BLOEMFONTEIN TOWN COUNCIL v. STEYN.

1909. *March* 25, *April* 2. MAASDORP, C.J., and FAWKES and WARD, JJ.

Municipality.—Regulations.—Sewerage connection.—Ordinance 36 *of* 1905.—*Retrospective effect.—Liability of purchaser.*

Where S had purchased property connected with the sewers of B town council, and the latter claimed instalments of a debt originally due in consideration of such connection by S's predecessor in title, on the ground of the retrospective effect of sec. 8 of Ordinance 36 of 1905, which makes the payment a first charge on the property, *Held*, that the Ordinance had no retrospective effect, and that the defendant was not liable for the cost of the connection.

The facts sufficiently appear from the judgment.

De Jager, for the plaintiff: Sec. 8 of Ordinance 36 of 1905 is clearly retrospective in effect. The regulation made no provision for payment, and sec. 9 of that Ordinance lays down rules for payment by instalments. The wording of sec. 8 shows the retrospective force of the Ordinance: "Whenever . . . the Council . . . shall have effected." Otherwise the words "shall have effected" would have read "shall effect."

[FAWKES, J.: You argue that the mortgage was antecedent to the Ordinance?]

No; but it covers liability incurred prior to the Ordinance. It gives a preference from the date on which the Ordinance takes effect.

[MAASDORP, C.J.: You say the Ordinance effects registration of the mortgage?]

Yes; this is borne out by sec. 10, for sub-sec. 1 prohibits transfer until payment of the matured instalments. It was too late to prevent transfer, and sub-sec. 2 provides for this contingency as follows: "In case any such transfer shall have been passed as aforesaid, the succeeding owner shall be deemed to be liable for the payment of any such instalments and interest

subsequently becoming due, and no subsequent transfer shall be passed except on production of a like certificate in respect of such further instalments and interest." The property has been rendered more valuable by the work done.

[WARD, J.: You are encroaching on the rights of private individuals.

MAASDORP, C.J.: You contend that the council has added an unexhausted improvement to the property, of which the owner reaps the benefit.]

Blaine, K.C., for the defendant: When there is a sewerage connection on property purchased, the improvement enhances its value and is taken into consideration in fixing the price. The council is in this case attempting to deprive the defendant of the vested rights he obtained on getting transfer of the property, which is opposed to the policy of the law. Putting aside the consideration of the Ordinance, he was entitled to the property free of any charge or burden. It is a principle of law that no burden can be imposed on an individual or his property unless the intention is expressed in the clearest terms. Such an intention cannot be inferred. The words "shall have effected" are proper words to use in connection with work done after the Ordinance comes into force. The words "such transfer" in sub-sec. 2 of sec. 10 must refer to sub-sec. 1, which is clearly not retrospective. See Maxwell's *Interpretation of Statutes* (3rd ed. pp. 298, 299 and 284); *Guinsberg* v. *Scholtz and Others* ([1903] T.S. at p. 756).

De Jager replied.

MAASDORP, C.J.: In this case the plaintiff sues the defendant for the sum of £26, 16s., being the amount of certain twelve instalments of a debt alleged to be due to it by the defendant under and by virtue of the provisions of secs. 8, 9 and 10 of Ordinance 36 of 1905.

The facts of this case are that, under regulation 1 of the Bloemfontein Drainage and Sewerage Regulations of 1905, the town council at the request of one Wilson connected erf 10,

Elizabeth Street, which at that time stood registered in his name, with the corporation sewers. This work, it was alleged in the declaration, was finally completed on the 25th January, 1906, but in the course of the argument it was admitted by counsel for the plaintiff that the work was finally passed on the 2nd August, 1905. The defendant in his plea maintained that the work had actually been completed on the 1st June, 1905, but, in the view the Court takes of the case, it makes no difference whether it was so finished on that date or on the 2nd August, 1905.

The further important facts are that on the 1st August, 1905, Wilson sold the said property to defendant, and transfer of the same was passed on the 3rd August, 1905. In addition to this, we have the fact that Ordinance 36 of 1905, upon which the plaintiff's claim is based, was promulgated on the 18th August, 1905. Whether, therefore, we take the 1st June or the 2nd August as the date upon which the work was completed, it is clear that such completion took place before the transfer of the property to the defendant, and that the promulgation of the Ordinance only took place after such transfer.

This being so, it would appear that previous to the promulgation of the Ordinance, whatever may have been the case after such promulgation, the position of the parties was that the town council had carried out the work at the request of Wilson at his expense, and that he and he alone was liable to the council for the cost of such work. The only question, therefore, is whether there is anything in the Ordinance which, by reason of the transfer of the property in question by Wilson to the defendant before the promulgation of the same, makes the defendant liable for a debt with which he had nothing to do, and of the existence of which he had no knowledge at the time he bought the property from Wilson and obtained transfer thereof.

The only parts of the Ordinance which bear upon the point are secs. 8, 9 and 10. Sec. 8 provides that "whenever by virtue of any regulation duly framed in that behalf the council shall have effected at the *owner's* expense" such a connection with

the town sewers as that upon which the action is based, the cost of such connection shall, "until defrayed by the *owner of such property*, form and be a first charge on such property." Now there can be very little doubt that this section, taken by itself, effects no transfer of liability from Wilson to defendant. The term *owner* is used twice in the section, first in connection with the expense incurred, and, secondly, in connection with the defraying of such expense, and there is nothing to show that the person who is to defray the expense is to be any other than the person on whose behalf the expense was incurred. The section, in fact, contemplates only one person, and may be read as if the words "until defrayed by such owner" were inserted in the place of "until defrayed by the owner of such property." It in fact provides for the case where the owner on whose behalf the expense was incurred should still be the owner at the time the Ordinance came into force, and for none other. It in fact provides that Wilson's liability should become a first charge on the property in question, provided such property should be found to be still registered in his name on the date of the promulgation of the Ordinance.

This view is strengthened by the terms of sub-sec. 1 of sec. 10, which provides that "no transfer *shall be made* of any *such premises as aforesaid.*" Now, the transfer here spoken of is clearly not a transfer already effected before the promulgation of the Ordinance, but one to be effected thereafter. Nor do the words of sub-sec. 2 detract from this view. All it means is that, when once such future transfer shall have been made, the transferee shall be liable for the subsequent instalments.

The contention of the plaintiff may also be met by an *argumentum ad absurdum.* It is practically admitted by the plaintiff that there are no express words in the Ordinance which make the defendant liable for a debt for which Wilson alone was in the first instance liable, but the plaintiff says that the intention of the legislature to make him so liable may be gathered by implication from the general wording of the three sections referred to. Now, the effect of sec. 8 is to impose a legal mortgage upon all property upon which sewerage connections have been con-

structed by the council. If the contention of the town council is correct, it would amount to saying that the legislature intended to provide that A's property should become mortgaged for debts of B, with which A had no connection whatsoever, and of which he had absolutely no knowledge, for the fact that defendant has the benefit of the improvement to the property can have no effect upon the decision of the question, seeing that he had already paid Wilson for the same. What reception would the town council have met with if it had come to the legislature with the suggestion that defendant's property should be mortgaged for the debts of Wilson for whatever purpose incurred, whether for building on the property or for any other purpose? There can be no doubt that the legislature would not have entertained the suggestion for a single moment, and yet we are asked to say that the legislature intended to do by implication what it certainly would never have done of set purpose. It would require very strong words to justify such a conclusion; and in the present case it is possible to give a reasonable construction to the Ordinance without having recourse to it. Judgment must therefore be for defendant with costs.

FAWKES, J.: The defendant is sued for the cost of introducing the new sewerage system upon an erf now registered in the name of the defendant, the work having been carried out by the town council under the powers given it by regulations. These regulations imposed a personal liability upon the owner of an erf to repay the council, upon the completion of the work, the expenses which it had incurred under the regulations.

The defendant purchased the erf in question and got registered transfer after the work had been completed, and the plaintiff admits that, but for the provisions of Ordinance 36 of 1905, which came into operation subsequent to the transfer, the only remedy would have been a personal one against Mr. Wilson, the then registered owner. Ordinance 36 of 1905, secs. 8 and 9, upon which the council relies, secures the repayment of the above expenses by a statutory mortgage upon the

erf itself, and provides for their repayment by twenty equal instalments; and sec. 10 prohibits registration of a transfer without the production of a certificate that the instalments then due have been paid; this was introduced no doubt with the object of securing as far as possible for the benefit of the council punctual payment of the instalments. In sub-sec. 2 of sec. 10 it is provided that the erf shall remain subject to the mortgage in the hands of subsequent owners, notwithstanding that registration of transfer has been effected without the production of this certificate. The object of this section, I think, is to remove any doubt as to the possible effect of the registration of a transfer to a third party where the requirements of the preceding subsection have not been complied with. It is clear that the provisions of these two subsections have reference to the mortgage created by the Ordinance, and can have no retrospective application.

The decision of this case turns, therefore, upon the construction that is given to the wording of sec. 8. The mortgage provided for by this section could only come into existence on the passing of the Ordinance; but the plaintiff asks us to hold that the personal liability under the regulations for the expense of work completed by the council, to which the owner of the erf was liable prior to the passing of the Ordinance, was by the operation of sec. 8 converted into a mortgage debt secured upon the erf itself—notwithstanding the fact that the erf had been previously transferred and registered in the name of third parties. This would be giving a retrospective effect to the section, which by the well-known rule in construction of statutes we can only do where such an intention can be clearly gathered either by express terms or by necessary implication from the provisions of the Ordinance itself, more especially where such a construction prejudices vested rights and interests. Mr. *De Jager* contends that the words in sec. 8—"whenever by virtue of any regulation duly framed in that behalf the Council shall have effected at the owner's expense the connection of any drains, sewers or pipes with the town sewers, or the construction of any house drains or other drains on private property, the cost of such connection or construction shall . . . form and be

a first charge on such property bearing interest at the rate of 6 per cent. per annum from the date of the completion of such work"—must be read to include liabilities under the regulations incurred by owners prior to the passing of the Act. Grammatically they can be equally well read as referring only to expenses for work completed subsequent thereto; and this, for the reasons given by the CHIEF JUSTICE, is, I think, the correct interpretation.

There is no express provision to be found in the Ordinance, nor can I gather by implication from its terms any intention of making its operation retrospective. We have to decide this question upon the strict interpretation of a statute without reference to the equities of the case; but I think the equity is with the defendant. The fact that the vendor was liable at the date of the purchase to pay for the drainage carried out would be considered in fixing the purchase-price, and if Mr. Steyn's erf is now to be mortgaged to secure Mr. Wilson's debt, he would in effect be paying twice over for the improvement to his property, and the town council, having carried out the work for or at the request of Mr. Wilson, would have his personal liability for the cost transferred and turned into a mortgage debt secured on the property of a person against whom it had no claim whatever.

WARD, J.: In this case the plaintiff is the municipality of Bloemfontein, and the defendant is sued as the owner of a house in Elizabeth Street in this town in respect of certain instalments alleged to be due from him for work done by the municipality in constructing and connecting the drains of this house with the sewers.

It appears that the council of Bloemfontein, acting under the powers conferred on it by statute, made a regulation in January, 1905, requiring all owners of property to connect their premises with the drains which had been or were being constructed by the municipality, and providing that if the work was not done within a certain time the municipality itself would make the necessary drains and connections at the expense of the owner.

Apparently the then owner of the property (a Mr. Wilson) did not employ any one to do the work, and it was undertaken and completed by the municipality as provided by the regulation in June, 1905, although the final inspection was not made until the 2nd August of that year. Why it took the council so long to make up its mind as to whether the work performed by itself was properly done is not apparent, but whether the work was completed in June or on the 2nd August is immaterial to the decision of this case.

The regulation above referred to makes, as will be observed no provision as to the time of payment for the work performed thereunder, and it must therefore be taken that payment was due and exigible from Mr. Wilson, at whose express or implied request the work was undertaken, upon completion.

The defendant entered into a contract with Wilson, to purchase the property on the 1st August, and the transaction was completed by transfer to him on the 3rd of the same month. It is clear, therefore, that at the time the transfer took place the only rights possessed by the plaintiffs in regard to this property was a personal right to recover the amount for putting in the drains from Wilson. The plaintiffs, however, now seek to make the defendant liable under the provisions of Ordinance 36 of 1905, which was promulgated on the 18th August, 1905—fifteen days after defendant became registered owner of the property, that is in effect to make the Ordinance retrospective.

Many cases involving the question whether or not a statute is or is not retrospective have come before the courts, and the law is clear on the subject, and that is that to make a statute retrospective it must appear, either expressly or by necessary implication, that it was the intention of the legislature to make it so.

In the case of *Smithies* v. *Association of Operative Plasterers*, decided by the English Court of Appeal so late as the 21st December last (78 L.J. K.B. at p. 259), VAUGHAN WILLIAMS, L.J., says: "The general rule is well stated in Maxwell on *Interpretation of Statutes* (4th ed. at p. 322) as follows: "It is a fundamental rule of English law that no statute shall be con-

strued so as to have a retrospective operation unless such a construction appears very clearly in the terms or arises by direct and necessary implication;" and the LORD JUSTICE goes on to say: "A statute will not divest rights already vested unless by express provision or necessary inference."

Legislation which, like the subsection in question, purports on its face to refer only to the future, using such words as "shall," affects only rights which have not yet come into existence, and not those which have accrued and become vested.

In an earlier case (*Hickson* v. *Darlow*, [1883] 23 Ch. Div. at p. 693) FRY, J., lays down the law: "Now it is a well-known principle of law on the construction of Acts of Parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated." In *Allhusen* v. *Brooking* ([1884] 26 Ch. Div. at p. 564), CHITTY, J., says: "You are not to interfere with rights unless you find express words." So far for English law.

In this colony the Laws Settlement and Interpretation Ordinance of 1902, sec. 15, enacts that "all Ordinances of the Legislative Council shall commence and take effect from and after their promulgation in the *Gazette*." I do not read this to mean that the legislature is debarred from fixing a date from which any subsequent Ordinance may take effect, but it must be done either expressly, or in such terms as to lead to the irresistible conclusion that such was the intention.

In the Ordinance (36 of 1905) on which the plaintiff bases its claim, is there anything which would, having regard to the principles of interpretation above laid down, justify us in giving retrospective effect to its provisions? Express provision there is none, but we are asked to infer from the words "shall have effected" in sec. 8, and "has been effected" in sec. 9, sub-sec. 1, that the Ordinance is retrospective. I am wholly unable to draw any such inference. If the words are to be taken strictly in the sense contended for, then the Ordinance only refers to work done at the time of the promulgation of the Ordinance, the date from which it speaks—an interpretation that would scarcely suit the plaintiff. The natural meaning of the words appear to me to be

that the rights of the plaintiff accrue on the execution of the work, and have nothing to do with the Ordinance being retrospective. I therefore concur.

Plaintiff's Attorneys: *Fraser & Scott;* Defendant's Attorneys: *Steyn & Vorster.*