In the High Court of Swaziland

Civ. Case No. 1423/93

In the matter between:

Riverside Investments (Proprietary) Limited	Applicant
and	
The Minister for Works & Construction	1st Respondent
Marples Construction Limited	2nd Respondent

CORAM	Hull, C.J.
FOR APPLICANT	Mr. Kuhny, S.C.
FOR FIRST RESPONDENT	Mr. Wilmaratne
FOR SECOND RESPONDENT	Mr. Millin

Judgment
(22/11/93)

The applicant is the registered owner of land situated near the outskirts of the City of Manzini. It operates the Prince Velebantfu Hotel on the site. The property comprises Portion of Farm 1 of Farm 1206 Manzini and Remainder of Farm 1206 Manzini . Access to the hotel is at present gained from the main road from Manzini to Matsapa.

The Ministry of Works is constructing a new road between those two places. Marples Construction Limited is the contractor on this major project. As planned, this road is intended to pass on the other side of the hotel.

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At the end of 1992, for the purposes of building the road, the contractor entered upon the applicant's land and began construction work.

In September 1993, the applicant commenced these present proceedings which it has brought by way of notice of application. What it is now seeking is first, an order evicting the respondents from its property and secondly, if necessary, a permanent interdict restraining the respondents from entering on the land other than to remove its equipment. Mr. Kuhny, for the applicant, indicated at the hearing that any question of compensation will be pursued elsewhere, at a later date.

The application is opposed by both respondents. Before the hearing, an order was made by consent which included (inter alia) an undertaking by the respondents that until the outcome of this hearing, they would proceed on their work in such a way as not to interfere with existing access to the hotel or to demolish any further buildings belonging to the applicant or disturb trees and vegetation on its property.

It was common cause at the hearing that the cause of action of the applicant being a rei vindicato, and it being not disputed that the applicant is the owner of the property or that the respondents are in possession of it (or of part of it), then the applicant is entitled of right to an order evicting them unless the respondents discharge the onus of proving that they have a legal right to occupy the property. For these propositions, which as I say are not contentious, the following cases were cited in argument: Graham v. Ridley 1931 TPD 476, Chetty v. Naidoo 1974(3) SA 13 AD and Pretoria Stadsraad v. Ebrahim 1979(4) SA 193T.

It is also accepted by the second respondent, the contractor, that any rights that it may have to be on the applicant's land are derived by it through the Minister of Works, i.e. under the contract that it entered into with the Minister for the execution of the road project.

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The issues thus being defined succinctly by counsel for the parties, I will therefore turn directly to the bases on which the respondents claim to be entitled to be on the land.

At the outset, Mr. Wilmaratne at first submitted in limine that it was not shown, on the papers, that the applicant's attorneys had been duly authorised by it to sue the Minister. This objection was however abandoned, correctly in my view.

The respondents made common cause on their other grounds of opposition to the application. It is, I think, convenient and sufficient to deal with each ground in itself, referring as necessary to any submissions made in particular by Mr. Wilmaratne for the Minister or Mr. Millin for the contractor.

Their first contention is that they are undertaking the project on the applicant's land pursuant to the authority of the Roads and Outspans Act (No. 40 of 1931) - specifically section 7(3).

It is not disputed that on 28th, 29th, and 30th May 1991 the Minister through his servants caused to be published in local newspapers in Swaziland the public notice that is annexed at "1R1" to the affidavit of the Chief Professional Officer in the Ministry of Works, Mr. Andreas Manana, which has been filed in opposition to the application. I refer to that notice, according to its tenor, for its terms. As far as its legal significance in this matter is concerned, it is necessary for me to refer to subsections (3) and (4) of section 7 of the Act, which provide as follows:

"(3) The Minister or any person acting under his authority in that behalf may after notice to the owner enter upon any" (sic) "take possession of so much of any land as may be required for the opening or construction of any public road or any other purpose subsidiary to the discharge of the duties or

powers conferred and imposed by this Act in respect of such road.

"(4) Before issuing any notice under subsection (1)(a), (b) or (d) the Minister shall cause notice of his intention in writing to do so to be given to all owners whose property may be affected by such declaration, deviation or closing, requiring any person who may object thereto to lodge such objection in writing with the District Commissioner within thirty days after the date of the said notice:

"Provided that when the address of an owner is not known the notice shall be published in the Gazette and sent to such owner by registered post to his last known place of residence and a copy shall be posted at all public offices in the district.

"And provided further that where a road has been in existence for a period of twelve months before the commencement of this Act and has been in use as a public road, it shall not be necessary to give notification in writing to such owner."

It is common ground that apart from the public notice to which I have referred, no notice relating to this matter was ever published, in a newspaper or in the Gazette, and no other form of notice was ever given to the applicant, before the respondents occupied its land and proceed to build a road upon it.

The intention of section 7 of the Act, as far as the present case is concerned, is in my view clear. Under subsection (1) the Minister may (inter alia) declare that a public road shall exist on land where no road was previously in existence and define its course, or deviate any public road. In either case, before doing so, a road board constituted under the Act is required to investigate and report on the proposed action.

Under subsection (3) the Minister or a person acting under his authority may, after notice to the owner, enter on and take possession of so much of any land as may be required for the opening or construction of a public road. It is in my opinion intended as a condition precedent to such action that the Minister shall have first established the road under subsection (1).

Before he may do so however, he is required under subsection (4) to give notice of his intention to all land owners who may be affected by his decision to do so. The purpose of this, clearly, is to call on any landowner who objects to lodge his objection in writing with the District Commissioner within thirty days.

Under subsection (5) the road board has a duty to inspect the locality affected and make full enquiries into the intended action and any objections, and to transmit its report on these matters as soon as possible to the Minister. The words "intended action", read in conjunction with subsection (1), refer to a proposal by the Minister under that subsection to declare and define a new public road or to order the deviation of an existing public road.

The Act also provides, in Part VII, for the compensation of landowners affected by road projects. That is however, in my view, a separate, subsequent provision. It may be that in due course, after a road board has considered objections, and reported to the Minister, he will decide to proceed on his intended action. He will no doubt, in reaching a decision, have regard to the public interest as well as that of individual landowners. He may decided that the public interest is overriding. In that event, if adversely affected, the landowner will be entitled to compensation.

But quite apart from this, and before that point is reached, the scheme of the Act, in section 7, is that landowners whose property may be affected are to be given the

opportunity to object to the intended action, before it is taken at all. Such objections must be considered, and duly weighed - albeit against competing considerations such as the public interest - before a decision is made to proceed on the intended action.

In the present case, it is conceded by the respondents that the notice published in local newspapers in May of 1991 did not comply strictly with section 7(4).

There is no doubt about that. The notice does indicate an intention to alter the alignment of the Mbabane/Manzini road. It does disclose that certain specified properties, including that of the applicant, may be affected. It also does intimate specifically, elsewhere, that the approach of the existing road to Manzini, near the Trade Fair ground, may be affected. The hotel is in that general vicinity.

It does not define the proposed new course of the road. I do not say that that last point is necessarily a fatal defect but the notice does not call for objections either. It is a preliminary warning to landowners who may be affected. It asks them for their postal addresses. It indicates that plans showing the actual area to be affected are expected to be available within three months, and it gives public notice that owners should arrange to inspect them.

The notice that was published in the newspapers was not, in my opinion, anything more than an advance warning of a proposal to re-route the road. There is no evidence before me that in fact plans were subsequently made available for inspection. The notice in May did not specify where they could be viewed. No further notices were published.

What was required to be done, to comply with section 7(4), was not only to give all owners whose property might be affected notice of the intended action, but also require them to object within thirty days if they had objections.

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Notice in terms of the second leg of that requirement was not given. For that reason alone, the subsection was not complied with. I do not consider that the omission can, in itself, be regarded as merely technical. The opportunity to object to a proposal that may affect one's property rights is an important one. It is important as well to bring that opportunity to the attention of landowners. Not everyone would be aware of it.

The notice published during May did not comply with subsection (4) in one other respect. The subsection contemplates that where the address of a landowner is known, the notice shall be given to him directly (or at the least in one of the ways provided for in section 33 of the Interpretation Act 1970 (No. 21 of 1970)). It is only in the case where his address is not known that service can be effected by public notice under section 7(4). The subsection stipulates that such notice is to be published in the Gazette, but it also goes on to stipulate that in addition it must be sent to the owner at his last known place of residence, and that copies must be posted at all public offices in the district.

In this case, the applicant, which is a company, was registered as the owner of the land concerned. It has not been asserted in the opposing affidavits that the respondents were unaware of its address. In preparing a project of this nature, I would have thought that it would be possible, readily, to ascertain from public land records the names of the property owners concerned. After all, the notice that was published identified the legal lots. From this, I would also have thought it an easy matter, by referring to the public records pertaining to companies, to ascertain the applicant's registered office. Quite apart from these things, it must surely have been known that one of the properties that were likely to be affected was the one on which the Prince Velebantfu Hotel stood. (Indeed it would appear to me to be evident from the notice that it was known that that was one of the properties.)

While I acknowledge the practical force of the submission that, where the address of a landowner is in fact unknown, publication in a local newspaper is more likely to come to his attention than is notice in the Gazette, and I also keep in mind the evidence for the respondents that wide publicity was given to this project in the media, notice was not in fact published in the Gazette and there is no evidence that it was sent to the applicant's last known address or put up in public offices in the district.

I am therefore in respect of service of the notice bound to hold, as Broome J. held in Durban Corporation v. Lewis 1941 42 SA 24 (NPD NPA) (cited by Mr. Wilmaratne and to which I shall shortly come) that the statutory requirements were not met.

It was submitted by Mr.Millin that non-compliance with section 7(4) was not a matter of real consequence because in the circumstances of this case, the applicant was in due course in fact given for all practical purposes an opportunity to make its objections, and did so.

On 25th November 1992, the applicant did write to the Ministry (through its estate agents) stating that it had recently come to its notice that road works were being conducted on its property, and objecting to them. This letter is annexed at "IR2" to Mr. Manana's affidavit. The letter also foreshadowed the applicant's subsequent discussion with the Ministry, in which it included the question of compensation.

One answer to this particular submission by Mr. Millin is that even if this letter could properly have been treated as curing the earlier failure by the Ministry to comply with section 7(4), the subsection requires that objections are to be investigated and reported upon, to the Minister, by a road board. It did not lie with the applicant to have to ensure that this was done. That was a matter for the

authorities. But there is no evidence here that the applicant's objection was ever referred to a road board for investigation and report. On the contrary, it seems quite clear that this was not done.

Mr. Wilmaratne has also submitted - and strictly I think that it is a prior issue - that Durban Corporation v. Lewis is authority for the proposition that the court can disregard technical shortcomings in a statutory requirement such as that in section 7(4) for notice. I understood him to put it that widely. With respect I am not able to agree. In that case Broome J. expressly held that the relevant statutory provisions had not been complied with. He then proceeded to hold that this was not a defence for the landowner, not because of any general rule that the omissions were merely technical, but because on the facts the landowner was estopped from relying on them.

In the present case, I do not regard the failure of the first respondent to comply with section 7(4) as a mere technicality, for the reasons that I have already given. The respondents do however assert that the applicant is in any event estopped from asserting non-compliance. Mr. Millin also contends that it has waived its rights to dispute the authority of the Minister and his contractor to go on to its property and build the road, and he contends further that it has consented to their doing so. (In advancing this last assertion, he said that the respondents were in occupation and undertaking the project with the applicant's "knowledge and consent", but as a person cannot meaningfully consent to a course of action without knowing about it, I think that it comes down simply to an allegation of consent.)

Mr. Millin also submitted that in any event the papers disclose a dispute of fact in respect of these issues so that I should at least order that oral evidence should he heard on them. He did not press, in the event of a dispute, for the dismissal of the application.

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The three further bases on which the respondents seek to justify their entry on to the applicant's land and their actions there all depend on an assertion that the applicant has, by words or conduct, not pursued its objections to the construction of the road over its land as such.

As to whether the papers disclose a real issue of fact in that regard, Mr. Manana in paragraph 7(2) of his affidavit deposed that after receiving the letter of 25th November 1992, and responding to it, he then had discussions in the same month with the applicant's managing director, Mr. Dumisa Dlamini. The latter proposed a certain form of compensation. There were subsequent discussions, and at some time after 7th June 1993 the applicant agreed to appoint its own valuers to assess compensation and report back to the Ministry. Instead, however, it launched this present application.

Mr. Manana also deposed that at no stage of the discussions did the applicant object to the construction of the road over its property. In paragraph 10 he also stated that "in permitting the construction works to proceed for almost a year," the applicant was estopped from seeking an interdict, and that his proper remedy was compensation.

The second respondent filed an affidavit by Mr. L.M.S. De Sousa, who is one of its directors. He deposed in paragraph 7.2 of that affidavit that he was "advised" by the first respondent that the applicant was given notice of the work, that construction commenced with its knowledge and consent, and that compensation was lawfully determined and the applicant informed.

He also deposed in paragraph 7.3 and repeated in effect, in paragraph 8.2, that he was "advised" by the first respondent that the applicant had (as the deponent put it in paragraph 7.3) "at all times" disputed the amount of compensation "but not the fact" that the road would be constructed over his land.

In paragraph 8.3 and 8.4 he referred to substantial works being carried out on the property after discussions with the hotel manager and without "protest" from the applicant; at paragraph 8.7 he stated that as far as he was aware, the applicant had never protested against the works as such; and at paragraph 10.5 that the applicant's employees had assisted in demolishing the only building that was pulled down.

It is however clear from the first respondent's own papers, to which the letter of 25th November 1992 was annexed, that in that letter the applicant did at the outset object to the execution of the works themselves. It is also quite clear from Mr. De Sousa's affidavit that apart from his assertions that the applicant's staff (including, admittedly, a manager) discussed with the contractor certain work, and never protested to the contractor, and helped in demolishing a building, his evidence that it consented to the building of the road over its land and had not objected to it is not only hearsay but, in the last respect, is incorrect.

In its replying affidavits, the applicant denied that the work had commenced with its knowledge or consent, and that it had over abandoned its objections to the execution of such at the works themselves. Mr. Dlamini deposed that he first became aware that the first respondent was purporting to act under the Roads and Outspans Act after discussions between lawyers at court on 22nd October 1993. He also stated that the applicant's objection to the execution of the works was maintained. In that respect he annexed at RD - RG letters dated 17th June 1993, 30th June 1993, 26th July 1993, and 5th August 1993. The last three of these, according to their tenor, all voice objection to the carrying on of the works.

The hotel manager, Mr. H. Zikalala, also denied that equipment was brought on to the property with his knowledge or consent.

Mr. Wilmaratne, for the first respondent did not seek to object in limine that there were disputes of fact that could not be resolved on the papers alone. He himself did not in fact make such a submission expressly at all, and Mr. Millin did not do so except as a final argument at the end of his own submissions.

I do not consider that the papers in these proceedings disclose sufficiently a real or genuine dispute of fact as to whether or not the applicant is estopped from denying the respondents' authority to enter or occupy its land and to carry out the road works, or has waived its rights in those respects or has consented to the works.

The applicant, as the lawful owner of the land, is entitled as of right to the order for ejectment sought by it in paragraph 2 of the notice of application, in the absence of proof by the respondents that they have entered upon and occupied the land pursuant to legal authority. The respondents have not in my judgment discharged that onus or shown that the plaintiff is estopped from enforcing its right or has waived it or consented to their activities. They have not shown that it is prevented by delay from insisting on its right. Accordingly I find that the applicant is entitled to the order sought in paragraph 2 of the notice of application.

It has also sought a permanent interdict under paragraph 3 of the notice of application. This is a matter of discretion. I do not see the need for such an order. The order under paragraph 2 will secure effectively to the applicant the relief it desires, as Mr. Kuhny has more or less acknowledged. The court does not contemplate that a Minister of the Crown or his servants or agents would seek to enter on and occupy land contrary to an order for ejectment. I do not consider that there is a real prospect that the contractor would do so either. I see no need at present for such an interdiction, and I do not regard it as appropriate.

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Finally, there is a question of costs. Mr. Millin has argued that as the applicant has not pursued on this occasion any question of compensation, but the second respondent has prepared its case on such issue, the appropriate order is that there should be no order for costs. With respect this submission is misconceived. At the time when the applicant commenced these proceedings, it was entitled to seek compensation. The first respondent invoked the Roads and Outspans Act (which has its own provision for compensation.) The second respondent relied on a derivative right from the first respondent to seek to justify its own actions. In the way in which the respondents have answered this application - on their papers - the applicant has gone as far as it needs to go for the time being in seeking the relief it desires. It has substantially succeeded on the application. I think that there are evident reasons why it may think fit not to pursue the question of compensation at this time, and that it is also evident that that issue will essentially be one between the applicant and the first respondent.

The costs must therefore follow the event, and there will be an order accordingly as prayed in paragraph 5 of the notice of application in favour of the applicant.

DAVID HULL
CHIEF JUSTICE