26/94

Bib

Case No : 321/93
N v H

THE DIEPSLOOT RESIDENTS' AND LANDOWNERS' ASSOCIATION — First Appellant

STUART AITCHINSON — Second Appellant

and

THE ADMINISTRATOR, TRANSVAAL — Respondent

SMALBERGER, JA :-

Case No : 321/93
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

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| THE DIEPSLOOT RESIDENTS' AND LANDOWNERS' ASSOCIATION | First Appellant |
| STUART AITCHINSON | Second Appellant |

and

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| THE ADMINISTRATOR, TRANSVAAL | Respondent |

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| CORAM: | BOTHA, SMALBERGER, FH GROSSKOPF, JJA, et NICHOLAS, OLIVIER, AJJA. |
| HEARD: | 15, 16 FEBRUARY 1994 |
| DELIVERED: | 24 MARCH 1994 |

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J U D G M E N T

SMALBERGER, JA:

The first appellant is a voluntary association representing the residents and landowners of smallholdings situated on the original farm Diepsloot ("the Diepsloot residents"). The area in question falls within the Pretoria/Witwatersrand/Vereeniging

region ("the PWV region"). The second appellant owns, and resides upon, one such smallholding. The respondent is the Administrator of the Transvaal.

On 26 June 1992 the appellants (and one other applicant) brought an urgent application against the respondent and others in which they claimed a temporary interdict, pending an action for final relief, restraining the respondent from settling, or permitting the settlement of, certain homeless persons on land at Diepsloot West adjacent to that owned and occupied by the Diepsloot residents ("the Diepsloot site"). The application was premised on the intended settlement creating a nuisance and causing unlawful interference with the rights of the Diepsloot residents to the enjoyment of their properties. It was also alleged that the decision of the respondent to settle the persons concerned at the Diepsloot site was reviewable on certain grounds.

The matter first came before DE VILLIERS, J, in the Transvaal Provincial Division. He decided to refer certain issues that had arisen on the papers to trial. At the same time he granted an interim interdict preventing the respondent from proceeding with the planned settlement pending the final adjudication of the application. The judgment of DE VILLIERS, J, is reported at 1993(1) SA 577(T) ("the first judgment"), and the full order made by him appears at 587C to 588G. The matter eventually proceeded before McCREATH, J. After a protracted hearing, during the course of which a number of witnesses testified, McCREATH, J, dismissed the application with costs. His judgment is reported at 1993(3)SA 49(T) ("the second judgment"). The learned judge refused leave to appeal, but the necessary leave was subsequently granted by this Court.

This appeal focuses on the powers and duties of the respondent, in the exercise of his public

functions, to take steps to alleviate the plight of the homeless at the possible expense, or to the detriment, of neighbouring property owners. For a proper understanding of the issues involved in this appeal, and their ultimate resolution, it is necessary to set out in some detail the sequence of events which preceded and gave rise to the application in the court a quo.

Prior to September 1991 a community comprising forty-five families of approximately six members each occupied farmland in the Zevenfontein area which they hired from the lessee of the land. Their tenancy was lawfully terminated but they refused to vacate the property. An eviction order was obtained and they were removed from the property at the end of September 1991. They were temporarily settled on an adjoining property. Over a relatively short period there was an influx of squatter families into the area, causing the size of the community to increase dramatically. Concerned local

inhabitants took steps to prevent the further influx of squatters into the area. This caused a tense situation to develop. The members of this community are generally known as the "Zevenfontein squatters". In what follows I shall refer to them as such. As a result of socio-political changes rapid urbanisation was taking place at the relevant time. This led to a large number of persons migrating to the PWV region in search of employment opportunities. There was a pressing need for land to accommodate these people. In order to deal with the problem, the respondent appointed a task group to study and report on the means of ensuring orderly long term urbanisation in the north-westerly quadrant of the PWV region. The task group under the chairmanship of Mr Waanders, the chief town and regional planner of the Transvaal Provincial Administration, included experts in town planning and other fields, and representatives of various Town and Regional Services

Councils, Local Area Committees and other interested bodies and organizations, many of whom were assisted by their own professional advisers. According to the evidence of Mr Waanders, "dit was 'n versameling van tegniese en vakkundige mense wat ons bymekaar gekry het wat na my mening ongekend was". Members of the task group also consulted widely with interested parties not specifically represented on the group. The task group eventually reported its findings to the respondent in Executive Committee on 30 March 1992. Its report is commonly referred to as the "Blue Report".

The unhappy plight of the Zevenfontein squatters became the concern of the Transvaal Provincial Administration during October 1991. Efforts to find suitable land for their settlement met with opposition and lack of success. On 5 February 1992 the respondent instructed the task group, as a matter of urgency, to investigate the settlement of the

Zevenfontein squatters at a suitable site and to furnish him with an interim report by 2 March 1992 at the latest. The task group duly carried out its mandate and produced a report known as the "Green Report".

The Blue and Green Reports were considered jointly by the respondent in Executive Committee on 5 June 1992. Both are comprehensive documents, comprising forty eight and thirty two pages respectively. According to the respondent, and this is nowhere challenged, all aspects of the two reports were comprehensively debated and considered in the Executive Committee. In addition the following documentation was available:

1) A summary of objections received from interested parties;

2) Proposals received from members of the public;

3) An evaluation of thirteen possible sites for

low cost housing presented by officials of the Transvaal Provincial Administration during November 1991;

4) A more detailed evaluation of certain sites, including the Diepsloot site, by officials of the Transvaal Provincial Administration;

5) Offers of sites by members of the public, and objections received from members of the public after 30 March 1992.

In the course of their deliberations the respondent and certain members of the Executive Committee visited all the sites dealt with by the task group save four, which had been seen and inspected previously.

As appears from the Green Report, the task group's first choice for the settlement of the Zevenfontein squatters was a site at Cosmo City. The second choice was Diepsloot East, and the third the Diepsloot site. The respondent in Executive Council

opted for settlement at the Diepsloot site and an area known as Nietgedacht (with which we need not concern ourselves for the purposes of the present appeal). According to the respondent, there were a number of factors which militated against the site at Cosmo City, and which led to the Diepsloot site being preferred to Diepsloot East. There is no need to deal with them. Suffice it to say that it has never been suggested that the choice of the Diepsloot site in preference to that at Cosmo City or Diepsloot East was unreasonable or open to challenge in any way. Consequent upon the choice of the Diepsloot site, the properties comprising it were expropriated by the respondent under the provisions of the Expropriation Act 63 of 1975. The various notices of expropriation were dated 9 June 1992.

On 8 July 1992, subsequent to the appellants launching their application, the respondent caused to be

published in the Official Gazette Extraordinary of that date Administrator's Notice 294 ("the Notice"). The relevant portion of the Notice reads as follows:

> "DESIGNATION OF LAND FOR LESS FORMAL SETTLEMENT ON THE FARM DIEPSLOOT 388 JR IN THE DISTRICT OF PRETORIA (PROPOSED DIEPSLOOT TOWNSHIP)
>
> I, Daniël Jacobus Hough, in my capacity as Administrator of the Transvaal do hereby under and by virtue of the powers vested in me by section 3(1) of the Less Formal Township Establishment Act, 1991 (Act No 113 of 1991), designate the following land made available by me under section 2(1) of the Act as land for less formal settlement:
>
> A certain area of land 92,9812 hectares in extent, being the Remaining Extent of Portion 120 and Portions 151 to 153, all of the farm Diepsloot, Registration Division 388 JR, Transvaal.
>
> The above designation is on condition that the final layout plan and draft conditions of establishment of the proposed township be approved.
>
> The following restrictive conditions and servitudes are hereby suspended:
>
> 1. .....
> 2. .....
> 3. .....
> 4. .....
>
> Given under my Hand at Pretoria, on this 8th day of July in the year 1992 (One thousand Nine hundred and Ninety-two).

D J HOUGH
Administrator of the Province of the Transvaal."

The proposed layout plan for the Diepsloot site provided for 1324 residential stands, the majority of which averaged 250 square metres. It also made provision for three schools, sixteen community sites, two business sites and twelve parks. According to the unchallenged evidence on behalf of the respondent, the intention is to settle approximately 8000 people on the Diepsloot site, including about half the number of the Zevenfontein squatters. What is envisaged is not haphazard squatting but orderly development within the context of town planning. As the persons to be settled there will mainly be impoverished they will be permitted, initially at any rate, to erect corrugated iron and cardboard structures. It is also common cause that the main access roads will be gravelled,

provision will be made for potable water, adequate sanitation will be provided and electricity will be made available. Efforts will also be made to provide sufficient policing, to prevent illegal squatting and to encourage the burning of wood rather than coal.

Three issues arise in the present appeal. The first, and main, issue is whether the appellants are entitled to an interdict restraining the respondent from settling, or allowing the settlement of, persons on the Diepsloot site. The second is whether the respondent's decision to establish an informal settlement at the Diepsloot site was grossly unreasonable and thus reviewable. The third raises the question whether the respondent's designation of the Diepsloot site in terms of s 3(1) of the Less Formal Township Establishment Act 113 of 1991 ("the Act") was suspended pending the approval of the final layout plan and draft conditions of establishment in respect of the

proposed settlement. I shall deal with each of these in turn.

The requisites for a final interdict are well settled. The appellants have to establish (1) a clear right (ii) unlawful interference with that right, actually committed or reasonably apprehended and (iii) the absence of any other satisfactory remedy (Setlogelo v Setlogelo 1914 AD 221 at 227). The first and third requirements are not in issue, only the second. The appellants base their case for a final interdict on a reasonable apprehension that the proposed settlement will create a public nuisance. This, it is said, will result from heightened levels of air pollution consequent upon the burning of wood and coal by the persons who will be settled on the Diepsloot site, as well as a marked increase in the incidence of crime. It is also claimed that the proposed settlement will bring about a significant diminution in the value of

properties adjacent to the Diepsloot site with resultant economic loss to the Diepsloot residents. This cannot per se create a nuisance; at best "the alleged drop in market values may afford a barometer of the alleged diminution in use and enjoyment of the applicants' [appellants'] properties as a result of the intended settlement ...." (the first judgment at 581E).

For the purposes of the present appeal it may be assumed that the likely consequences of the establishment of the proposed settlement are such as to induce a reasonable apprehension that a nuisance will be created which will interfere with the rights of the Diepsloot residents. The crucial question is whether such interference will be unlawful and constitute an actionable wrong. This will depend upon whether statutory authority exists for such interference, for where a statute has authorised the infringement of legal rights there can, subject to a qualification that will

be mentioned later, be no wrongful conduct and hence liability (Union Government (Minister of Railways) v Sykes 1913 AD 156 at 169). It therefore becomes necessary to consider the nature of the statutory powers conferred upon the respondent under the Act in order to ascertain whether the Legislature intended to grant immunity in respect of any interference with the common law rights of the Diepsloot residents. This is a matter of construction involving a consideration of the relevant provisions of the Act as well as its purpose. As stated by INNES, CJ, in Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 ("the African Realty case") at 171/2:

> "Whenever the exercise of statutory powers is alleged to have resulted in injury to another the enquiry must always be, - what was the intention of the Legislature? Did it intend that immunity from consequences should accompany the grant of authority, or did it intend that the authority should either not be exercised at all to the legal prejudice of others, or that if so exercised there should be an accompanying liability to make good any

consequential damage?"

It is common cause that there are no provisions in the Act which expressly authorise interference with the rights of the Diepsloot residents to the enjoyment of their properties. The question is whether such authority is necessarily to be inferred. In determining whether or not such an inference is justified, regard may be had to certain guidelines propounded by INNES, CJ, in the African Realty case (at 172) as "useful, but ... not necessarily decisive". The first of these is that an intention to interfere with private rights is not presumed where no provision is made for compensation, subject to the caveat that "[t]hat principle loses much of its force, however, when applied to public undertakings". INNES, CJ, then went on to add (at 172/3):

> "But the nature and character of the powers conferred, and of the work contemplated, and the terms of the statute are more important. The work authorised to be done may be defined

> and localised, so as to leave no doubt that the Legislature intended to sanction a specific operation. In such a case, especially if the work were one required in the public interest, an intention that it should be duly constructed in spite of interference with common law rights might fairly be inferred. ..... Or again, if an act which a statute definitely authorises to be done is one which must necessarily interfere with common law rights, the Court will infer a legislative intention that they should be infringed. ..... On the other hand, where the permissive powers conferred are expressed in general terms, where there is nothing in the statute to localise their operation, and where they do not necessarily involve an interference with private rights, the inference would be that the Legislature intended the powers to be exercised subject to the common law rights of third persons."

The principles and guidelines referred to in the African Realty case have been consistently applied, in matters involving disputes concerning the exercise of statutory powers by public authorities to construct and maintain roads, drainage systems, dams and the like. (See, e g, Union Government (Minister of Railways) v Sykes (supra); New Heriot Gold Mining Company Limited v

Union Government (Minister of Railways and Harbours) 1916 AD 415; Breede River (Robertson) Irrigation Board v Brink 1936 AD 359; Bloemfontein Town Council v Richter 1938 AD 195; Reddy and Others v Durban Corporation 1939 AD 293). More recently, in East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others 1989(2) SA 63(A) they were extended and applied to a situation where the establishment of a squatter township of some 8000 refugees was alleged to have caused an unlawful invasion of the rights of owners of adjoining properties. By a majority of three to two this Court held that the rights of such property owners had been infringed and ordered an abatement of the public nuisance which had been created. The decision turned on the particular facts of that case and the empowering legislative provisions on which the defence of statutory authority was based, both of which, as pointed out in

the second judgment at 62E - 64B, are clearly distinguishable from those we are dealing with in the present matter. It laid down no new principle or binding precedent. There, as here, it was the nature and extent of the powers conferred on the relevant public authority that were of crucial importance.

The qualification to which the principles outlined above are subject is the following. Where the interference with private rights is justified, "the exercise of the statutory power is limited by another consideration, namely that it must be carried out without negligence" (the African Realty case at 173). By "negligence" is meant the failure to prevent harm if by the reasonable exercise of the power conferred this could have been avoided (the African Realty case at 174), or, differently put, a failure to take certain reasonably practicable precautions or to adopt another reasonably practicable method of achieving the purpose

of the power by which the extent of the interference will be lessened. (Bloemfontein Town Council v Richter (supra) at 231; Germiston City Council v Chubb & Sons Lock and Safe Co (SA)(Pty) Ltd 1957(1) SA 312(A) at 322A - 323A). Although it is clear what the word negligence is intended to convey, its use is questionable. The issue is not whether the repository of the power acted negligently (culpably), but whether he has exceeded his authority by unreasonable conduct and therefore acted wrongfully (see Neethling, Potgieter and Visser: Law of Delict (2nd Ed) at 99; Baxter: Administrative Law at 606). In determining whether or not there has been a reasonable exercise of power regard may be had, inter alia, to the commitments of the public authority, the resources it has available and alternative courses of action open to it (cf Germiston City Council v Chubb & Sons (supra) at 323 C-D). In the African Realty case (at 177) it was stated that the onus

of showing that the repository of a power acted "negligently" (wrongfully) when exercising such power rests upon a plaintiff (or applicant). Although the question of onus generally (and the implications thereof) were much debated in argument, I do not consider it necessary, for reasons that will become apparent in the course of this judgment, to embark upon a discussion of the subject.

I come now to consider the Act and its provisions in order to determine whether, in authorising informal settlements, it impliedly authorized interference with the common law rights of neighbouring landowners and residents - in the present instance, the Diepsloot residents.

The Act was assented to on 27 June 1991 and came into operation on 1 September 1991. Significant developments took place in the Republic in 1991 with regard to the dismantling of the system of apartheid.

Parliament passed laws repealing a wide range of racially discriminatory legislation dealing, inter alia, with the ownership and occupation of land. That year also saw a rapid increase in urbanisation with resultant squatting in urban areas. The changing circumstances were responsible for statutes such as the Abolition of Racially Based Land Measures Act 108 of 1991 (which, in terms of s 48, abolished the Group Areas Act 36 of 1966), the Upgrading of Land Tenure Rights Act 112 of 1991 and the Act presently under consideration. It is permissible to view and interpret the relevant provisions of the Act against the background of these developments which are sufficiently well-known for judicial cognisance to be taken of them (Consolidated Diamond Mines of South West Africa Ltd v Administrator SWA and Another 1958(4) SA 572(A) at 657 F).

The purpose of the Act, according to its long title, is to provide, inter alia, "for shortened

procedures for the designation, provision and development of land, and the establishment of townships, for less formal forms of residential settlement ....."

In terms of section 2(1), the Administrator may make available State land that is controlled by him or has been acquired by him by means of purchasing, expropriation or in any other manner, for designation under s 3. Apart from a proviso, which may be disregarded for present purposes, the relevant part of s 3(1) reads as follows:

> "When the Administrator is satisfied that in any area persons have an urgent need to obtain land on which to settle in a less formal manner, he may, by notice in the Official Gazette, and on the conditions mentioned in the notice, designate -
>
> (a) land made available by him under section 2(1); or
>
> (b) .....
>
> as land for less formal settlement."

In terms of s 4(1)(a) the planning and

development of designated land shall be undertaken, in the case of land referred to in s 3(1)(a), by the Administrator (or by someone with whom he has concluded an agreement for that purpose) "subject to the conditions mentioned in a notice under section 3(1) and in accordance with the requirements deemed necessary by the Administrator to make the speedy and orderly settlement of persons in terms of section 8 possible". Section 8 provides for the settlement of persons on designated land on allocated erven after such erven have been surveyed.

It is apparent from the provisions of the Act to which I have referred that informal settlement under the Act essentially involves three phases. In the first phase State land controlled by the Administrator or land acquired by him (in the present instance, by expropriation), is made available for designation. In the second phase, if the requirements of s 3(1) have

been met, such land is designated for less formal settlement. The third phase involves the settlement of persons on the land so designated.

It is arguable that these three phases constitute three separate and distinct acts - expropriation, designation and settlement - to each of which certain legal consequences attach. So viewed the position would be as follows. No challenge was, or can be, directed against the expropriation of the Diepsloot site by the respondent. The expropriation per se could not have infringed any rights of the Diepsloot residents. One then proceeds to the next stage, the designation. It is common cause that the respondent was satisfied (and was entitled to be so satisfied) that the Zevenfontein squatters were in urgent need of land on which to settle informally. It was therefore incumbent upon him to designate the Diepsloot site (being the land made available by him

under s 2(1) of the Act) for informal settlement. Despite the use of permissive language ("may"), s 3(1) imposes upon the respondent a power coupled with a duty. In the words of Earl Cairns LC in Julius v The Lord Bishop of Oxford (1880) 5 AC 214 at 225:

> "[W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

The designation was therefore carried out by the respondent in the prescribed manner and as contemplated by the Legislature. It would only be open to attack on review on the ground of gross unreasonableness. (For reasons that will appear later, such an attack is untenable.) The designation per se could not cause any unlawful interference with the rights of the Diepsloot residents. To the extent that

it could have resulted in a drop in the value of their properties (and in fact did so result) such diminution could not have constituted a nuisance or have afforded them a legal interest which could be protected by an interdict. Any subsequent settlement would of necessity, having regard to the terms of the Act, have to be on land so designated. In other words, once a designation has been made, the locality for any subsequent settlement must be taken to have been clearly spelt out by the Legislature. The question of possible alternative sites does not arise. From this it would follow, in effect, that the Legislature intended the Diepsloot site to be used for the settlement of persons having an urgent need to obtain land (in casu, the Zevenfontein squatters). To the extent that this would result in interference with the rights of the Diepsloot residents, such interference was authorised by necessary implication.

Compelling as this approach may be it is, in my view, somewhat legalistic. It tends to lose sight of the realities of the situation the Act was designed to cater for and remedy. Expropriation, designation and settlement are all part and parcel of the attempted resolution of the squatter problem brought about by increased urbanisation. In the present instance all three had the same object in mind - to settle the Zevenfontein squatters on the Diepsloot site. It seems to me, therefore, that one must approach the matter, as was done in the court a quo and in argument on appeal, on the basis of whether, without drawing a firm distinction between expropriation, designation and settlement, the Act authorized the respondent to act as he did irrespective of any infringement of the appellants' rights. While s 3(1) of the Act imposed upon the respondent the duty to act once he was satisfied that the Zevenfontein squatters had an urgent

need to obtain land for informal settlement, the question remains whether, in acting as he did, he acted unlawfully in any way. If not, his conduct would not be open to attack by the appellants.

I have previously mentioned that the Act was enacted against the background of the repeal of discriminatory legislation, increased urbanisation and the resultant squatter problem. There was an urgent need to provide for the speedy and orderly settlement of homeless persons. The Act sought to cater for this need by providing, in keeping with its purpose as outlined in the long title, for less formal settlements (chapter 1) and for less formal township establishment (chapter 2). The need having arisen in urban areas, the solution had to be found there as well. The Legislature must clearly have contemplated the settlement of large numbers of homeless and impoverished persons in an informal manner within urban areas as part

of the urbanisation process and the resolution of the squatter problem. After all, the persons in need of settlement were there to stay. Their urgent needs could not be satisfied by allocating to them land distant from where such needs existed. Nor could they be moved to where they could not reasonably be expected to move. Such persons would therefore have to be settled, to the extent that this was reasonably practicable, near to where they were, or wanted to be, and near to their work or where employment opportunities existed. In the circumstances the settlement of persons next door to -or close to - established residential areas is unavoidable. The Legislature was also aware that any settlement would, initially at any rate, be sub-standard in terms of town planning and housing requirements, and must have foreseen that this could adversely affect adjoining and surrounding areas. In this regard, s 3(5) of the Act provides, inter alia, that the provisions of laws

relating to the establishment of townships and town planning (ss(5)(e)) and the standards and requirements with which buildings shall comply (ss(5)(f)) shall not apply in respect of designated land (unless declared otherwise by the Administrator - ss(6)(a)). It must therefore have been within the contemplation of the Legislature that the exercise by the Administrator of his powers (including the exercise of any discretion vested in him) with regard to the settlement of homeless persons might result in interference with the common law rights of third parties. Inherent in the grant of such powers is statutory authority for any such interference.

The present matter can be distinguished from cases such as Tobiansky v Johannesburg Town Council 1907 TS 134 and Herrington v Johannesburg Municipality 1909 TH 179 on which the appellants sought to rely. In Herrington's case the plaintiff instituted an action for

a final interdict to restrain the deposit of sewage and the continuance of certain sewage works by the defendant municipality that was creating a nuisance. The defendant pleaded, inter alia, that the works complained of were carried out under statutory authority. In the course of his judgment BRISTOWE, J, said the following (at 192):

> "Without attempting anything like an exhaustive analysis of the cases in which questions of this kind have arisen, I think it will be found that where, in the absence of express provision, a statutory power has been held to deprive third persons of their rights of action, not only has the work intended to be authorised been defined as regards locality as well as regards character, but its performance has been associated with an element of compulsion arising either from an express legislative command, or because the power is combined with something in the nature of a public duty to exercise it whenever occasion requires or immediately as the case may be."

BRISTOWE, J, went on to hold that the provisions on which the defendant sought to rely for its defence of

statutory authority did not satisfy these requirements, and that the plaintiff's common law right of action had not been taken away. In this regard he observed (at 195):

> "Official consents may be multiplied to any conceivable extent, and still the condition that the legislature must itself define the locality is not satisfied. The choice of site is still the voluntary act of some person or persons other than the legislature, and the element of legislative compulsion to carry out the work on the particular spot selected remains lacking."

In Tobiansky's case a similar conclusion was reached along the same lines.

The principal reason why the defence of statutory authority failed in Herrington's case (as it did in Tobiansky's) was because the empowering provision neither defined nor indicated the locality where the power granted was to be exercised. The choice of locality was left entirely to the repository of that power. Here we have a wholly different situation. The

provisions of the Act prescribe (by implication) the general locality for the exercise of the respondent's powers of settlement, viz, an urban area in which there exists an urgent need to settle homeless persons. The Legislature requires and authorises their settlement in that area. The respondent is left with no choice in that regard. Apart from locality the Act also defines the character (the settlement of persons in urgent need of land) of the respondent's power. The element of compulsion (the power to act coupled with the duty to do so) is also present. The requirements referred to in Herrington's case for the defence of statutory authority have accordingly been satisfied. I have not lost sight of the fact that no provision is made in the Act for compensation for persons whose rights are infringed and suffer loss. This is a relevant consideration, but as we are dealing here with what amounts to an undertaking in the public interest with possible far-reaching socio-

economic implications it loses much of its force, as pointed out by INNES, CJ, in the Realty Trust case (supra at 172). It is comprehensively outweighed by the other considerations I have mentioned in favour of the existence of statutory authority.

What the Legislature has not done is to define the precise locality of any particular settlement. It could obviously not do so without knowing where exactly there was a need and what land was available to satisfy it. It has therefore left it to the Administrator to designate, within the prescribed locality, the precise site for the settlement of persons in need. In doing so it has vested the Administrator with a discretion to choose an appropriate site - a discretion that must be exercised judicially having regard to various relevant criteria. These would include considerations of public policy and the interests of the general public (bearing in mind that the resolution of the squatter problem is

an on-going process) as well as conflicting private interests (the needs and wishes of those who have to be resettled, on the one hand, and the concerns of those who may be affected thereby, on the other). It could also involve making a choice between alternative sites. The making of such choice would be an integral part of the exercise of his discretion.

Much was made in argument on behalf of the appellants of the alleged availability of alternative sites near Alexandra for the resettlement of the Zevenfontein squatters. It was claimed that if the respondent had selected one of those sites in preference to the Diepsloot site, a nuisance could either have been avoided or the effect thereon on neighbouring landowners and residents lessened. To determine the true nature of this argument it is necessary to distinguish between, on the one hand, the exercise by the respondent of his powers and the

performance of his duties and, on the other, the exercise by him of a discretion. Under the Act the respondent has the statutory power, and concomitant duty, to settle homeless persons at a designated site in an urban area. In designating that site, however, he exercises a discretion conferred upon him. If he exceeds his statutory powers with regard to the settlement of the Zevenfontein squatters at the Diepsloot site his conduct will be unlawful and, assuming all the other requisites are satisfied, an interdict could be obtained against him by an aggrieved person. The same will apply if he exercises his powers wrongfully by failing to take reasonably practical measures to lessen the harm that will be caused by the exercise of such powers. In this regard it is not contended by the appellants that the respondent intends to act unreasonably in relation to the number of persons he intends to permit to settle

there or to the services to be provided. Nor is it contended that, accepting that settlement will take place on the Diepsloot site, there are other steps he could reasonably take to lessen the apprehended interference with the rights of the Diepsloot residents. What is complained of is the way in which he exercised his discretion in the choice of the Diepsloot site. In relation thereto his conduct, in my view, is only open to challenge on review on the ground of gross unreasonableness.

Even if one assumes in favour of the appellants that the choice of the Diepsloot site related to the manner in which the respondent exercised his powers rather than the exercise of a discretion, there would still not, on the evidence, be room for a finding that he acted wrongfully in selecting the Diepsloot site in preference to any other. As it was the appellants who raised this issue it was incumbent upon them (apart

from any question of onus) to identify what sites fell into the category of alleged available alternatives. The next step would be to determine if any of those sites was available for the settlement of the Zevenfontein squatters.

In their founding affidavit the appellants identified portions 16 and 35 (both being portions of portion 36) of Lombardy (347 hectares in extent) as a possible alternative site for the settlement of the Zevenfontein squatters as well as squatters from elsewhere. These properties lie adjacent to Alexandra and are referred to throughout the papers and evidence as the "Far East Bank" of Alexandra. I shall continue to refer to them as such. It is common cause that the Far East Bank is suited to low cost housing development. No other sites were identified.

In his answering affidavit the respondent stated that the Far East Bank had been investigated and

evaluated by the task group in the Green Report, and had been considered and rejected by him in Executive Committee. He went on to add "[s]uch sites do not provide a solution to the problem at hand, but will obviously be considered as settlement areas in future". The Green Report, which was an annexure to the respondent's affidavit, also contains an evaluation of certain areas referred to as Frankenwald, Modderfontein and Waterval (the precise locations of which are not readily apparent from any of the documents, maps or photographs forming part of the record). Not one of these three sites featured in the recommendations of the task group.

In his replying affidavit the second appellant (on behalf of both appellants) annexed affidavits by Otto Bolweg and John Dale Maytham, and with regard thereto said:

> "[I]t will be seen that at the proposed Alexandra site there is land available for low

> cost housing development where the Zevenfontein squatters and others could be settled without material interference with the rights of the inhabitants of the areas surrounding Alexandra.
>
> Consequently I say with respect that the First Respondent is in law obliged to settle the Zevenfontein squatters and others at the proposed Alexandra site."

The "proposed Alexandra site" is the Far East Bank. This is the only property considered and evaluated by Bolweg as an alternative to the Diepsloot site. The same is true of Maytham who assessed the suitability of the Far East Bank for residential development, and concluded that a low cost housing development there would provide the capacity to settle the numbers of people the respondent proposed settling at the Diepsloot site. Neither Bolweg nor Maytham made any reference to sites at Frankenwald, Modderfontein and Waterval.

The respondent filed a fourth set of affidavits ("the fourth affidavit"). In response to

the claims made by the second appellant, and the affidavits of Bolweg and Maytham, he said the following:

> "Although I am of the view that I do not have to justify the reasons for not choosing a site at or near Alexandra, I nevertheless state that the main reason is that all available sites must be kept available for the accommodation of the vast spill-over caused by over-population in Alexandra. The estimated figure of such spill-over at present is 40 000 families. With an estimated family membership of six, 240 000 people urgently require accommodation.
>
> Any suggestion thus far to accommodate people, other than those of Alexandra, in the area surrounding Alexandra, has been met with hostility by the Alexandra residents and civic organizations. Any such action will probably be met with physical attacks on members of informal settlement communities, resulting in death and destruction."

The issues that were referred to trial by DE VILLIERS, J, included the following (see the first judgment at 587 F):

> "In the event of any of the categories of nuisance being found to exist, the extent to which the said categories of nuisance may

> reasonably be abated (including the investigation of the property adjoining Alexandra Township), so that a settlement may be established."

On the papers before DE VILLIERS, J, the "property adjoining Alexandra township" could only have been the Far East Bank, and it was correctly so held by McCREATH,J, at the subsequent trial. The matter proceeded accordingly, with no evidence being specifically directed to sites at Frankenwald, Modderfontein and Waterval. As the appellants did not pertinently raise any issues in relation to those sites on the papers, and the respondent was not alerted to dealing with them, and did not deal with them, it is simply not open to the appellants to raise the availability of those sites on appeal. The mere fact that they were referred to in the Green Report does not suffice to put them in issue. It is accordingly only the Far East Bank that fell to be considered as an

alternative site. However, the court a quo also had regard to an area of some 50 hectares wedged in between the northern boundary of Lombardy and the southern boundary of the Far East Bank.

I do not propose to consider the evidence in any detail. The allegations made by the respondent in the fourth affidavit are supported to the hilt by the evidence of the witnesses Burger and Xhosa (save that the families involved are only half the number referred to, although from a practical point of view that makes no difference). The main features of their evidence are dealt with in the second judgment at 70 C-H. The evidence in my view leaves no doubt that the Far East Bank is required for the needs of the residents of Alexandra and that it is not reasonably practicable for the respondent to utilise that land for the settlement of the Zevenfontein squatters. The 50 hectares to which reference has been made is also not available for that

purpose as the respondent has certain commitments in respect thereof to the Johannesburg Municipality which it cannot disregard - see in this regard the second judgment at 70 H to 71 B. In any event that land, if available, would also have been required for the needs of the Alexandra residents.

It follows from the aforegoing that the reasonably apprehended interference with the rights of the Diepsloot residents as a result of the proposed settlement of the Zevenfontein squatters at the Diepsloot site is authorised by the Act and not wrongful. The appellants were consequently not entitled to the interdict sought.

The second issue on appeal is whether the respondent's decision to designate the Diepkloof site for the settlement of the Zevenfontein squatters is open to attack on review. I have sympathy for the genuine concerns of the Diepsloot residents and the financial

loss they may suffer as a consequence of the necessary reconstruction of our society. What they conceive, rightly or wrongly, to be a burden may well have fallen elsewhere. But that does not mean that the respondent acted unreasonably. And even if he did, that would not have been sufficient. The appellants accept that to succeed on review they have to go so far as to show that his unreasonableness was so gross that it is inexplicable otherwise than on the ground of mala fides or ulterior motive (of which there is no suggestion) or that it amounts to proof of a failure on his part to apply his mind to the matter (Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 236/7). Such a failure has been held to include "capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his

thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles" (Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another 1975(4) SA 1(T) at 8G; Hira and Another v Booysen and Another 1992(4) SA 69(A) at 84 F-J).

At the commencement of this judgment I set out the facts leading up to the respondent's decision to designate the Diepsloot site. It is apparent that his decision was not lightly taken. It was preceded by thorough expert investigation and evaluation. In reaching his decision he had regard to, inter alia:

1. The task group's Blue Report on the means of ensuring the orderly long-term urbanisation in the north-westerly quadrant of the PWV area;

2 The task group's Green Report (including its recommendations) on the settlement of the Zevenfontein squatters at a suitable site;

3. The wishes of the Zevenfontein squatters;

4. Objections received from interested parties including Diepsloot residents;

5. Proposals received from members of the public;

6. The physical inspection and evaluation of some thirteen sites.

7. Financial considerations.

Notwithstanding this the appellants contend that the respondent failed to apply his mind properly to the matter as he did not take into account the socio-economic and cultural differences between the Zevenfontein squatters and the Diepsloot residents. According to the evidence of the sociologist, Dr du Toit, in determining an appropriate settlement it is imperative to have regard to such differences between the future inhabitants of that settlement and the inhabitants of the surrounding areas. The respondent's alleged failure in this regard is based on a press

release by him dated 5 June 1992, the relevant portion of which reads:

> "Teen hierdie agtergrond moes die Uitvoerende Komitee sy besluit neem. Dit het 'n ewewigtige en menslike besluit vereis wat die regte en belange van al die betrokkenes op gelyke voet erken, ongeag hulle sosio-ekonomiese situasie."

It appears from the evidence that among the objections received and considered by the task group and the respondent were ones that dealt with socio-economic differences between the Zevenfontein squatters and the Diepsloot residents. It seems highly unlikely that these differences would have been overlooked or ignored by the respondent in arriving at his decision. In the circumstances the somewhat inelegantly worded press release cannot be taken to mean that those differences were simply disregarded. It means no more than that, in determining an appropriate site for settlement, all persons affected would be treated as equals (which is

not the same as treating their socio-economic circumstances as similar). There is thus no basis for a finding of gross unreasonableness and this ground of review must accordingly fail.

This bring me to the third and final issue. The Notice (Administrator's Notice 294 quoted earlier in this judgment), after providing for the designation by the respondent of the Diepsloot site as land for less formal settlement, goes on to state:

> "The above designation is on condition that the final layout plan and draft conditions of establishment of the proposed township be approved".

It was contended on behalf of the appellants that this amounted to a suspensive condition precluding the proposed settlement of the Zevenfontein squatters on the Diepsloot site without prior approval of the township plan by the surveyor-general (which, it is common cause, had not yet been obtained). A similar

argument was advanced in the court a quo. It was dealt with and, in my view, effectively disposed of, in the second judgment at 54F to 55B. I respectfully agree with the reasons advanced by McCREATH, J, for concluding that the condition was resolutive and not suspensive. No useful purpose would be served by repeating or reformulating them. I would merely emphasize that the fact that the notice provides that certain restrictive conditions and servitudes in the deeds of the properties comprising the Diepsloot site are "hereby suspended" is a clear indication that the notice was intended to have immediate effect. This purpose could not have been achieved if the condition was a suspensive one, as this would have resulted in the suspension of the notice itself. To hold otherwise would run counter to the clear wording and intention of the notice and would render nugatory the suspension of the conditions of title and servitudes referred to. The condition was

therefore resolutive. The designation would have taken immediate effect and would only have lapsed if the final layout plan and draft conditions of establishment were ultimately not approved.

In the result the appellants cannot succeed on any of the grounds advanced by them. The appeal is accordingly dismissed with costs, such costs to include the costs of two counsel.

J W SMALBERGER
JUDGE OF APPEAL

BOTHA, JA )
FH GROSSKOPF, JA ) Concur
NICHOLAS, AJA)
OLIVIER, AJA)