necessity but reasonable expediency. And that test is satisfied in the present instance.

Mr Osborn pointed out in argument that the approved scheme was not the one that had initially been recommended by the consulting engineers; that a scheme could have been adopted which would have preserved Sentrachem's railway line or not have interfered with the respondent's right to his property; that there was no evidence that the approved scheme was economically more viable than any other scheme. These considerations relate to the manner in which the Administrator exercised his power. They do not effect the existence of such power. They are therefore not relevant to the present appeal.

It was further argued by Mr Osborn that the Administrator could, and should, have compensated Sentrachem for the loss of its railway line, and that it was an improper exercise of the Administrator's power to seek to minimise the compensation payable by providing Sentrachem with an alternative railway line. Nor was the Administraror entitled to acquire the respondent's land and transfer it to Sentrachem, or one of its subsidiaries, to achieve this purpose. When planning the construction of road 51 the Administrator was in my view entitled and bound to consider the total cost of the whole project, and to minimise costs as far as possible in the public interest, provided always that he acted in good faith in doing so. As Mr Junod correctly pointed out, the Administrator's contemplated transfer of the respondent's land to Sentrachem to minimise the compensation otherwise payable was only

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an ancillary purpose and not the primary reason for the expropriation of the respondent's land. Once again this argument fails to distinguish between the existence of the Administrator's power and the manner of its exercise. It relates to the latter, and is therefore irrelevant to the present appeal.

Mr Osborn also contended that it was not necessary for the Administrator to have the power to relocate public services (and therefore the existence of such power could not be implied), as such power already existed in the hands of the State and/or the various public utilities supplying such services. In this regard he referred to various Acts such as the Electricity Act 41 of 1987 and the Post Office Act 44 of 1958. The simple answer to this contention is that it does not necessarily follow, because powers of

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expropriation vest in certain State organs or public utilities to enable them to relocate their services, that s 7(1) does not confer a corresponding power on the Administrator where such relocation is required in connection with the construction of a road. Alternatively, it was argued that if the Administrator was vested with such power in respect of public services, he was not similarly empowered in respect of private services such as Sentrachem's railway line. As has been pointed out, the relocation of services is a purpose "in connection with" the construction of a road. The power to relocate services therefore exists, and the power to relocate private services is not excluded either expressly or by necessary implication. The point was also raised that as Sentrachem was operating an undertaking of national importance at its Chloorkop factory complex it could,

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had it lost its railway line because of the construction of road 51, have acted in terms of the provisions of the Expropriation (Establishment of Undertakings) Act 39 of 1951 to expropriate land for the re-establishment of the railway line. This, it was claimed, gave rise to two additional considerations. The first was that if the respondent's land were to be expropriated under the provisions of Act 39 of 1951 he would be better compensated than under the less beneficial provisions for compensation to be found in sections 92 and 95 of the Ordinance. The second was that the need to keep Sentrachem's railway line operative in the national interest would no longer be a relevant consideration with regard to any decision by the Administrator as Sentrachem had other means available for retaining its railway line. With regard to the latter consideration,

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while it may have a bearing on the manner in which the Administrator exercised his power, it has no relevance to the existence of the Administrator's power to expropriate the respondent's land. As far as the first consideration is concerned, the answer once more lies in the fact that it does not follow that simply because in certain circumstances powers of expropriation exist in other statutes, the Administrator does not possess a similar power. Nor does the fact that the respondent would be better compensated under another Act preclude the Administrator from acting under the Ordinance (cf Broadway Mansions (Pty) Ltd v Pretoria City Council 1955(1) SA 517 (A)).

I turn now to what was probably Mr Osborn's main argument. He contended that s 7(1) of the Ordinance could never be interpreted in such a manner

as to confer on the Administrator the power to acquire the land of one person (in casu the respondent) and transfer it to another (in casu Sentrachem) for the latter's use and benefit - which was what was contemplated in the present instance. It was pointed out, firstly, that in such circumstances the respondent would have to suffer the attendant disadvantages in respect of compensation occasioned by the provisions of s 92 and 95 of the Ordinance, and not Sentrachem (which would have been the position had the Administrator simply decided to compensate Sentrachem for the loss of its railway line and not relocate it). It was not within the power of the Administrator to judge who should suffer the most or the least. Secondly, and more importantly, s 7(1) of the Ordinance provided for the acquisition of land in the name of the State ("acquire any land and cause it to be registered in the

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name of the State"). It therefore contemplated use of the land so acquired by the State and not for a purpose directed at private use by and for the benefit of a third party.

It is a non sequitur that because land must be acquired in the name of the State it must be acquired for the use of the State. Where a power line belonging to an electricity undertaking is relocated from one side of a road to another (because of the need to widen the road) on land acquired by the Administrator in terms of s 7(1) in the name of the State, the purpose for which the land is acquired is not the use thereof by the State, but the retention of the power line in order not to disrupt the supply of electricity. Land acquired under s 7(1) need not therefore necessarily be for the use of the State or one of its organs. In the present instance the

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State, having acquired ownership of the respondent's land, could have retained its ownership and could merely have granted Sentrachem a servitude over it. The fact that the Administrator may regard it as expedient to transfer such land to Sentrachem in due course does not per se affect the validity of such acquisition. The fundamental problem, however, still remains - is the Administrator empowered under s 7(1) to acquire or expropriate the property of one person for what is essentially the benefit of another? Expropriation, generally speaking, must take place for public purposes or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. Non constat that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can

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conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest. The present instance affords an example of such a situation. In planning the construction of the new road 51 the Administrator would needs have had to take an overall view of all the practical and economic implications of the project as a whole in deciding what would best serve the public interest. He would be entitled and obliged to have regard to the fact that Sentrachem conducted an undertaking which was in the national interest, and what the effect on the national interest would be if Sentrachem lost its rail connection with its sources of raw material, thereby disrupting its production of

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strategically important products. In principle, therefore, the Administrator's power under s 7(1) can extend to the acquisition of land for what may include the benefit of a third party. The power exists; the manner in which it is exercised may be open to challenge e g where the Administrator has acted mala fide and not in the public interest. The present appeal, as has been stated previously, does not concern the manner in which the Administrator exercised his power.

When, therefore, the Administrator expropriated the respondent's land in 1985 he gave effect to what he had planned to do, and had intended to achieve, from the time the approved scheme was accepted and first implemented. He was not resorting to a subterfuge to achieve something that had never previously been in his contemplation. He was putting

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right what he had previously mistakenly and incorrectly set about doing. What he did fell within the ambit of his powers. Notice 1909 was accordingly not invalid for lack of authority in terms of s 7(1) of the Ordinance.

This brings me to the second ground on which the validity of Notice 1909 was challenged, viz., lack of adequate description of the property expropriated. The judge a quo did not come to a finding on this point as his conclusion that Notice 1909 was ultra vires the powers of the Administrator rendered it unnecessary for him to do so.

It is accepted by the parties that Notice 1909 itself constituted the act of expropriation. Section 7(1) of the Ordinance does not prescribe in what manner, and with what degree of accuracy, the land expropriated must be described. In the absence of

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any prescriptive provisions to this effect it seems to me that the land expropriated under s 7(1) must be described, whether by reference to sketches, plans or otherwise, with a sufficient degree of clarity to enable the expropriatee to identify, with reasonable certainty and within reasonable limits, what is being expropriated. Whatever data is provided for identifying the land expropriated it need not necessarily be such as would enable a layman to make a determination without expert assistance. It is not unreasonable when dealing with sketches, plans and the like to expect an expropriatee to consult an expert with a view to their interpretation. Mr Osborn, as I understood him, did not contest this to be so. He in fact conceded, in my view correctly, that if Notice 2161 had been the notice of expropriation such Notice, with its attendant sketch plans, would, with the aid of

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expert interpretation, have disclosed with sufficient clarity the area of land expropriated. To that extent it would have been a valid notice.

The sketch plan annexed to Notice 1909, insofar as it relates to the respondent's land, shows an area bordered by two bold black lines which run approximately south to north. Adjacent to the western line is a stippled area which is bordered on its eastern side by a somewhat fainter black line. There are therefore three black lines with the stippled area situated between the western outer line and the inner line. Certain numbered reference points and beacons appear on the sketch plan. As part of Notice 1909 there is a legend which states that the stippled area represents "portions of the declared road reserve of district road 51 (K 117) which are acquired for purposes in connection with construction of the

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aforementioned road and depicted in detail on plans PRS 81/55/7 Lyn - 9 Lyn". (I shall refer to these plans as "the lyn plans".)

The lyn plans (more particularly the 7 lyn plan) indicate the same three black lines in positions approximating those on the sketch plan. There is, however, no stippled area on the 7 lyn plan, nor do the numbered reference points and beacons depicted on the sketch plan appear on it. These factors, plus an absence of co-ordinates and other relevant data, led Gerke to testify that on the information available on the sketch and lyn plans he was unable to determine the boundaries of the expropriated portion of the respondent's land. Gerke basically confined his evidence to a consideration of the sketch and lyn plans.

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Whitehorn, in sharp contrast to Gerke, testified that he would have had no difficulty in establishing the precise location and extent of the respondent's expropriated land. According to him, the statement in Notice 1909 that the stippled area on the sketch plan represented portions of the declared road reserve of district road 51 would have alerted him to the road declaration in Notice 2161. That Notice would have provided him with a list of co-ordinates, and would have referred him to compensation plans PRS 81/55/9V-7V. Using the co-ordinates together with relevant data obtained from the sketch, lyn and compensation plans he would have been able to establish the western boundary of the land expropriated, and thereafter all other relevant points needed to demarcate such land.

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It is not necessary to go into the evidence in greater detail. The onus was on the respondent to prove that Notice 1909 was invalid for want of an adequate description of the property expropriated. The respondent has failed to discharge that onus. Gerke's evidence cannot be accepted in preference to that of Whitehorn. Gerke has not actively practised as a land surveyor for more than twenty years. He was shown to have been lacking in experience in regard to road surveys; had difficulty in understanding the plans; was unacquainted with certain relevant (and apparently standard) data therein; and initially testified from a very limited base, essentially confining his evidence to a consideration of the sketch and lyn plans. Whitehorn is a man with vast experience in the field of road surveying. It was argued that Whitehorn was intimately involved in the planning of

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the whole project, and would have been unable to disabuse his mind of information he had obtained in such capacity, but which did not appear in the relevant documents. A consideration of Whitehorn's evidence reveals no traces of lack of objectivity on his part, nor that he was subjectively influenced by extraneous factors.

As I have indicated, it has not been suggested that in a matter such as the present land expropriated should necessarily be described in such a manner that its location and extent can be established by a layman without the need for expert assistance. It is therefore reasonable to expect that expert assistance will be obtained and relied upon. Notice 1909 provided a reference to the declared road. If the sketch and lyn plans were in themselves not sufficient to establish what land had been

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expropriated, it would have been reasonable for an expert to have had regard to Notice 2161. Once that was done sufficient information was available, as conceded by Mr Osborn, to determine what land of the respondent had been expropriated. In the circumstances the requirements for reasonable clarity have been met, and Notice 1909, having provided a reasonable and sufficient description of the land expropriated, was not invalid for lack of adequate description.

In the result the appeal succeeds, and an appropriate order must be made. Mr Junod very fairly raised the question of a possible apportionment or special order as to the costs in the court a quo arising from the fact that the respondent had been successful in having Notice 2161 declared invalid. It is common cause that this does not affect the

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position of Sentrachem, and that it is entitled to recover its costs in the court a quo from the respondent. The Administrator and the respondent were unable to agree on the order to be made with regard to their costs in the court a quo. As the trial in the court a quo will proceed in relation the the other issues raised on the pleadings between the Administrator and the respondent, the best course to adopt would be to remit the question of their costs in the court a quo to that court for its decision.

The following order is made:

1) The appeal succeeds with costs, such costs to include, in the case of each appellant, the costs of two counsel in respect of both the appeal and the application for leave to appeal;

2) Paragraphs 2 and 3 of the order of the court a quo are set aside and there is substituted in their stead the following order:

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"(a) Administrator's Notice 1909 of 4 September 1985, insofar as it relates to portion 213 of Zuurfontein 33 IR, is declared to be valid.

(b) The plaintiff is ordered to pay the costs of the second defendant, such costs to include the costs of two counsel."

3. The question of costs in the court a quo as between the respondent (plaintiff) and the first appellant (first defendant) is remitted to the court a quo for its determination in the light of this judgment.

J W SMALBERGER
JUDGE OF APPEAL

BOTHA, JA)
STEYN, JA) CONCUR
EKSTEEN, JA)
SMUTS, AJA)