APPENDIX.

MASEROWITZ AND MASEROWITZ v. JOHANNESBURG TOWN COUNCIL.

1914. *April* 23, *May* 4. MASON, J.

Municipality.—Ord. 9 (*Transvaal*) *of* 1912, *sec.* 96.—*Application for license.—No notice to applicant.—Reopening.—Superior Court.*

Provincial Council.—Powers.—Ord. 9 *of* 1912, *secs.* 88, 90, 91.—*South Africa Act, secs.* 85 (1), 89.—*Cycle dealers' license.—Regulation of Trade.*

Section 96 of Ordinance 9 (Transvaal) of 1912, which lays down the procedure to be followed by a town council for hearing applications for licences to carry on a trade, contemplates that if the council takes evidence and hears objections, there should be notice to, and a hearing of the applicant. Where no such notice is given or hearing granted, the applicant (assuming that a magistrate has no jurisdiction to re-hear such application or to grant redress) is entitled to have the matter reopened in a superior court.

Sections 88, 90 and 91 of Ordinance 9 (Transvaal) of 1912, so far as they relate to cycle dealers, are *ultra vires* the Provincial Council of the Transvaal under sections 85 (1) and 89 of the South Africa Act, as that act confers no power on Provincial Councils to regulate trade. A power to control local trade, commerce or industries, (apart from questions of public health or certain other objects) is not a necessary or incidental function of municipal government.

Application* for an order on the respondents to issue certain cycle dealers' licenses to the applicants, or in the alternative to re-hear applications therefor, or in the further alternative that Provincial Council Ordinance No. 9 (Transvaal) of 1912 be declared invalid in so far as it purports to authorize municipalities to regulate and license cycle dealers. The facts and arguments appear fully from the judgment.

C. F. Stallard, K.C. (with him *Manfred Nathan*) for the applicants.

* On May 17th, 1914, leave was granted to respondents to appeal on the questions of costs. On appeal [Johannesburg Municipal Council *v.* Maserowitz, 1914, T.P.D. 439], the question of costs only was involved and the appeal was dismissed with costs. The Court assumed that the Provincial Council Ordinance was valid.

R. Feetham for the respondents.

Cur adv. vult.

Postea (May 4th).

MASON, J.: The petitioners are Harry Maserowitz and his wife, to whom he is married out of community of property. The husband applied in January, 1914, to the Town Council for two licenses in his own name for two separate businesses as a cycle dealer, and the wife for one license in her name for a third business, in renewal of the licenses which they had held during the preceding year.

The applications were refused by letter which stated no reasons for the refusal.

Thereupon the applicants filed a petition praying for an order directing the issue of the licenses to them or for alternative relief.

In answer to the petition affidavits have been filed on behalf of the Town Council which show that the applications were referred by the Inspector of Vehicles, who received them to the Criminal Investigation Department for report, that the police strongly objected to Harry Maserowitz as being a most undesirable person to hold a cycle dealer's license by reason of three convictions relating to cycles, viz., (1) receiving stolen cycles—six months, 1st March, 1909; (2) fraud and forgery—£20 or one month, 28th May, 1907; and (3) contravening Traffic Byelaws—10s. or seven days.

The Police objected to the granting of a license to the wife, as the husband would in that case manage and control the business.

The Inspector of Vehicles embodied the police information in his report, and recommended that the applications should be refused. His report was laid before the Works Committee of the Council which is authorised to deal with applications for licenses, and he attended the Committee meeting at which the applications were considered. They were refused on the ground that the applicants were not considered desirable persons to hold such licenses.

No notice of these reports or proceedings was given to the petitioners. They claim that the Council should be ordered to issue these licenses, or alternatively to re-hear their applications, or, if the Court is adverse to them on these points, that the Provincial Ordinance No. 9 of 1912 (Transvaal) should be declared invalid, in so far as it purports to authorise municipalities to regulate and license cycle dealers.

There is considerable force in the objection of Mr. *Feetham* on behalf of the Council that the applicants are not entitled to ask for a declaration of this nature which will defeat their own petition, and will pronounce upon a question properly triable on a prosecution for trading without a license, and as to which a decision in this sense is unfair to the respondents, because they could not appeal against it, however prejudicial to their interests it might be. The proper course to adopt seems to me, therefore, to determine, in the first instance, whether on the basis of the validity of the Ordinance, the petitioners are or are not entitled to redress; if they are not, then it becomes unnecessary to discuss the constitutional question; if they are, then relief cannot be granted unless the statute is valid.

The Ordinance, by section 88, sub-section 8, empowers Town Councils to make bye-laws for regulating and licensing cycle dealers, manufacturers and repairers. The bye-laws so made on this subject are stated in the petition; they provide for the form of application and for various details not of importance in this case, but they do not provide for the hearing of applications for licenses nor for the grounds upon which they may be granted or refused.

For such provisions we must refer to chapter 7 of the Ordinance. The first part of section 90 empowers the Council to refuse ony license which it is authorised to grant upon certain grounds not in issue at the present time; the second portion authorises refusal in respect of certain trades upon the ground *inter alia* that in the opinion of the Council the applicant is not a desirable person to hold such license; and the third part provides for an appeal to the Magistrate against the Council's decision.

Section 91 authorises the Council, subject to the same appeal, to refuse licenses in respect of these and certain other trades, including that of a cycle dealer, on any of the grounds mentioned in section 90, as also upon the ground that the applicant has failed to produce satisfactory evidence of good character, or that the granting of the license would be contrary to the public interest.

These sections undoubtedly justify the refusal of the licenses upon the grounds assigned, unless the Council has failed to follow in some substantial respect the prescribed procedure.

It is contended that the Council have failed to comply with the provisions of section 96 as to the hearing of applications for licenses.

or, alternatively that their action has caused such injustice to the petitioners as demands the interposition of the Court. Section 96 provides that the Council may appoint Committees for the hearing of applications for licenses, or may itself sit to hear such applications and prescribes the procedure to be then adopted. Subsection 2 requires all witnesses giving evidence before the Council or a Committee to give it upon oath.

The first question which arises is, whether the provisions of this section are compulsory. The matter was discussed in the case of *Ermelo Municipality* v. *Ismail Ebrahim* (1913 T.P.D. 353), and there BRISTOWE, J., in delivering the judgment of the Court, expressed the opinion that section 96 was permissive and not compulsory, and that the appeal to the Magistrate was not an appeal in the ordinary sense of the word, but substantially a re-hearing of the application for a license, upon which the burden was thrown upon the Council of satisfying the Magistrate that the refusal was on good and sufficient grounds. It is not quite clear to me that this point was necessarily at issue in that case, but I am not prepared, and in the present instance I do not think it is necessary, to investigate this aspect of the case.

But the question will still remain as to whether the acts of the Committee entitle the applicants to redress. They received evidence, not on oath, by way of objection to the granting of the license. They had in attendance the Inspector of Vehicles, who also gave an adverse recommendation. The applicants had no notice at all of what was being done, and no opportunity of protecting their interests. Could they then obtain any redress by way of appeal to the Magistrate, seeing that the Committee had *bona fide* come to the conclusion that the applicants were not desirable persons to hold a license? In the *Ermelo* case BRISTOWE, J., was of opinion that the Magistrate would not have authority to enquire into, or judge of the adequacy of, the Council's reasons as to the desirability of a person, but that the only fact upon which he had to be satisfied was that the Council had *bona fide* formed its opinion, as otherwise it would be the Magistrate's opinion that would prevail, whereas the Legislature intended that it should be the Council's. The Magistrate has no authority to direct the re-hearing of any application by the Council, and, so far as I can judge, the applicants would have no redress except from this Court. Can this Court grant it?

It seems to me that section 96 contemplates that, if the Council do take evidence and do hear objections to the granting of a license, the procedure of that section should be followed, and that there should be some sort of notice to and hearing of the applicant; otherwise the gravest injustice might be inflicted. Indeed Mr. *Feetham* had to admit that, if the Magistrate could neither re-hear nor redress, it was difficult to refuse to this Court the power of interposing, so that in some way and before some tribunal the applicants should have a hearing.

I have come then to the conclusion that the applicants would in the ordinary way be entitled to have the matter re-opened.

But I can grant no order for a hearing, unless the Provincial Council has the power to confer on Municipalities the right to make bye-laws for regulating and licensing cycle dealers, manufacturers and repairers. The validity of this provision of the Ordinance was contested firstly on the ground that it was repugnant to the Act of Union, because the licensing of cycle dealers was dealt with by Transvaal revenue Acts, the fees and duties of which were a portion of the Union revenue; and, secondly, because the Act of Union conferred no powers on Provincial Councils to regulate trade, and this provision amounted to a regulation of trade. The first objection is founded on the contention that Ord. 23 of 1905, and Act 15 of 1909, provided *inter alia* for licenses to general dealers, amongst whom cycle dealers are undoubtedly included, that by the Act of Union the revenues arising from these licenses were payable to the Union Consolidated Fund, and that the Provincial Council was not contemplated, therefore, to interfere with them. This view, it is argued, is supported by the Financial Relations Act (No. 10 of 1913, section 11), which, after providing for the transfer of these revenues from the Union to the Provinces for a limited period, gives express authority to Provincial Councils to legislate in respect of these matters.

As these powers are not conferred until after the passing of the Ordinance No. 9 of 1912, they cannot be invoked in its support, but they are urged as indicating the interpretation adopted by Parliament. Mr. *Feetham* replies that Ordinances otherwise within the competence of the Provincial Council are not repugnant to Union Acts of Parliament because they impose taxation in cases in which the Union Acts impose similar taxation. Such a repugnancy might exist if the Provincial Ordinance imposed conditions

inconsistent with those imposed by Parliament, but there is no inconsistency, it is maintained, in the mere payment of a double tax.

The decision of the Privy Council in the *Brewers and Malster's Association of Ontario* v. *The Attorney-General of Ontario* (1897, A.C. 231) seems to lead countenance to this view; the Provincial Assembly imposed a license on brewers and malsters, who were already subject to a somewhat similar tax enacted by the Dominion Parliament. The argument that the duplication of the tax by the Province was repugnant to the Dominion legislation was not sustained. The constitution and powers of the Canadian and South African Provinces differ of course very considerably, but the words in which the authority is given to impose direct taxation are the same in each case. But the language, however, of the Financial Relations Act is more consistent with the view that a duplication of licensing authorities and charges was not contemplated. This is also shown by the provisions of section 16 of that Act which refers to Transvaal, and I believe other Colonial Acts under which certain licenses are handed over to Municipalities and excluded from the provisions of general taxaton.

The principle in issue is of great importance, but in view of the fact that no authorities were cited by the Counsel, and of all the circumstances of the case, I prefer to decide the matter upon the other ground raised in argument. Briefly, that argument is that the regulation and licensing of cycle dealers by the Provincial Councils or Municipal Corporations can only be justified upon grounds which involve a similar regulation and licensing of trade, commerce and industry in general. The powers conferred by the Act of Union upon Provincial Councils are strictly limited; and they are liable at any time to be overridden by Act of Parliament, and are effectual only to the extent to which they are not repugnant to Union legislation.

The Local Government Ordinance can therefore only be supported in the question now at issue if it comes within sub-section 1 of sub-section 85, or section 89 of the South Africa Act.

Sub-section 1 empowers Provincial Councils to levy direct taxation, but only in order to raise revenue for Provincial purposes. The phrase a revenue for Provincial purposes received construction by the Privy Council in the case of *Dow* v. *Black*, 1875, (L.R. 6, P.C. 272). There the Provincial Assembly imposed an assessment

on a district of the Province for the purpose of providing a subsidy to a local railway. It was contended that the Provincial powers of direct taxation could only be exercised for general Provincial purposes by a tax incident on the whole Province; this contention was overruled. If there were no other statutory limitations, it seems to me upon this authority that the Provincial Council might perhaps authorise direct taxation by a municipality.

The *Brewers'* case and many Canadian cases show that trade licenses are generally direct taxation, whilst a general definition of the phrase is given in the *Bank of Toronto* v. *Lamb* (1887) 12 A.C. 575. But here again the difference between the British North American Act and the Act of Union require consideration.

Section 92 of thte former Act confers exclusive powers on the Provinces to make laws in relation to various subjects, including direct taxation and shops and other licenses, and as to licenses the power is conferred in order to raise revenue for Provincial, local and municipal purposes. And this exclusive power extends to the amendment of the Provincial constitutions.

The South Africa Act on the other hand grants to the Union Parliament alone authority to vary the provisions of the Act which are applicable to the Provinces.

Now section 89 requires all revenues to be paid into the Provincial administration generally, or in case of moneys paid over by the Governor-General-in-Council for particular purposes, then for such purposes only. The same section enacts that no money is to be issued except under the warrant of the Administrator, whilst section 92 makes the countersignature of the Auditor necessary.

The result of these provisions is that the Provincial Council cannot, it seems to me, by virtue of its power to impose direct taxation transfer that source of revenue wholly or in part to a municipality, though it may be able to appropriate specific amounts in the ordinary way for municipal purposes. And sections 4 and 11 of the Financial Relations Act seems to me to point in the same direction.

Is it competent then for this regulating and licensing power to be conferred upon municipalities as an incident or a necessary element of municipal institutions?

This involves some consideration of the general nature of municipalities and of the powers which have heretofore been conferred upon them in South Africa.

Mr. *Feetham* argued that because similar powers had been granted in prior Transvaal municipal acts, as probably in other colonial legislation, it must be inferred that they were at the time of Union considered incidental to municipal government, and he referred in particular to the powers to regulate barbers, woodsawyers and pawnbrokers, and the verification, sale and use of weights and measures and the sale of goods by weight and measure.

It is not, of course, easy to specify the powers which are necessary or incidental to municipal government, which varies so much with both place and time, but they may be grouped generally under the heads of Public Health and Sanitation, the control of streets, traffic and public places, the regulation of buildings, the provision of public amenities, and the establishment, management and control of what are known as the public service utilities such as water and lighting, the prevention of fires and similar objects in which public combination is necessary for effective results, or individual activities require local supervision.

With regard to barbers and woodsawyers, their business seems to have connection with questions of public health as may also be the case of pawnbrokers, who frequently receive clothes in pawn, or there may be instances in which the Central Government has delegated to a local body, as in the case of sales by weight and measure, some of the functions of the general administration.

But the business of cycle dealing does not fall under any of these heads, but resembles any other ordinary trade such as that of ironmongers, drapers and grocers.

It is quite true that any business may be so conducted as to create a nuisance and the abatement of nuisance is admittedly a usual and beneficial municipal function, but it does not seem to me either a necessary or incidental function of municipal government that the Town Council should control local trade, commerce, and industries apart from questions of public health or other the objects to which I have referred.

The provision, for instance, that a cycle dealer should be of good character is probably an excellent means of checking bicycle thefts, but that is not an ordinary municipal function.

To hold that such powers as are claimed in this case may be conferred on Municipalities would be to authorise Provincial Councils to hand over to Municipalities the complete control within urban districts of commercial and industrial legislation which the Provincial Councils themselves have no power to impose in the Province generally.

This is the view adopted by the Privy Council in the case of *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion* (1896 A.C. 348). The main question at issue was whether the Provincial Assembly of Ontario had authority to confer upon Town Councils the power of prohibiting the sale of liquor under local option conditions. One of the arguments in support of this statute was that the power to create municipal institutions involved conferring upon them the powers which under Canadian legislation had been understood to belong to such bodies. The Privy Council declared that there was nothing to support that contention in the language employed, which according to its natural meaning simply gave provincial legislature the right to create a legal body for the management of municipal affairs. It was pointed out that the various legislatures before confederation entrusted to municipalities the execution of powers which thereafter belonged exclusively to the Parliament of Canada, and that a provincial legislature could only delegate to a municipal body of its own creation functions which it had itself authority to exercise apart from the creation of municipalities.

This seems to restrict Provincial legislation in this sphere within much narrower limits than those which I have suggested.

As was stated in *Russell* v. *Queen* (1881, 7 A.C. 837), the true nature of the legislation must be determined. The provisions as to good character, the desirability of persons and the general public interest do not constitute fiscal legislation nor the regulation or licensing of trades in the same sense in which the phrase is interpreted in *Hodge* v. *Rex* (9 A.C. 117), but as explained in the Prohibition case in 1896, A.C. p. 364, and in *Russell* v. *Queen* relate to matters affecting the morals and the general peace, order and good government of the country which are not in the jurisdiction of Provincial Councils under the South Africa Act.

I have therefore come to the conclusion that the enactment of sections 88, 90 and 91, so far as they relate to cycle dealers, was not

within the competence of the Provincial Council at the time when the Ordinance was passed. Hence I am unable to make any order on the application.

As to costs I propose to follow the example of the Privy Council in *Citizens Insurance Company of Canada* v. *Parsons* (1881, 7 A.C. 112) by making no order.

In form the applicants get no relief, in reality they obtain as great an advantage as if they had succeeded.

Applicant's Attorney: *J. M. Cohen;* Respondent's Attorneys: *Lance & Hoyle.*

[G.W.]

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