THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1038/15

In the matter between:

RAND WATER BOARD **APPELLANT**

and

BIG CEDAR TRADING 22 (PTY) LTD **RESPONDENT**

Neutral citation: *Rand Water Board v Big Cedar 22 (Pty) Ltd* (1038/15) [2016] ZASCA 177 (25 November 2016)

Coram: CACHALIA, SERITI, WALLIS and PILLAY JJA and SCHIPPERS AJA

Heard: 8 November 2016

Delivered: 25 November 2016

Summary: Statutory power to lay pipeline across private land – s 24*(j)* of Act 17 of 1950 – no servitude registered over land in respect of pipeline – property sold to new owners – no right to claim removal of pipeline – court not empowered to order the registration of servitude in respect of pipeline – no claim for compensation by new owner against water board.

ORDER

On appeal from: Gauteng Division, Pretoria of High Court (Tsoka J sitting as court of first instance):

(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the court below is amended to read:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Wallis JA (Cachalia, Seriti and Pillay JJA and Schippers AJA concurring)

Introduction

[1] In 1971 or 1972 the appellant, the Rand Water Board (Rand Water) laid the H16 underground pipeline over various properties including the remaining extent of Portion 1 of the farm Klipfontein No 268JR. In 1997 it laid a further underground pipeline, the H29 pipeline, across the same property. The position of the two pipelines on that property appears from a survey diagram SG10602/1998 approved by the Surveyor General. At the time the two pipelines were laid, the property in question was owned by various members of one family, the precise ownership having altered between the laying of the first and the laying of the second pipeline. After the second pipeline was laid negotiations took place with that family with a view to registering a servitude over the property in respect of the pipelines. Before those negotiations came to a satisfactory fruition the

family sold the property to the respondent, Big Cedar Trading 22 (Pty) Ltd (Big Cedar). It became the registered owner of the property on 20 June 2003.

[2] Although the pipelines were in existence at the time Big Cedar acquired the property the evidence is that it was unaware of them. On 4 March 2004 attorneys acting for Rand Water wrote to Big Cedar informing them of the existence of the pipelines and suggesting that a servitude be passed over the property in accordance with Rand Water's standard terms and conditions. All endeavours thereafter to register a servitude foundered on the inability of the parties to agree on the amount of any compensation payable by Rand Water to Big Cedar.

[3] On 28 October 2009 Big Cedar launched an action against Rand Water advancing two claims. Counsel described the first claim as a vindicatory claim. Big Cedar's contention was that the pipelines were constructed, installed and were being used by Rand Water without the consent or permission of Big Cedar and without any servitude or other limited right being registered and/or endorsed in the deed of transfer of the property. The pleadings go on to allege that Rand Water refused to remove the pipelines and thereby prevented Big Cedar from having the unhindered enjoyment of its property. On that basis an order was sought that Rand Water remove the pipelines, alternatively that it register a servitude in respect of that portion of the plaintiff's property, or take transfer of that land against payment of the amount of R6.6 million.

[4] The second claim was advanced on the basis that the presence of the pipelines constituted an infringement of Big Cedar's fundamental right to property. Rand Water was entitled either to expropriate the

relevant portion of the property or expropriate a servitude in respect thereof, against the payment of compensation, but had failed to do so. Big Cedar accordingly alleged that its rights had been infringed, and continued to be infringed, as a result of which Rand Water was unjustifiably enriched and benefited at its expense. On that basis it sought an order for payment of a reasonable rental, alternatively compensation, in an amount of R38 500 per month. In the further alternative it sought payment of that amount by way of constitutional damages.

[5] In the high court Tsoka J upheld the first claim, on the alternative basis, but dismissed the second claim. He ordered Rand Water to register a servitude over the property at its own expense on its usual terms and conditions and to pay Big Cedar R32 804 000 as fair, just and equitable compensation for the servitude. He also ordered that Rand Water pay the costs of the action on the scale as between attorney and client. The appeal is with his leave. There is a cross-appeal by Big Cedar against his refusal to order the removal of the pipelines and his rejection of the claim for constitutional damages.

Legal background

[6] Rand Water was originally constituted under the Rand Water Board Incorporation Ordinance, 32 of 1903 (Transvaal). That statute was from time to time amended by subsequent ordinances and, from 1914, statutes of the national parliament. These were consolidated in the Rand Water Board Statutes (Private) Act 17 of 1950 (the Act). The powers of the Board were set out in s 24 of the Act and where relevant read as follows:

'In addition to the powers vested in the Board by other sections of this Act, the Board shall have the right to supply water within the limits of supply and for that purpose may, whether within or without the limits of supply–

(g) Purchase, lease or exchange voluntarily any land or rights therein or in connection therewith;

(h) Acquire by compulsory purchase any land within the Republic or rights therein or in connection therewith (other than water rights) reasonably necessary for carrying out and developing any of the undertakings transferred to the Board under the Ordinance of 1904 and the rights to water secured to the Board by the Vaal River Development Scheme Act, 1936 (Act 38 of 1934), and in the amendment thereof;

…

(j) Lay or carry through, over, on or across any land, public or private, and any public road, public place or outspan, within the Republic, and from time to time repair and maintain any pipes for the supply of water with any necessary valves, cocks, meters or other accessories in connection with the same, and enter upon any such land, road or place for such purpose as aforesaid: Provided that–

(i) At least seven clear days' notice, except in the case of urgent repairs, shall be given to the authority under whose management or control the said public land or road may be, or to the owner or occupier of any private land or road, before making any such entry as aforesaid;

(ii) On the completion of such works the Board shall forthwith restore the surface of such land, road or other place to the same condition as near as may be as it was in before the commencement of such works, and in executing the same the Board shall do as little damage as may be to such land, road or other place and shall make full compensation for all damage done by it …

(iii) All proper and necessary precautions shall be taken to prevent injury to the persons or property of all persons using or being upon such land, road or place.'

[7] Shortly after H29 had been laid on the property, the Water Services Act 108 of 1977 repealed the Act with effect from 31 December 1977. It contained provisions directed at the transition of various water boards, including Rand Water, from the former statutory regime to the new regime under the Water Services Act. They were to continue to exist and

were deemed to be water boards constituted under the Water Services Act. The key provisions were contained in s 84(4) and (6) of the latter Act reading as follows:

'(4) All existing rights and obligations of those water boards remain in force after the commencement of this Act.

…

(6) Anything done before the commencement of this Act by an organisation contemplated in subsection (2) and any regulation made or condition set under or in terms of any law repealed by subsection (1) remains valid and is deemed to have been done, made or set under or in terms of the corresponding provision of this Act if—

(a) it is capable of being done, made or set under or in terms of this Act; and

(b) it is not in conflict with the main objects of this Act as set out in section 2.'[1]

[8] The effect of s 84(6) is that, if laying the two pipelines, H16 and H29 was lawful when that was done, then it remained lawful after the Water Services Act came into operation, provided that this was something that could be done in terms of the later Act. There can be no doubt that Rand Water still had the power to lay pipelines pursuant to its obligation to supply water services to water services institutions in terms of s 29 of the Water Services Act. While the procedures for exercising that power may now be different, and may require it to expropriate servitutal rights over the affected property in terms of s 81 of the Water Services Act, that does not alter the fact that Rand Water is entitled to do under the Water Services Act what it was entitled to do in 1971 and 1997 under the Act. Section 84(6) serves to preserve the validity of anything done under the repealed legislation that 'is capable of being done' under the present legislation. In this case what was done under the Act was that

[1] There are clear similarities between these provisions and those contained in s 12 of the Interpretation Act 33 of 1957, but as these are special provisions they would ordinarily exclude the operation of the general provisions in accordance with the maxim *generalibus non specialibus derogant*.

two pipelines were laid and that is something that can unquestionably be done under the current statute. The fact that the manner in which it must now be done has changed does not affect the position. Provided Rand Water's original actions were lawful their validity is preserved by s 84(6). That is reinforced by s 79(1) of the Water Services Act, which protects its ownership of the two pipelines.

[9] There was some debate over the impact of s 84(4) and whether it preserved the right of Rand Water under s 24*(j)* of the Act from time to time to repair and maintain the pipelines and their appurtenances. It is unnecessary to resolve this because Rand Water has, in any event, the right to do that in terms of s 80(1)*(b)* of the Water Services Act, on reasonable notice to the owner of the land on which the pipelines are situated.

[10] Against that background the key issue is whether Rand Water acted lawfully in laying the two pipelines in the first place. As counsel for Rand Water expressed the matter, once the pipelines were lawfully upon the property, the owner at the time and all subsequent owners were obliged to tolerate their presence on the property. Counsel for Big Cedar very fairly accepted this proposition saying that 'if the pipes are lawfully there, I must go home'.

Were the pipelines lawfully laid?

[11] Rand Water's contention is that the laying of the pipeline was lawful in terms of s 24*(j)* of the Act. There was no dispute that this section empowered Rand Water to lay both pipelines. There could hardly be any dispute over that in the face of its wording, which specifically said that Rand Water was entitled to 'lay or carry through, over, on or across

any land' pipes for the supply of water. Big Cedar's attack on the lawfulness of Rand Water's conduct in laying the pipes necessarily lay elsewhere.

[12] The argument advanced on behalf of Big Cedar flowed from the provision in s 24*(j)*(i) that, before entering upon property for the purpose of laying a pipeline, Rand Water was obliged to give the owner of the property at least seven clear days' notice of its intentions. It submitted that the evidence showed that no such notice had been given and therefore that the actions of Rand Water had from the outset been unlawful. Accordingly, so the argument ran, Rand Water could not rely on s 24*(j)* to justify its incursion into and laying of pipes on the property.

[13] I am prepared to accept that the evidence at the trial did not establish Rand Water's compliance with this requirement prior to its laying each of the pipelines. However, for the reasons that follow, one procedural and one substantive, I do not think that its assumed failure to comply with this requirement rendered its actions in laying the pipelines unlawful and unauthorised by s 24*(j)*.

[14] The procedural reason is simply that this case was not pleaded. The case Rand Water faced on the pleadings was that it had placed the pipelines on the property and used them for its own purposes without the consent or permission of Big Cedar and without any servitude or other limited real right being registered over the property. In the second claim it was said that this infringed Big Cedar's rights to the exclusive use of its property.

[15] In its plea Rand Water responded to these allegations by saying that:

'In laying the aforementioned pipelines the First Defendant[2] exercised its pipe-laying powers in terms of section 24(j) of the Rand Water Board Statutes (Private) Act 17 of 1950 … after the required notice had been given to the owners of the property at the relevant times.'

Rand Water went on to plead that it was therefore entitled to keep, repair and maintain the pipelines and to enter upon Big Cedar's property for such purposes. In response to the allegation that it lacked a servitude in order to do this, Rand Water pleaded that no such servitude was required to enable it to exercise its rights and obligations in terms of its primary objective. It dealt with the repeal of the Act by relying upon ss 84(2) and (4) of the Water Services Act.

[16] There was no replication to this plea. Counsel for Big Cedar contended that the effect of this was to place in issue the allegation that due notice had been given and that nothing more was required of it. I do not agree. The plea was directed at the allegation that, in the absence of a registered servitude or other real right in property, the presence of the pipelines on the property was without the consent or permission of Big Cedar and interfered with its use and enjoyment of the property. The answer was simply that there was no need for a registered servitude or similar real right because the pipelines had been laid in terms of Rand Water's powers under s 24*(j)* of the Act. The allegation that notice had been given to the owners added nothing to the validity of the plea and amounted to a *plus petitio*. That can readily be tested by asking whether

[2] The Minister of Water Affairs and Forestry was cited as a nominal second defendant but played no part in the litigation.

the plea would have been excipiable in the absence of such an allegation. The answer is clearly that it would not.

[17] Uniform rule 25(2) says that no replication is necessary which would be a mere joinder of issue or bare denial of allegations in the previous pleading. But if Big Cedar wished to attack the plea, not by challenging the existence of the power claimed by Rand Water, but by contending that it had not in truth purported to act in terms of that power in constructing the pipelines, or by challenging the validity of the exercise of that power on the grounds of a failure to comply with the statutory requisites for its exercise, it needed to replicate and identify that as an issue in the litigation. Such a case would not involve a bare denial or joinder of issue. Big Cedar did not replicate as it needed to do. Had it done so then there can be little doubt that it would have attracted a rejoinder from Rand Water, either that the then owners had in fact had knowledge of the intention to lay the pipeline and consented thereto; or that they had subsequently acquiesced in its presence and thereby waived any right to object; or that in terms of the delay rule[3] any reasonable period for challenging the validity of the exercise of the pipe-laying power by way of judicial review had passed long before Big Cedar became owner of the property. No doubt other possibilities might have emerged. What is clear is that, by not raising this point as it should have by way of a replication, Big Cedar failed to alert Rand Water to the issue and prevented it from responding properly to it.

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[3] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en ń Ander* 1986 (2) SA 57 (A) at 86D-E; *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) paras 33 and 50-51.

[18] The confusion in regard to this issue was compounded by counsel for Big Cedar saying in his opening address to the trial court that:

'We emphasise firstly that this is not the issue whether the Rand Water Board acted lawfully in 1971 and 1972, and again in 1997. This case is concerned with the question whether today, despite the advent of a new Constitutional dispensation, and despite developments in the governing legislation, Rand Water currently enjoys an ongoing statutory authorisation which justifies it to have these two underground pipelines through the land of another person without a servitude in respect of them.'

A more emphatic disavowal of any intention to challenge the lawfulness of Rand Water's conduct in laying the pipelines would be hard to find.

[19] It is true that, shortly after this, counsel went on to say that the first factual issue was whether the Board acted lawfully in 1971 and 1997 when it laid these underground pipelines and he said that it had not given the required notice prior to its doing so. He concluded by saying that on its own documents Rand Water had never really acted in terms of s 24*(j)* but had acted ultra vires its provisions. This conclusion would, he said, cause all the other legal issues to go away.

[20] To quote Holmes J, in another context,[4] what is the court to do about this drollery? Big Cedar started by telling the judge that the lawfulness of Rand Water's conduct in laying the pipelines was not in issue and in the next breath contended that it acted *ultra vires* in doing so. The answer in my view lies in the purpose of pleadings, which is to identify for the benefit of the court and the parties the issues in the case so that they may be fairly addressed and considered. Courts are not slaves to the pleadings[5] but it is essential if parties are to have a fair hearing of

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[4] *Dreyer v Naidoo* 1958 (2) SA 628 (N) at 629A, the case of the ambidextrous sheriff.
[5] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

their dispute, something that the Constitution guarantees,[6] that the issues in the litigation are adequately defined and canvassed, so that no prejudice is suffered by either party in consequence of any deficiencies in the pleadings.[7] The court will not be astute to hold that an issue falling outside the pleadings has been so raised and investigated and parties should not be encouraged to rely on the court's readiness at the stage of argument or on appeal to treat unpleaded issues as having been raised and fully investigated.[8]

[21] The point here under discussion ought to have been pleaded and it was not. The vacillating way in which it was addressed at the trial, bearing in mind that no oral evidence was led on the point and no cross-examination was addressed to it, makes it clear that it was not fully investigated or canvassed. Therefore it was not open to Big Cedar to rely upon it in the appeal.

[22] The substantive reason for holding that this argument does not avail Big Cedar is that, on a proper interpretation of s 24*(j)*(i), a failure to comply with the notice provision does not render the laying of the pipeline unlawful. There is nothing in the section itself to say that a failure to give the required notice will render invalid all actions thereafter undertaken in terms of the powers granted by the section. The question is one of interpretation to determine whether non-compliance with the statutory injunction is to be visited with nullity.[9]

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[6] Section 34 of the Constitution guarantees a fair public hearing of justiciable issues before a court or other independent and impartial tribunal or forum.
[7] An informal expansion of the issues is most likely to arise through the parties canvassing fully and without objection an issue falling outside the pleadings. *Shill v Milner* 1937 AD 101 at 105.
[8] *Middleton v Carr* 1949 (2) SA 374 (A) at 385-386.
[9] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274; *Sutter v Scheepers* 1932 AD 165; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-830C.

[23] The clear purpose of the requirement that notice be given to the owner of a property before entering upon the property and undertaking work, is to enable the owner to engage with Rand Water over the impact that the work of laying the pipeline will have upon the owner's activities. It also affords the owner an opportunity to make arrangements to ensure that its own activities are disturbed as little as possible by the proposed work upon its property. But the period of notice is short, so that planning for any extensive work, such as the laying of the two pipelines in this case, and the decision to undertake that work, would have occurred and been finalised long before the notification to the owner. That means that the notice's purpose was not to enable the owner to dissuade Rand Water from laying the pipeline, or in any significant degree to cause it to alter its plans. It was rather to ensure that when workmen come on site to undertake the laying of the pipeline inconvenience to the owner would be minimised and the owner would be given an opportunity to, for example, move stock or goods away from the working area and take other steps to protect its own property. There is nothing in this to suggest that a failure to give notice to the owner invalidates the act of laying the pipeline.

[24] It follows that Rand Water acted lawfully in installing the two pipelines. Further consideration of the appeal must therefore proceed on that basis. I can however be brief as counsel for Big Cedar conceded that his case had to stand or fall by the lawfulness of Rand Water's conduct in laying the pipelines in the first place. He accepted that if that was lawful it was a necessary implication of the entitlement to lay the pipelines that there was also a right for them to remain in place or, as Mr du Plessis SC for Rand Water put it, an obligation on the original owner and all subsequent owners to tolerate their presence. That conclusion is

supported by the judgment of Bisset CJ in *Fison*,[10] a case resembling this one, where the owner of property sought the removal of a water pipeline constructed by the municipality under statutory powers similar to those in issue here. It is also supported by the description of similar powers by this court in *SMI Trading*[11] where it was said that:

'Coercive powers to enter land, and even to deprive owners of the use of land, for public purposes is a typical governmental power that is provided for in democracies such as ours precisely in order to further the public interest.'

[25] The conclusion that Rand Water acted lawfully put paid to the claim for removal of the pipelines and also disposed of the cross-appeal. I need only note therefore that I am by no means satisfied that counsel was correct in describing the basis for the claim for removal of the pipes as a *rei vindicatio*, or vindicatory action. A vindicatory action is the means whereby the owner of property recovers possession of that property from a third party.[12] Rand Water was not in possession of Big Cedar's property so that the *rei vindicatio* was not the appropriate means for asserting its claim. In a situation such as this it seems to me that the appropriate remedy is likely to be similar to the remedy available to an owner of property where there is an encroachment upon that property.[13] Alternatively the owner would have a claim for damages under the Aquilian action as described by this court in *Hefer v Van Greuning.*[14] But I need say no more as the issue is academic.

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[10] *Fison Albatros Fertilisers (Rhodesia) Ltd v Salisbury Municipality* 1931 SR 61.
[11] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 34.
[12] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-D; *Hefer v Van Greuning* 1979 (4) SA 952 (A)(*Hefer*) at 959G-H.
[13] *Rand Waterraad v Bothma en ń Ander* 1997 (3) SA 120 (O) at 130F-132H; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).
[14] *Hefer* supra fn 16

A servitude

[26] Apart from the claim for removal of the pipelines Big Cedar sought, in the alternative, an order that a servitude be registered over the property in respect of the two pipelines and that Rand Water pay it R6.6 million as compensation therefor. As mentioned the court below made an order for the registration of a servitude and in addition ordered that compensation of R32 804 000 be paid therefor.

[27] Mr du Plessis, who appeared for Rand Water in the appeal but not at the trial, submitted that both these orders were unsustainable. As to the servitude he contended that a court may not order registration of a servitude, because personal servitudes are created by agreement, legislation or expropriation. For a court to order the registration of a servitude over property, which would necessarily extend to determining the extent of the servitude and the conditions attaching thereto, amounts to making a contract for the parties that they have not made for themselves.

[28] This argument strikes me as compelling and the problems attendant upon an order such as that granted by the trial court are well illustrated by the facts of the present case. For example the judge appears to have assumed that the servitutal area would be 3,2804 hectares as reflected on the survey diagram annexed to the particulars of claim. But that diagram had been prepared in 1998 when negotiations were taking place between Rand Water and the family that then owned the property. He ignored the fact that Big Cedar itself had proposed a servitude covering a somewhat smaller area and that there had been no agreement on the terms and conditions of the servitude. Why then should they be Rand Water's usual conditions, assuming there to be such? On this point the matter was not

canvassed in evidence and the draft conditions of servitude in the record reveal that there were some clauses special to this particular property. It is unnecessary to decide whether there are any circumstances in which a court may order the registration of a servitude and, if so, on what terms, but no foundation was laid for such an order in this case.

[29] Counsel for Rand Water rightly pointed out that the exercise of powers in terms of s 24*(j)* is a very different matter from exercising rights in terms of a registered servitude. The reason is that there is an element of indeterminacy arising from the exercise of a power to enter property and lay a pipeline that is largely absent from a registered servitude. In the former case there is scope for dispute as to the extent to which the property owner may undertake works in the immediate vicinity of the pipeline. How close to the pipeline may the owner build a building or install other services, such as electricity cables or sewage pipes? May the owner allow vehicles to cross the pipeline or mine under the pipeline? May the surface be used for agricultural purposes and, if so, what constraints are to apply? Once a servitude has been registered its terms will ordinarily dispose of these questions. All of these issues were dealt with in a draft deed of servitude that was part of the record. And that provided the explanation for Rand Water's willingness to offer some compensation to Big Cedar in return for its agreement to the registration of a servitude in this case. The compensation was payable in return for securing certainty in regard to the respective rights of the parties.

[30] Recognition of the distinction between the outcome of the exercise of the statutory power and the registration of a servitude explains why the allegation that Rand Water was acting without a registered servitude or a real right to construct the pipeline was misconceived. Accepting, as

counsel for Rand Water was prepared to do, that Rand Water was entitled to exercise a power of expropriation in order to secure servitutal rights in relation to the pipeline, there was nothing in the Act that required it to do so before constructing the pipeline. Its statutory right was different from any right that it would acquire from a registered servitude.

[31] The fact that the exercise of the statutory power did not constitute a servitude meant that the rule that an unregistered servitude does not bind a subsequent purchaser without knowledge[15] had no application. It is also the answer to the contentions based on the unreported judgment in *Rotek Industries v Rand Water Board*.[16] There are curious features of that judgment. In para 38 the judge correctly held that the powers granted to Rand Water in terms of s 24*(j)* could be exercised without any obligation, either in conjunction with the exercise of that power or after it had been exercised, to expropriate a servitude. Her conclusion was that there could be no doubt about the Legislature's intentions in that regard. But then she went on to say that whilst this was clear as against the owner of the property at the time the pipe was laid 'it is not so clear in relation to successors-in-title'.

[32] The substance of the court's reasoning appears from the following passage in para 42 of the judgment:

In determining the intention of the Legislature in regard to whether the first defendant's rights are enforceable against successors-in-title, there is no doubt in my mind that the Legislature generously endowed the first defendant with section 24*(j)* powers in order to enable it to perform its functions in the most cost-effective way possible. Furthermore the fact that it is a public body, the intention was to ensure that

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[15] *Grant v Stonestreet* 1968 (4) SA 1 (A); and *Bowring NO v Vrededorp Properties CC and another* 2007 (5) SA 391 (SCA) paras 7 and 8.

[16] *Rotek Industries (Pty) Ltd v Rand Water Board and Another* Case No 99/26709, WLD (unreported).

it would not be fettered with obligations which could become costly and burdensome. However, it could equally not have been the intention of the legislature that this would be at the expense of the innocent successor-in-title who unwittingly purchases land not knowing that the value is diminished, that his ability to use it effectively may be fettered with the informal servitude and which potentially represents a dangerous situation as he is unaware of the pipes and where it may be located. In balancing the rights of the first defendant and that of the successor-in-title, I cannot find that these section 24*(j)* powers are enforceable against successors-in-title. In effect the taking of th land without compensation, while permissible in certain instances, cannot be said to be justified in the present circumstances.'

[33] The logic of this analysis escapes me. I fail to see why the legislature would have been content to allow Rand Water to enter private property and lay pipelines without any obligation to obtain a servitude or pay compensation to the owner, but would have shown such tender solicitude to successors-in-title who may only have come on the scene many years later. Take the present case. Rand Water laid H16 in 1971 and 1972. The pipeline was in place for 42 years before Big Cedar acquired the property. On the judge's analysis the family who owned it originally would have had to tolerate its presence for all of those 42 years with no right to compensation, but Big Cedar would have been entitled to compensation as soon as it acquired the property. That is an absurd construction of the statute and in my view it was clearly incorrect. Accordingly the judgment in *Rotek Industries (Pty) Ltd v Rand Water Board* is overruled.

Compensation

[34] Counsel for Big Cedar did not press any argument in favour of the pleaded claim for constitutional damages. That was wise. Such a claim would need to rest on the provisions of s 25 of the Constitution

guaranteeing the right to property. Its operation is triggered either by an expropriation or by a deprivation of property. Those could only have occurred when the pipelines were constructed. In the case of H16 that was prior to the Constitution coming into force so that could not give rise to a constitutionally based claim. In the case of H29 any deprivation of property occurred before Big Cedar became owner of the property.

[35] That fact is important because counsel was unable to give any answer to the question of what would happen to Big Cedar's claim if the previous owners had received compensation from Rand Water when the two pipelines were constructed. It seems inconceivable that so long as no servitude was registered each successive owner would have a claim for compensation. The question illustrates that if there had been any deprivation of property it occurred prior to Big Cedar becoming owner of the property. It also illustrated the fact that if Big Cedar had any claim arising from its ignorance of the presence of the pipelines that claim would have lain against the previous owners rather than Rand Water.[17]

[36] It needs to be noted that Big Cedar did not seek to support the trial court's order insofar as compensation was concerned. Mr du Plessis SC was correct when he said at the outset that it was insupportable on any basis. The judge took the area of the servitude as proposed in 1998 and multiplied it by R1 000 a square metre on the basis that this was what Rand Water paid for a servitude over another property in the same general area. There was no evidence that the two properties were comparable and the person who prepared the valuation on which that

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[17] *Glaston House (Pty) Ltd v INAG (Pty) Ltd* 1977 (2) SA 846 (A). See also *Dibley v Furter* 1951 (4) SA 73 (C).

figure had been based did not give evidence.[18] Big Cedar's own valuer said in evidence that he could not support this figure on any basis. The award was plainly untenable and had the appeal failed we would have had to enter upon an extremely complex enquiry in regard to the assessment of compensation.

Costs

[37] The trial court awarded attorney and client costs against Rand Water. That order will obviously be overturned in the light of the outcome of the appeal. But it is appropriate to say that the strictures expressed by the trial judge in regard to Rand Water's conduct, and his finding that its reliance on s 24*(j)* of the Act 'was far from the truth', because it knew that there was no formal servitude over the property, was entirely unjustified. So was his attack on Rand Water's bona fides. Such findings are never to be made lightly and they should not have been made in this case.

Result

[38] The appeal must succeed and the following order is made:

(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the court below is amended to read:

'The plaintiff's claim is dismissed with costs.'

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[18] The judge erroneously said that this value was in accordance with Rand Water's own expert evidence.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	S J du Plessis SC (with him I M Lindeque)
Instructed by:	Breytenbach Mostert Skosana Inc, Pretoria
	Hill McHardy & Herbst, Bloemfontein.
For respondent:	M M Oosthuizen SC (with him J Rust)
Instructed by:	Rorich Wolmarans & Luderitz, Pretoria
	Symington & De Kok, Bloemfontein.