

(Appelcase Provincial Division)
(Provinciale Afdeling)

Appeal in Civil Case Appel in Siviele Saak

G. D. Brown.

Appellant,

versus

versus
Divisional Council of The Cape & Anglo Respondents

Appellant's Attorney
Prokureur vir Appellant

Loving B. MRS

Respondent's Attorney
Prokureur vir Respondent

DMCINTYRE 210P

Appellant's Advocate
Advokaat vir Appelland.

L.R. DiCenso

Respondent's Advocate
Advokaat vir Responde

1. H S 11/22, 2005

Set down for hearing on

Op die rol geplaas vir verhoor op..

(C P D)

Ces-ann. It was left to W. Roach, Corbett, Hefernan
et Frederic A. J. A.

4. 45 am	—————	11. 00 am
11 10 am	- - - - -	12. 42 pm
3 10 pm	—————	3. 45 pm

C. R. V.

The Court dismisses the
said appeal with costs of
both respondents, including ^{by}

**Writ issued
Lasbrief uitgereikt**

Date and initials
Datum en paraaf.

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GEORGE DENIS BROWN

APPELLANT

and

DIVISIONAL COUNCIL OF THE CAPE

FIRST RESPONDENT

and

THE HON. THE ADMINISTRATOR OF
THE CAPE

SECOND RESPONDENT

Coram: Rumpff, CJ., Wessels, Corbett, Hofmeyr, JJA.,
et Trengove, AJA.

Heard: 29 August 1978

Delivered: 16 November 1978

J U D G M E N T

HOFMEYR, JA:

This appeal is against the dismissal with costs

of an application made by the appellant in the Cape of
Good Hope Provincial Division. The application was
for an order:-

- "(a) Declaring that an enhancement levy consequent upon the rezoning of the property formerly owned by him, namely remainder of Lot 6, Block "A", and Portion 4B of Lot 4, Block "A", Philippi, is not exigible against him.
- (b) Declaring that Section 35 (ter) of Ordinance 33 of 1934 is ultra vires the powers of the enabling legislation.
- (c) Declaring that as a former owner of the said property he cannot be compelled to pay an enhancement levy in relation thereto.
- (d) Alternative relief.
- (e) Costs against First Respondent only except in the event of the opposition of Second Respondent, in which case costs are claimed against both Respondents."

I shall herein refer to the appellant as the
applicant, to the first respondent (the Divisional Council
of the Cape) as the Council and to the second respondent
as the Administrator, it being understood that the reference

is to the Administrator of the Cape Province, acting with the advice and assistance of the Executive Committee of the Province.

The sequence of events culminating in the dismissal of the application was as follows:-

The applicant was the owner of the abovementioned property as from some date prior to the promulgation of the Townships Amendment Ordinance, No. 25 of 1969, on 26 September 1969. By Section 4 of this Ordinance a new Section, 35 ter, was inserted in the Townships Ordinance, No. 33 of 1934, whereby a discretion was conferred upon the Administrator to determine whether a development contribution was due to the local authority concerned by an owner whose property had been beneficially affected by a rezoning of his land in terms of Section 35 bis of the said Townships Ordinance or whether compensation should be due from the local authority to an owner of any land injuriously affected by such rezoning. The appli-

cant's property which had been zoned as agricultural land was on the 29 July 1970, in terms of Section 35 bis of the Townships Ordinance, rezoned by the Administrator for use for industrial purposes. On the same date the Administrator, in terms of Section 35 ter of the Ordinance directed that a development contribution of R59 300 was due to the Council. During the period 29 July 1970 to 26 October 1970 the applicant sold the property to Suburban and Industrial Properties (Pty) Limited. Although disputing his liability for such development contribution, the applicant paid the contribution under protest. The date of payment was 26 October 1970, the very day on which the property was transferred out of the applicant's ownership into that of the purchasing company. The purchase price is unknown but it is emphasized by the applicant that the Council "has been collecting rates from the new owners ever since the said transfer".

On 20 August 1971 Ordinance No. 13 of 1971 was

promulgated. In terms of Section 35 ter (2) as substituted by Section 1 of the 1971 Ordinance the Administrator was empowered to cancel or from time to time to vary a development contribution order before such order had been complied with. Relying upon this provision the Administrator, on 4 October 1971, resolved to set aside the development contributions fixed on 29 July 1970, including the applicant's contribution. The Council was instructed by the Administrator to inform the applicant of the cancellation and that owners could apply for a refund pending new development contributions to be levied at a later date. It was also suggested that owners should be invited to leave amounts paid by them with the Council if they so wished pending the levying of fresh contributions.

The applicant elected to receive a refund of the full amount paid by him. On 23 January 1972 the Council repaid to the applicant the difference between R59 320 and R42 076 (being the new contribution suggested by the

Council in its letter addressed to the applicant on 23 December 1971) and interest on the firstmentioned amount. Subsequently, on 29 August 1972, the balance was released to the applicant with interest. The payment was made by the Council "as a matter of policy".

In the meantime, on 24 March 1972, Ordinance No. 3 of 1972 was promulgated amending Section 35 ter (1) of the Townships Ordinance so as to enable the Administrator to prescribe a development contribution or compensation with retrospective effect as from the coming into force of Ordinance No. 25 of 1969, being 26 September 1969.

Despite the repayment of all development contributions, including the applicant's, the Council maintained that because a contribution order could, in terms of Section 35 ter (2), be cancelled or varied only before such order had been complied with, it (the Council) was uncertain whether the cancellation of the applicant's contribution was valid and effective or not, since the applicant

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had complied with the Administrator's order. There may be some substance in this view.

Whatever the answer to this suggestion may be, it was submitted on behalf of the Council that the amendment of the Townships Ordinance by Section 5 of Ordinance No. 17 of 1973 was probably prompted by the decision in Davies and Others v. Administrator Cape Province, 1973(3) SA 804 (C), at p 811 (H) where it was held, on a subsidiary submission on behalf of the Administrator, that the above-mentioned restriction upon the Administrator's power to cancel or vary a development contribution did not fetter the discretion of the Court to set aside such a contribution on appropriate grounds.

It was further submitted on behalf of the Council that it was decided by the Administrator to make a new start but with effect from 26 September 1969 when Section 35 ter in its original form became law. Defects which may have remained in the earlier enactments were to be avoided.

Steps were to be taken to give effect to the declared policy of the Administrator to adjust the position fairly between the Council and the owners of land affected by a zoning or rezoning where the value of their land were either enhanced or depreciated by such zoning. If regard is had to the history of the legislation, there may well be some substance in this submission.

In order to place the powers of the Provincial Councils to pass legislation with this end in view, beyond all doubt, Section 3 of Act No. 42 of 1973 was passed by Parliament. The Act was promulgated on 23 May 1973. The section provides as follows:-

"3. (1) The Second Schedule of the Financial Relations Consolidation and Amendment Act, 1945, is hereby amended -

(a) by the addition to paragraph 14 of the following sub-paragraph

(i) the payment of an amount or the transfer of land -

(i) to an institution, council or body contemplated in Section 84(1)(f) of the Republic of South Africa Con-

stitution Act, 1961 (Act No. 32 of 1961), by the owner, or his successor in title, of land the value of which has been increased; and

- (ii) by an institution, council or body referred to in item (i), to the owner, or his successor in title, of land the value of which has been decreased,

by any town-planning scheme, or the alteration or substitution of any town-planning scheme, irrespective of whether such town-planning scheme is in the course of preparation, is awaiting approval or is in operation; and

.....

- (2) Sub-section 1(a) shall be deemed to have come into operation on 1 April 1925".

There can be no doubt that Provincial Councils were by this enactment empowered to pass legislation such as envisaged with prospective effect. One of the issues debated between the parties was, however, whether such legislation could be passed by Provincial Councils with retrospective force. I shall presently revert to this issue.

The contemplated Ordinance, No. 17 of 1973 (Cape), was promulgated on 17 August 1973. On 15 October 1973 the Council reminded the applicant that the development contribution earlier imposed by the Administrator in respect of the applicant's property amounted to R42 076. The applicant's attention was also directed "to the provisions of Section 35 ter of Ordinance No. 33 of 1934, as amended by Ordinance No. 17 of 1973, in terms of which the above amount, now referred to as an enhancement levy, is now due" by the applicant to the Council "by virtue of the fact that transfer has already been passed on the property". The applicant was also advised that he could, in terms of the amending Ordinance, submit a request in writing to the Council for a fresh determination of the amount liable to be paid by him.

The applicant's reaction to this was that he was not prepared to debate the amount of the levy before it was established in principle that he was liable to pay such a levy.

His contention was that he was not liable to pay the levy.

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The first issue which I propose to discuss is whether or not the Court a quo was justified in holding, in effect, that the applicant could in terms of Section 35 ter of Ordinance 33 of 1934, as a former owner of the above-mentioned property, be compelled to pay an enhancement levy in relation thereto.

There can be little doubt that for the purposes of the enhancement levy in issue in this case the applicant was the owner of the land in question for the purposes of Section 35 ter (1)(a) of the Townships Ordinance as amended.

Section 35 ter (1)(a) reads as follows:-

"35 ter. (1) In respect of every provision which is or has been prescribed by the Administrator after the commencement of the Townships Amendment Ordinance, 1969 (Ordinance 25 of 1969), in terms of section 35 bis for a local authority's scheme in the course of preparation or awaiting approval, there shall, subject to the provisions of subsections (8), (9) and (10) -

(a) be an enhancement levy due to such local authority by the owner of any land of which the value is or

has increased in consequence of such provision being or having been so prescribed."

"Owner" is defined in sub-section 13 of Section 35 ter as follows:-

"The person whose name is registered in a Deeds Registry as the owner of the land concerned on the fixed date".

"Fixed date" is in turn defined in the same sub-section as follows:-

"Date upon which the provision contemplated in sub-section (1) is or was prescribed".

The rezoning of applicant's property for use for industrial purposes constituted the prescription of a provision in the Council's town planning scheme in the course of preparation, in terms of Section 35 bis, of the Ordinance. It was in consequence of this rezoning that the enhancement levy was claimed. The rezoning took place on 29 July 1970, which was accordingly the "fixed date" for the purposes of the definition of "owner". The property was registered in the name of the applicant on 29 July 1970 (the "fixed date")

and consequently applicant was the "owner" in terms of the definition thereof contained in Section 35 ter (13). On the premise that the liability for the enhancement levy is imposed by Section 35 ter on the person who is the owner as defined in Section 35 ter (13) and leaving aside for the moment the question of ultra vires, it follows that applicant became liable for the enhancement levy in issue. It is true that the provisions of the Ordinance relied upon to reach this conclusion were inserted only in 1973 by Ordinance No. 17 of 1973, whereas applicant ceased to be the registered owner of the property on 26 October 1970 but that position is met by the provisions of Section 5(2) of Ordinance No. 17 of 1973 which enacts that the new Section 35 ter shall be deemed to have come into operation on 26 September 1969.

It was submitted, however, that the defined meaning of the word "owner" should not apply in applicant's case. In my opinion, however, this is the meaning which

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should prevail unless it appears that the legislature intended otherwise. The legislation passed by a Provincial Council must, but for two exceptions which do not apply to the present case, be construed in the same manner as an act of parliament. This, by the way, is a scintilla of federalism appearing in our unitary constitution.

The first submission made on behalf of the applicant is that it might lead to great hardship and inequity if a prior owner could be forced to pay the levy perhaps twenty years after he had sold the land. In the first place it is fanciful to suppose that such a situation would in the ordinary course of events arise. The submission also loses sight of the fact that the enhancement (if any) in the value of property occurs at the moment of zoning or rezoning (see definition of "estimated difference", subsection 13 of Section 35 ter).

The definition reads as follows:-

"'estimated difference' means the difference between the value of the land concerned immediately prior to and im-

mediately subsequent to the fixed date, having regard to the provisions of the scheme applicable to such land."

If an owner were to sell his property below its enhanced value, he would have only himself to blame. If he is dissatisfied with the amount of the levy, he is entitled to challenge the amount (sub-section 4 of Section 35 ter). It must furthermore be remembered that the owner becomes entitled to compensation in the event of his property having decreased in value as a result of a zoning or rezoning of his land. The case of Administrator of Natal v. Bluff Drive-in-Cinema, 1969 (1) SA 415 (N), relied on in support of the foregoing submission, is clearly distinguishable on the facts.

For the convenience of the reader I cite, as far as is relevant for this investigation, the provisions of sub-sections (8) and (9) of Section 35 ter to which reference will presently be made:-

"(8) Whenever it is proposed to transfer land in respect of which an enhancement levy is due but has not yet been paid or to transfer any portion of such land and -

- (a) the obligation to transfer such land or such portion arises from or in consequence of a contract which was entered into by the owner and the proposed transferee before the fixed date, or
- (b) the owner of such land and the proposed transferee have in writing agreed that such transferee accepts liability for payment of such levy,

the Administrator may, after consultation with the owner, the proposed transferee and the local authority, determine that such owner shall, on the transfer of such land or of such portion to such transferee, be wholly or partly exempt from liability for payment of such levy and upon such transfer such transferee shall, subject to any further such exemption, become liable for payment of such levy to the extent to which such levy has not been paid by such owner.

(9) (a) Where a portion of the land referred to in subsection (1)(a) is required by the local authority for any purpose whatsoever which it is from time to time by law empowered or required to carry out, the local authority may, by notice in writing served on the owner before any agreement as contemplated by subsection (4)" -

(which determines the quantum of the levy or compensation) -

"is reached inform the owner that it intends requesting the Administrator to direct in terms of paragraph (c) that such portion shall be transferred to it.

(b)

(c) / 15(b)

(c) The local authority shall notify the Administrator in writing of the value determined in accordance with the preceding provisions of this subsection and the Administrator may direct that, if the value so determined is equal to or less than the amount of the enhancement levy due in respect of the land concerned, the portion referred to in paragraph (a) shall be transferred to the local authority and, upon the transfer of such portion to the local authority, the value so determined shall be deemed to be an amount paid in full or partial settlement, as the case may be, of such enhancement levy.

(d)"

It is also submitted that an inequity would arise if a prior owner should be required to pay an enhancement levy in respect of property where a sale had been concluded prior to the coming into operation of an enhancement levy. This submission is not accurately stated since it is directed to the provisions of sub-section 35 ter (8) which, in the first place, refer to a contract entered into before the fixed date, i.e. the date of the zoning or rezoning of the property. In the second place the provisions of the sub-section relate to a situation where the parties to a sale of property have come to an agreement regarding the incidence

of the levy in which ^tlater case no problem is likely to arise. In normal circumstances, where the purchase of the land is entered into prior to the zoning or rezoning of the property, transfer should have been given before the fixed date in which case the purchaser would be the owner liable to pay any levy subsequently raised. If any exceptional case has been overlooked by a legislature such as a Provincial Council with plenary legislative powers, an oversight as postulated, if such it be, is no ground for departing from the definition of owner. In any event the Administrator is in such a case authorised to shift the liability from the owner to the transferee in terms of sub-section (8) of Section 35 ter and subject to the conditions therein prescribed.

The next submission also requires consideration. As far as sub-section (9) concerns the payment of an enhancement levy, its provisions are covered by the earlier considerations dealt with herein. The sub-section provides further, however, that the Administrator may order the

"owner" of land to transfer to the local authority portion thereof if such land should be required by the local authority. It is suggested that this would be an unreasonable result. It may even be added that an obligation impossible of performance may be involved. It is submitted on behalf of the second respondent that the subsection is applicable only in cases where the owner as defined is still the registered owner and not in cases where transfer has already been given to another. The lastmentioned submission would avoid the absurdity of a provision of the Ordinance requiring an owner in the grammatical sense of the definition i.e. a prior owner, to perform what might prove to be an impossibility. This result may also be avoided by departing from the defined meaning and construing the word "owner" as being the owner at common law at the time of the notice referred to in the sub-section. It is generally accepted that an interpretation section or definition does not necessarily apply in all possible con-

texts in which the word may be found in a statute.

This qualification is sometimes expressly so stated in the enactment. But in a clear case this is not necessary. If a defined word or expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning. (See for instance Halsbury, 3rd Ed. vol. 36 par. 574, C.I.R. v. Simpson, 1949 (4) SA 678 (A) at p 692).

Either of these two methods of avoiding an absurd result might be applied in the special circumstances of sub-section (9) of Section 35 ter of the Ordinance. There is no compelling reason, however, to depart from the defined meaning of "owner" when applying the provisions of Section 35 ter (1).

It is submitted further that the inclusion of the words "or successor in title of the owner" in the abovementioned enactment of parliament circumscribing the legislative powers of the Provincial Councils made it unlikely that the

legislature intended that a levy of a sum of money or the transfer of land should be exigible from a prior owner. It must be remembered in the first place that the legislative competence thus circumscribed was intended to provide not only for the Provincial Council of the Cape but also for the three other Provincial Councils. Each Council thus became competent but not obliged to enact provisions in accordance with the terms of the above-mentioned enactment as amended. As it happened the addition of the words in question enlarged the competence of the Cape Provincial Council so as to permit it to relieve a former owner from liability in appropriate cases such as contemplated in sub-sections 35 ter (8) and (9).

The next motion to be dealt with is the application for an order:-

"Declaring that Section 35 ter of Ordinance 33 of 1934 is ultra vires the enabling legislation".

It is strictly speaking not correct to speak of enabling legislation in relation to Ordinances of a Provin-

cial Council. It has furthermore been held that a court will not lightly declare that the provisions of a Provincial Ordinance are invalid as going beyond the legislative scope assigned to the Provincial Council in question.

(See S. v. le Grange, 1962 (3) SA 498 (A) at p. 505 A-B).

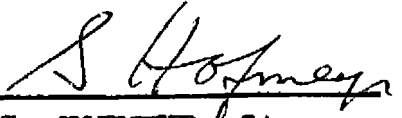
This results from the principle that provincial ordinances are enacted by the exercise of original powers of legislation possessed by Provincial Councils.

It is submitted that for the purposes of the interpretation of Section 35 ter (1) of the Ordinance it is sufficient if the validity of the Ordinance is jeopardised and that it is not essential for the purposes of this contention (that the section in question is invalid) that the court should affirmatively hold that the Ordinance is ultra vires. As authority for this proposition Falcon Investments Ltd. v. C.D. of Birnam (Suburban) (Pty) Ltd. and Others, 1973 (4) SA 384 (A) at p. 403 is cited. This decision is, however, no authority for the foregoing submission dealing as it does with a Scheme which was legislation by a local

authority possessing delegated powers only. As was pointed out earlier in this judgment the contrary approach has consistently been adopted by the courts in relation to provincial legislation.

It is unnecessary to deal with any further submissions. After having given due consideration to the arguments submitted by counsel, I remain unpersuaded that the Judge a quo erred in refusing the application.

The appeal is accordingly dismissed with costs of both respondents, including by consent (of which notice has been given) the costs of first respondent's two counsel.


S. HOFMEYR, JA

Rumpff,	CJ)	
Wessels,	JA)	
Corbett,	JA)	Concur
Trengove,	AJA)	