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Case No 485/89
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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE SOUTH AFRICAN ROADS BOARD **Appellant**
(First Respondent in the court a quo)

and

CITY COUNCIL OF JOHANNESBURG **Respondent**
(Applicant in the court a quo)

CORAM:
CORBETT CJ, MILNE, STEYN, F H GROSSKOPF et NIENABER JJA

DATE OF HEARING: 11 March 1991

DATE OF JUDGMENT: 24 May 1991

J U D G M E N T

MILNE JA/.....

MILNE JA:

At the outset I should mention that at the hearing of this appeal the South African Roads Board was, by consent, substituted as the appellant in place of the National Transport Commission ("the Commission"). This follows from the entrusting of the powers, functions and duties of the Commission to the Board in terms of section 3 of the Transport Deregulation Act, No 80 of 1988.

The N13 is a road which runs through the southern suburbs of Johannesburg from an interchange known as Uncle Charlie's in the west to the Rand Airport in the east. It is sometimes referred to as the Southern By-pass. It has been declared a national road in terms of section 4 of the National Roads Act, 54 of 1971 ("the Act"). It had not, at any time relevant to these proceedings, been declared a toll

road in terms of section 9 of the Act (nor, so it would seem, had it been so declared at the time when this appeal was argued). The Commission has, however, decided to declare it a toll road. Precisely when it made this decision is not clear but it seems that it had done so by early 1987. The reasons for this decision are in dispute, but they clearly relate to the intention of the Commission to construct a major motorway -the M4 - between Springs and Krugersdorp, which will be a toll road, known as the Hendrik Schoeman Expressway, and, it is estimated, will take approximately 7 years to construct. The link between the N13 and the M4 is the western by-pass known as the N1-20. It is stated in the affidavit filed on behalf of the Commission by a director of planning in the Chief Directorate of National Roads, that:

> "(a) The M4 will eventually replace the N13 as the link between the N1 between Pretoria and Cape Town and the N3 between the PWV and Durban, and will become

part of the Krugersdorp/Springs tollway which will be known as the Hendrik Schoeman Expressway.

(b) This whole project will lose its financial viability if the N13 is not included as a temporary toll road in the overall project."

It is common cause that the Commission decided to use the N13 as a toll road for as long as the M4 was under construction. In pursuance of this decision the Commission entered into a contract with Toll Highway Development Company (Proprietary) Limited ("Toll Highway"). The Commission has declined to reveal the content of this contract, but it is common cause that in August 1988, and in pursuance of that contract, Toll Highway began erecting a toll gate on the N13. The decision to declare the N13 a toll road, and the commencement of the erection of this toll gate upon it, gave rise to the proceedings in this matter.

The body objecting to the decision and the erection of the toll gate was the respondent, the City Council of Johannesburg ("the City Council"). Its interest in this matter arises because, in the first place, the N13 falls within the municipal area of Johannesburg and, indeed, the City Council contributed some R10 million to the cost of constructing interchanges leading onto the N13. Furthermore in the launching affidavit filed on behalf of the City Council it is stated that:

> "(b) The effect of imposing a toll on the N13 will inevitably be that certain of the traffic using that road, and in particular traffic emanating from the residential suburbs to the south of Johannesburg, will use alternative routes in order to avoid paying the toll. The effect of this will be that other roads in the vicinity will be used as alternative routes by traffic and are likely to become congested thereby disrupting the traffic flow in that area.
>
> (c) In particular, traffic to and from Soweto at present uses a road known as the old Potchefstroom road, passing on to the N13 at an interchange

known as the Uncle Charlies interchange. A substantial amount of traffic uses this route. Once the proposed tollgate is erected on the N13, it is likely that a significant proportion of this traffic will avoid the tollgate by following an alternative route through the residential suburb of Mondeor. These roads are simply not designed to cope with this volume of traffic, and major disruption of planned traffic flows will occur. Indeed, the very reason for the construction of the N13, to which the applicant made a substantial financial contribution, was to relieve the congestion on the roads falling under the jurisdiction of the applicant.

(d) These alternative roads are all roads which vest in the applicant in terms of the provisions of the Local Government Ordinance (Transvaal) 1939. The applicant has a duty in terms thereof to maintain these roads and keep them open. The additional traffic which these roads will be required to carry if a toll were to be imposed on the N13 will inevitably result in a greater financial obligation being placed on the applicant for the upgrading and maintenance of these roads to cater for additional traffic. In particular, one or more of the roads which will be used by this additional traffic will have to be widened to accommodate it. According to preliminary estimates which have been made of the implications for the applicant of this traffic being diverted, the cost of widening and upgrading roads as a result thereof will be approximately R3,6 million. In confirmation of the content of sub-paragraphs

(b),(c) and (d) above I refer to the affidavit of IAN FRASER SYMON annexed."

The grounds of the City Council's objections were, in essence, that

(a) the erection of the toll gate was **ultra vires** the Commission because, so it was submitted, in terms of section 9(1)(c) of the Act, such a toll gate may only be erected on a toll road which has been duly declared as such;

(b) the erection of the toll gate was illegal since it was in pursuance of a contract whereby Toll Highway would, on behalf of the Commission, use tolls collected from the N13 to help finance the construction of the M4 in breach of section 2(3A) of the Act; and

(c) the decision of the Commission was liable to be set aside because the Commission did not give the City

Council an opportunity to be heard before arriving at that decision.

The City Council accordingly brought proceedings against the Commission, Toll Highway and the Minister of Transport for an interdict restraining them from proceeding with the erection of a toll gate on the N13, for an order setting aside the decision of the Commission to declare the N13 a toll road, and costs. These proceedings were successful and the judgment of the court **a quo** is reported as Johannesburg City Council v National Transport Commission & Others 1990(1) SA 199 (W).

With leave of this court, the appellant appeals against the orders made by the court **a quo**. Toll Highway did not seek leave to appeal and has taken no further part in the proceedings. The Minister of Transport was content

to abide the decision of the court, both in the court **a quo** and in the appeal. As appears from the judgment of the court a quo, various objections were raised by the Commission and Toll Highway including an objection that the City Council had no **locus standi in judicio.** This objection was, rightly, overruled by the court **a quo,** and was not pursued in the appeal.

Subject to one qualification, the only issues raised in the appeal were

(a) whether the erection of a toll gate on a national road which has not been declared a toll road is **ultra vires** the Commission; and

(b) whether the Commission was obliged to give the City Council a hearing before deciding to declare the N13 a toll road.

The qualification referred to above is that the attack on the erection of the toll gate based upon the allegedly unlawful intention to use the funds paid as tolls on the N13 for the construction of the M4 was not abandoned by the City Council. No reference is made to this point in the judgment of the court a quo, nor in the appellant's heads of argument, and the matter was not fully argued - presumably because it was considered that there was a dispute of fact as to whether the tolls would be so used. It is unnecessary to say more on this aspect of the matter than that it would appear that, if tolls collected on the N13 were to be used for the financing of the construction or maintenance of the M4, this would be in breach of the section 2(3A) of the Act and accordingly unlawful.

I deal first with the powers of the Commission in relation to a toll road. The power to declare a national

road a toll road and to provide for the levying of tolls and the construction of toll gates thereon was introduced for the first time when the amendments effected by Act 79 of 1983 came into operation. Section 1 of the Act was amended to insert a definition of a toll road as:

> ... a portion of a national road which has been declared a toll road under subsection (1)(a) of section 9 and of which notice has been given in terms of subsection (2) of that section in the **Gazette**".

Section 9 now provides (omitting portions not relevant to this appeal) as follows

> "(1) The commission may -
>
> (a) subject to subsection (3), declare any bridge or tunnel on, or any other portion of, a national road, as a toll road;
>
> (b) in respect of the use of any vehicle on a toll road, levy a toll the amount of which has been determined and made known in terms of subsection (4) and which shall be payable by the person so using the vehicle;
>
> (c) collect moneys payable as toll on a toll road, and for that purpose erect a toll gate or toll gates and facilities in connection therewith on the toll road;
>
> (d) ...

(e) ...

(f) ...

(2) A declaration under subsection (1)(a) of a portion of a national road as a toll road, together with a description of such portion, shall be made known by notice in the Gazette.

(3) The commission shall not declare any portion of a national road under subsection (1)(a) as a toll road unless, in the opinion of the commission, at the time of the notification of such declaration in terms of subsection (2), and thereafter as long as the toll road retains its status as such road, an alternative road to the intended toll road, along which the same destination or destinations may be reached as that or those to which the route of the relevant toll road and national road leads, shall be available to road users, and which -

(a) has been provided by the commission; or

(b) is under the control of the commission or any other road authority.

(4) ...

(5) ..."

In terms of section 9(1)(c) the erection of a toll gate is authorised on a "toll road". In terms of section 1 a toll road means a portion of a national road which has been declared a toll road and of which due notice has been

given, unless that is inconsistent with the context. There does not in this case appear to be anything in the context which is inconsistent with the defined meaning. It was submitted on behalf of the appellant that the reference to a toll road in the phrase "may ... for that purpose erect a toll gate ... on the toll road", should be read as a reference to an intended toll road. There does not appear to be any reason for adopting this construction: if the legislature had wished to refer to an intended toll road it would surely have used those words, as it did in subsection (3) of section 9. It was submitted that the legislature did not always use the words "the intended toll road" when it wished to refer to such a road. In support of this argument counsel for the Commission sought to rely on the fact that, in subsection (3), the legislature used the phrase "the relevant toll road". The Afrikaans version uses "die betrokke tolpad" and this is plainly a reference back to

"the intended toll road". Furthermore, when the words "toll road" are used for the first time in subsection (9)(1)(c) itself, it is clear that they can only refer to a toll road which has been declared as such. They are used with reference to the power of the Commission to collect "moneys payable as toll", and it is common cause that no toll could be levied before declaration. The construction contended for by the appellant would mean that the legislature had, in the same subsection, used "toll road" to mean a declared toll road and an intended toll road. This is improbable. It was also submitted that, where the intention is to declare an existing national road a toll road, the preparation of that road for use as a toll road would have to be done while the road was still a national road. It would not be practicable, so it was argued, to declare a national road a toll road while it was being improved to toll road standard because, in terms of subsection (3),

there must (in the opinion of the Commission) at the time of the notification of the declaration of a national road as a toll road, be available an alternative road of the kind described in that subsection. This is not a real practical problem. Indeed, no such problem arises in this case since it is quite apparent from the affidavits that there was always an alternative route available. This consisted of roads under the control of the City Council which is a "road authority". These words are not defined in the Act, but the City Council is clearly such an authority. In any event, there is nothing to indicate that it would not be reasonably practicable to erect toll gates on the road after it had been constructed and duly declared a toll road.

It was submitted, in the alternative, that section 5(1)(c) of the Act was wide enough to cover the erection of toll gates. This subsection gives the Commission power to

"plan, design or construct any national road". The word "construct" is defined in relation to a road as including "reconstruct, widen, divert, alter, repair and maintain." The word "road" is defined as follows:

> "... a public road and includes in addition to the roadway -
> (a) the land of which the road consists or over which the road reserve in question extends;
> (b) anything on that land forming part of, or connected with, or belonging to the road;
> (c) land acquired for the construction of a connection between a national road and another road;"

A toll gate, so it was submitted, is something on the land of which the road consists or over which the road reserve in question extends, and it is "connected with", or is something "belonging to", the road. To construct a toll gate is therefore, so it was contended, to construct a "road". There is no substance in this contention. Quite apart from anything else, it is apparent that the toll gate

which was being constructed when the interdict was sought in the court a quo was, in part, outside the road reserve. In any event, as a matter of law, the section cannot bear the meaning sought to be attributed to it. In the first place, it seems that when the section refers to the power to "construct" a "road" it is referring to things which would ordinarily be considered innately part of or connected with or belonging to a road e.g. kerb-stones, reflectors and so on. The existence of paragraphs (d) and (e) would seem to support this view. These paragraphs respectively confer specific powers on the Commission to fence any national road and

> "to plant trees, shrubs, grass or other plants, to protect or promote any vegetation or to take such other steps or do such other work as it may deem desirable, with a view to the appearance of a national road or the convenience of users of a national road or the prevention of soil erosion on a national road or as a result of the construction of a national road."

In the normal course of events, the fence and plants etc

would be placed on the road reserve or, in the case of a double carriageway, on the median strip. They could, therefore, on a wide reading of the section, be regarded as something "connected with" or "belonging to" the road; yet it was thought necessary to enact separate paragraphs expressly giving the Commission such powers. This suggests that the section is intended to be read only in a narrow sense.

In any event, on the Commission's argument, section 9(1)(c) is superfluous, and counsel was driven to submit that this subsection was enacted **ex abundanti cautela.** This argument cannot succeed. Section 5 sets out the general powers, duties and functions of the commission; but it required special legislation, namely section 9, to introduce the new concept of toll roads and the provision of toll gates which are necessary to implement the toll system.

As already mentioned the phrase "intended toll road" is used elsewhere in the same section, and if the legislature had, out of an abundance of caution, wished to make it clear that toll gates could be erected on an intended toll road (although that power had already been conferred in section 5(1)(c)), it is inconceivable that it would not have said so in so many words. It follows that the interdict preventing the erection of the toll gate was rightly granted.

I now consider the attack on the decision of the Commission to declare the N13 a toll road. It is common cause that it did not give the City Council an opportunity to be heard before making that decision. It is, apparently, the practice of the Commission not to consult any local authority before declaring a toll road. The deponent who swore the affidavit on behalf of the Commission says that the Commission "... has never taken a decision to declare a

toll road in conjuction with a local authority." Where the road in question passes through the area of jurisdiction of a local authority, and that road is connected with an urban road system administered and controlled by the local authority, and particularly where the alternative road is part of that road system, I would have thought that good administration would demand some measure of consultation with the local authority before taking such a decision; all the more so, where the local authority is one which controls a vast network of roads serving the main industrial and commercial centre of the Republic. Be that as it may, the question is whether the Commission was obliged in law to give the City Council an opportunity to be heard before arriving at its decision.

I have already referred to the City Council's allegations to the effect that the decision would directly

affect its property rights. In the answering affidavits filed on behalf of the Commission these allegations are criticised as being so vague that it is "... impossible to respond thereto meaningfully." This prompted the City Council in its replying affidavits to provide more evidence in support of its original allegations; which, so it appears from the judgment, led to an application to strike out such allegations. The notice of the application to strike out is not included in the record, but it is apparent from the judgment that it relates to the allegations of inconvenience and expenditure which City Council said it would suffer as a result of the Commission's decision. The court a quo, rightly in my view, held that these allegations were properly raised in reply. In any event, I am inclined to agree that, even without such allegations, it is clear that the Commission's decision would, on the probabilities, lead to a diversion of the flow of traffic, and would result

in the City Council being required "to expend funds to up-grade the suburban roads which will be required to accommodate that traffic", and that the construction of the toll gate would cause a disruption of traffic requiring the City Council to assign traffic officers and equipment to the N13 in excess of those normally provided. It follows that the City Council's rights and property are, in a broad sense, affected by the decision. Indeed, I did not understand that to be in issue. The attack on the finding of the court **a quo** that the Commission was obliged to give the City Council an opportunity to be heard before arriving at its decision was based on the following submissions:

(a) The decision of the Commission to take steps to have the N13 declared a toll road was merely an expression of intention having no legal effect, and no relief could be granted (assuming the other requirements for such relief to be present) until the declaration had

already been made and notified in terms of section 9(2).

(b) In any event, the declaration of a toll road in terms of section 9 of the Act is, by its nature, a "legislative" Act, as is the decision which precedes it, and the **audi alteram partem** rule accordingly has no application.

(c) There are, furthermore, indications in the Act that the legislature did not intend any person to have the right to be heard before such a decision is made.

As to (a):

Problems do arise in the case of what **BAXTER** calls "multi-staged" administrative decisions: see **ADMINISTRATIVE LAW** p 582. In the particular circumstances of this case, however, the difficulty is more apparent than real. The N13 had been constructed as a by-pass and there was apparently

no intention to reconstruct or up-grade it before using it as a toll road. On the evidence before the court, from a practical point of view, all that was required for the N13 to be used as a toll road, was the erection of a toll gate. It follows that the decision to declare the toll road would inevitably lead to its declaration as such. It was submitted that what the City Council called a decision was merely the "internal thinking" of the Commission, and reliance was sought to be placed on Republican Publications (Pty) Ltd v Publications Control Board 1970(1) SA 577 (C) at 582D - 583F. In terms of section 5(3) of the Act the Commission is obliged to cause a record to be kept of the proceedings at every meeting held by it in connection with its functions under the Act. See also section 6 of the Transport Co-ordination Act, No 44 of 1948, with regard to meetings of the Commission. The "internal thinking" has clearly, in this case, been manifested in physical form, in

the sense that the decision must have been recorded in terms of the abovementioned sections. The Republican Publications case is clearly distinguishable. In that case all that the Publications Control Board had "decided" was "... to keep a close watch on further issues of SCOPE". This was conveyed in a letter which was no more than a "reminder", and was understood by the recipient to be no more than a serious criticism of the applicant's two publications. The Board had, in any event, a statutory duty to "keep watch" on publications that might be thought "undesirable" in terms of the legislation which was there under consideration, and the "decision" to perform its statutory duty in that regard could not prejudice the applicant. Here, the decision of the Commission had been implemented by (a) the conclusion of a contract with Toll Highway to control and manage the N13, and (b) the partial erection of a toll gate on the N13. Even if the diversion of traffic will only occur once the

gate is operating and tolls are being levied, there is clearly prejudice to the City Council at this stage. Roads cannot be up-graded overnight so as to cope with a far greater volume of traffic; they do not, like, Athena, spring fully armed from the head of Zeus. They may take months and, indeed, even years to prepare. The City Council would have to plan well in advance and allocate funds and personnel for the task to cope with the changed situation when it came. It cannot, therefore, be said that the grant of this relief was premature.

As to (b):

The question as to whether a legislative act, or the decision which precedes and gives rise to it, is subject to the rules of natural justice, including the audi principle, is, in my opinion, not one which admits of a simple and unqualified answer. Before essaying an answer I would

emphasize certain developments which have recently taken place in our law in this sphere.

In the first place, this Court has expressed a preference for the view which regards the audi principle as a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; as opposed to the view which requires the audi principle, if it is to apply, to be impliedly incorporated by the statute in question. (See in this regard Attorney-General, Eastern Cape v Blom and Others 1988(4) SA 645 (A), at 660 H - 662 I; Staatspresident en Andere v United Democratic Front en h Ander 1988 (4) SA 830

(A), at 871H - 872E; and, as to legitimate expectation, Administrator, Transvaal, and Others v Traub and Others 1989 SA 731 (A), at 754 ff.)

Secondly, this Court has now moved away from the classification of powers as, for example, judicial, quasi-judicial or purely administrative in order to determine whether the audi principle applies. These classifications and their application in administrative law to questions such as the justiciability of acts or decisions on the ground of a failure to observe the dictates of natural justice were originally derived from English law, which itself has now discarded them (Traub's case, supra, at 759 A - C, 762F - 763J; Wade, Administrative Law, 6th ed, at 518-20; Craig, Administrative Law, 2nd ed, at 204-5).

Although the formulation given above speaks of an

act or a decision prejudicially affecting an individual, clearly the principle would apply where the entity affected was a legal persona (see S v Moroka en Andere 1969 (2) SA 394 (A), at 398C) or a municipal corporation (Wade, op cit, at 532). And, subject to what is stated below in regard to legislative acts, it would also apply to a number of individuals similarly placed.

In the case of Pretoria City Council v Modimola 1966 (3) SA 250 (A) the Pretoria City Council, under powers delegated to it by the Community Development Board in terms of sec 13 of the Group Areas Development Act 69 of 1955, expropriated a certain erf in Pretoria for the purpose of properly developing the group area in which it was situated. The owner of the erf in question instituted action against the Council claiming an order setting aside the expropriation on the ground that it was invalid because,

inter alia, the Council had not afforded him an opportunity to be heard in regard to the expediency or otherwise of the expropriation before the notice of expropriation was issued to him. On appeal to this Court it was held (on exception) that the plaintiff's summons disclosed no cause of action since the expropriating authority was not obliged to give the owner of the property expropriated in terms of Act 69 of 1955 such an opportunity to be heard. The main judgment was delivered by Botha JA who referred to the well-known statement of the audi principle by Centlivres CJ in Rex v Ngwevela 1954 (1) SA 123 (A) at 127 and then went on to observe (at 261G - 262A):

> "The learned CHIEF JUSTICE could not by this passage, which was also cited in the recent case of Le Roux v Minister van Bantoe-Administrasie en - Ontwikkeling 1966 (1) S.A. 481 (A.D.) at p. 491, have intended to convey that the mere fact that a statute authorised the taking of a decision prejudicially affecting the property or liberty of an individual necessarily implies the incorporation therein of the maxim **audi alteram partem**, irrespective of whether the

> principles of natural justice would otherwise be violated or not. In those statutes, for example, where a public authority is authorised to take a decision prejudicially affecting the property or liberty of the members of a whole community, e.g. to levy taxation on them or their property, or to restrict their movements, no principle of natural justice is violated by a decision taken under the statute without affording an opportunity to every individual member of the community to be heard before the decision, which obviously prejudicially affects his property or liberty, is taken. In exercising its powers under such an enactment, the public authority is guided solely by what is best for the community as a whole, and the peculiar conduct or circumstances of any individual member of that community is a completely irrelevant consideration."

Most of this passage was cited with approval and applied by this Court in Moroka's case, supra (see at 398E - H). On the strength of these two authorities Baxter, Administrative Law, at 581, expresses the view that South African courts have held that individuals prejudicially affected by legislation, or at least by acts that have "legislative" effects, cannot demand a hearing, either individually or collectively. It is, accordingly, argued by appellant's

counsel that inasmuch as the declaration of a toll road in terms of sec 9 of the Act is by its nature a legislative act, the audi principle does not apply in this case.

The categorization of statutory powers into those which are executive or administrative, on the one hand, and those, on the other hand, which when exercised give rise to delegated legislation is not always an easy one. As explained by Gardiner J in Rex v Koenig 1917 CPD 225, at 241-2, laws are general commands which place general obligations on persons; whereas a special command enjoining only particular action constitutes an administrative act (see also Byers v Chinn and Another 1928 AD 322, at 329; Mabaso v West Rand Administration Board and Another 1982 (3) SA 977 (W), at 987 A - B). These broad criteria, however, do not, as Gardiner J conceded (at 242), afford any precise test by which in every instance the distinction between laws, or legislative acts, and non-legislative,

administrative acts can be determined. And as Baxter (op cit at 350) observes:

> "The distinction between legislative and non-legislative administrative acts is often difficult or impossible to draw satisfactorily."

(See also Wade, op cit, at 858-9; De Smith, Judicial Review of Administrative Action, 4th ed, at 71-6).

I am not persuaded that the categorization of statutory powers of action or decision into executive (or administrative) and legislative should in all cases provide the criterion as to whether the repository of the power is obliged in exercising it to observe the dictates of natural justice. It seems to me rather that a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an

individual or particular group of individuals. Here I use the word "individual" to include a legal persona such as a corporation or a local authority, clothed with corporate personality; and the word "calculated" to mean not "intended" but "likely in the ordinary course of things" to have this result (cf. Johannesburg Liquor Licensing Board and Another v Short 1946 AD 713, at 722-3). It is not necessary in this case to consider how large such a group of individuals may be.

In the case of the former ((a) above), which would usually be legislative in character, it would be true to say that in general, to use the words of Botha JA in Modimola's case, supra, where a public authority is empowered to take a decision prejudicially affecting the members of a whole community, the public authority is normally guided solely by what it believes to be best for the community as a whole and is not obliged to consider the

particular interests of individual members of that community. Consequently it may be argued that failure to give individuals affected a hearing does not violate any rule of natural justice.

As to the latter type of power ((b) above), on the other hand, which, depending on the circumstances, might be categorized as either administrative or as legislative or which might fall into the grey area in between, it would seem that the repository should normally, and in the absence of a contrary indication in the statute, be obliged to afford the particular party prejudicially affected a hearing before exercising the power.

It seems to me that such a departure from formal classification as a criterion not only would be in accordance with modern trends in administrative law, but also would provide a more rational foundation for the

application of the rules of natural justice in this area. For the audi principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power.

It is argued by some writers (see eg Baxter, op cit, at 581 - 2) that the audi principle should apply even in cases falling within category (a) above. In certain instances this could pose great practical problems, and generally it could tend to stultify the administrative process, and, in any event, it might introduce criteria for decision beyond those contemplated by the empowering legislation. The danger of applying the audi principle

outside its proper limits (see the remark of Schreiner JA in Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A) at 549 C) and the need to achieve a reasonable balance between competing interests in this sphere (as to which see Traub's case, supra, at 761 F - G) must not be forgotten. At this stage I prefer to say no more on this aspect of the matter.

There is some persuasive authority from Commonwealth countries which appears to support the general propositions stated above. The first of these is the case of Homex Realty & Development Co Ltd v Village of Wyoming 116 DLR (3rd) 1, a decision of the Supreme Court of Canada. There the appellant, a developer, had purchased a number of lots in a new subdivision falling within the jurisdiction of the respondent municipality. A disagreement developed between the parties as to appellant's liability in regard to the provision of municipal services, including the supply of

water, to the lots owned by it. Without notice to or the knowledge of the appellant, the respondent passed a by-law (no 6) which was aimed solely at the lots in question and in effect cut off the water supply to these lots. Some months later, and again without notice to appellant, a second by-law (no 7) was passed by the municipality the practical effect of which was to deny appellant the right to sell any of its lots without the consent of the municipality. One of the issues which arose on appeal to the Supreme Court was whether the by-laws were rendered invalid by the failure of the municipality to give appellant notice of the proposed by-laws and an opportunity to be heard. The Court divided as to the final result. Both the majority and the minority judgments (delivered by Estey J and Dickson J respectively) held that the audi principle applied to the enactment of by-7, but the majority denied relief by way of judicial review because of the conduct of the appellant. For other reasons

the majority also denied relief as far as by-law 6 was concerned. The minority held that the audi principle applied to the enactment of both by-laws. In the course of his judgment Dickson J dealt with an argument that in passing the by-laws the municipality exercised a legislative function to which the common law right to be heard did not apply. He stated (at 10-11):

> "It seems to me that a similar analysis should be employed in the present case. That is, it is not particularly important whether the function of the municipality be classified as 'legislative' or as 'quasi-judicial'. Such an approach would only return us to the conundrums of an earlier era. One must look to the nature of the function and to the facts of each case. I would adopt what was said by Judson J. in the **Wiswell** case. Although Judson J. dissented in **Wiswell**, being of opinion that adequate notice had been given, he did say (at p 757 D.L.R., p. 526 S.C.R.):
>
> 'I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the Judges prefer the term quasi-judicial. However one may characterize the function, it was one

> **which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected.'**
>
> (My emphasis.)"

Having referred to the fact that the Court below had noted that the municipality acted out of what it conceived to be the public interest, Dickson J continued (at p 11):

> "I have no doubt this is true. Council was seeking to protect members of the public from potential injury in the purchase of unserviced land and to protect its ratepayers from paying the costs of servicing. But that is no answer to the case made by the appellant. What we have here is not a by-law of wide and general application which was to apply to all citizens of the municipality equally. Rather, it was a by-law aimed deliberately at limiting the rights of one individual, the appellant Homex. In these circumstances, I would hold that Homex was entitled to some procedural safeguards."

Estey J concluded (at 25) that the municipality's action in enacting by-law 7 was -

> ".... not in substance legislative but rather **quasi-**judicial in character so as to attract the principle of

notice and the consequential doctrine of **audi alteram partem**".

In CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 the New Zealand Court of Appeal had to consider whether an Order in Council made by the Governor-General in Council (meaning the Governor-General acting by and with the advice and consent of the Executive Council) in terms of sec 3(3) of the National Development Act was invalidated by, inter alia, the fact that property owners affected by the Order in Council had not been given an opportunity to be heard. In considering this question Richardson J stated (at 188-9):

"The next matter for consideration is the nature of the power exercised by the Governor-General in Council. The mere fact that the decision is embodied in an instrument, an Order in Council, that is legislative in form does not necessarily preclude the imposition by implication of an opportunity to be heard. Again, it is well settled in this country that a body which is exercising functions that are legislative in form and substance may be subject to an implied duty to observe the requirements of natural justice. See **F E Jackson**

> & Co Ltd v Price Tribunal (No 2) [1950] NZLR 433; New Zealand United Licensed Victuallers Association of Employers v Price Tribunal [1957] NZLR 167; and DREWITT v Price Tribunal [1959] NZLR 21. Furthermore, the dividing line between 'adjudication' (or 'administration') on the one hand and 'legislation' on the other, is not always easy to draw and the attempt may be an arid exercise for in the twilight area the conceptual foundations for a distinction are not self-evident. It is more profitable to focus on the nature and effect of the decision under the statutory scheme than to search for labels to characterise the Executive Council's functions under s 3(3)."

In the result the Court decided that the property owners were not entitled to a hearing, but the general approach as articulated in the above-quoted passage is, in my view, instructive.

In a more recent case in the Court of Appeal of New Zealand, Fowler & Roderique v Attorney-General [1987] 2 NZLR 56, it was held that an order made by the Minister of Fisheries limiting the number of licences to be issued for the dredging of oysters in a certain area constituted a general piece of delegated legislation. Nevertheless, on

the particular facts of the case the Court held that the appellant, a company owning oyster-dredging vessels and previously the holder of a permit to dredge, should have been given an opportunity to be heard before the order was made. In the course of his judgment Somers J said (at 74):

> "It has been conceded, rightly I think, that the exercise of the Minister's power to limit the number of licences was not attended by any general obligation to call for submissions. Whether any particular person should be given an opportunity to be heard before a power is exercised depends upon the circumstances. If the exercise of the power is likely to affect the interest of an individual in a way that is significantly different from the way in which it is likely to affect the interests of the public generally, the person exercising the power will normally be expected to have regard to the interests of the individual before it is exercised. Where a person having no legal right to the renewal of the licence or permit has a reasonable and legitimate expectation of renewal the Court will normally intervene to protect that expectation by judicial review."

The fact that a body endowed with a statutory power should take into account the public interest as a

relevant consideration in the exercise of the power does not necessarily exclude a duty to act fairly towards an affected individual. This point is illustrated by the case of State of South Australia v O'Shea: O'Shea v Parole Board of South Australia 73 ALR 1, a decision of the High Court of Australia relating to a decision by the Executive Council of South Australia not to release a prisoner on licence as recommended by the State parole board. Mason CJ, having pointed out that the public interest was a relevant consideration in the making of its decision by the Executive Council, stated (at 7):

> "I would reject the argument that, because this notion of public interest involves some aspects of political or policy judgment, it lies outside the ambit of the doctrine of natural justice or the duty to act fairly. True it is that the courts do not substitute their view of policy for that prescribed by the Executive, but this does not mean that policy issues stand apart from procedural fairness. Although it is unrealistic and impractical to insist on a person having the opportunity to present submissions on matters of high level general policy, the same

considerations do not apply to the impact of policy on the individual and to those aspects of policy which are closely related to the circumstances of the particular case and that is the case here."

I return to the facts of the present case. There could be some debate as to whether the declaration by the Commissioner of the N13 as a toll road in terms of sec 9(1)(a) of the Act in truth constituted delegated legislation, but, accepting that it did, it seems to me that as far as the City Council was concerned the declaration, and the decision which preceded it, had a particular impact not experienced by members of the community as a whole. The details of this impact on the rights and property of the City Council have already been described. Moreover, in my view, it must have been obvious to the Commission, when it took the decision to declare the N13 a toll road, that the declaration would have an impact of this nature upon the

City Council. In the circumstances I consider that the declaration constituted the exercise of a power which I have placed in category (b) above and one to which the rules of natural justice, including the audi principle, apply, unless excluded expressly or by implication by the empowering statute. On its particular facts this case thus falls outside the general rule formulated in Modimola's case, supra, though the particular application of the rule in that case may in appropriate circumstances require to be reconsidered in the future.

It follows that the second line of attack upon the finding of the Court a quo that the Commission was obliged to give the City Council an opportunity to be heard before arriving at its decision must fail.

As to (c):

The legislature may, of course, exclude the application of the **audi** principle, expressly or by necessary implication. (The latter was, incidentally, the basis of the decision in Attorney-General of Canada v Inuit Tapirisat of Canada et al (1981) 115 D.L.R. (3d) 1 at pp 14-18). It was submitted that in the instant case the principle was impliedly excluded because the Act had, in certain respects, required the Minister or the Commission to consult and therefore, so it was submitted, it must be inferred from the failure to provide for such consultation in section 9, that it did not intend there to be any. A similar argument was advanced in Administrator, Transvaal & Others v Zenzile & Others 1991(1) SA 21 (A) where Hoexter JA (at p 379) described it as a "last refuge". It involves the application of the maxim **unius inclusio est alterius exclusio.** This is not a rigid

rule of statutory construction, and must at all times be applied with great caution. The only sections in which provision is made in the Act for prior consultation are section 4(2) and section 6(2)(b). The former precludes the Minister from issuing a notice declaring any existing road to be a national road, or declaring the route of a national road, without first consulting with the Administrator of each province in which the road in question is, or will be, situated, or (in certain circumstances) with the Secretary for Plural Relations and Development. Such notice can, furthermore, only be issued on the recommendation of the Commission. The latter section prevents the delegation by the Commission of any of its powers to the Administrator of a province, except after agreement to that effect between the Commission and the Administrator concerned. Section 4(2) may have been enacted partly in order to make it clear that the Minister must at

least consult the officials there referred to, and partly in order to make it clear which officials must be consulted. Section 6(2) contains elaborate provisions for the implementation of the power to delegate, and the terms upon which it is to be delegated. It does not necessarily follow from the fact that the legislature wished to provide specific machinery for consultation in these two respects, that it intended to deprive persons in the situation of the City Council of their common law right to be heard before a decision was taken in terms of section 9(1).

It follows that, in my judgment, the court a quo acted correctly in setting aside the decision of the Commission.

The appeal is dismissed with costs, including the costs of two counsel.

A J MILNE
Judge of Appeal

CORBETT CJ]
STEYN JA]
F H GROSSKOPF JA] CONCUR
NIENABER JA]