194/92

CASE NO 386/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CITY COUNCIL OF JOHANNESBURG — Appellant

and

NORVEN INVESTMENTS (PTY) LIMITED — Respondent

CORAM: EM GROSSKOPF, EKSTEEN, NIENABER JJA, HOWIE et VAN COLLER AJJA

DATE HEARD: 24 SEPTEMBER 1992

DATE DELIVERED: 12 NOVEMBER 1992

NIENABER JA:

The appellant is a local authority duly constituted as such in terms of the Local Government Ordinance, 17 of 1939 (Transvaal). At the times relevant to these proceedings the Township and Town Planning Ordinance, 25 of 1965 (Transvaal) ("the Ordinance"), since repealed, applied to it. The Ordinance, s 51 in particular, made provision for the levying by a local authority of a monetary contribution termed "a development contribution" (s 51(1)) in respect of properties within its municipal jurisdiction. A development contribution is in essence a tax (**Johannesburg City Council v Victteren Towers (Pty) Ltd** 1975 (4) SA 334 (W) at 337A). It is employed by the local authority, in the first instance, to defray expenditure in connection with a town planning scheme in operation (s 51(10) read with s 50). The overall purpose of a town planning scheme is the co-ordinated and harmonious development of land under the control and jurisdiction of a local authority (s 17). Whenever an interim scheme (a draft town planning scheme adopted by a local authority) which is

an amendment scheme (the amendment, extension or substitution of a scheme in operation) becomes an approved scheme (one approved and put into operation by the Administrator), the local authority is enjoined to set in motion the process for the determination of the development contribution which is to be levied in respect of the properties affected thereby (s 51(2) and (3)). A valuator is appointed to make two appraisements of the market value of every property included in the amendment scheme, the first one of the market value of the property after the amendment scheme has come into operation and the second one of the market value of the property upon the notional rejection of the amendment scheme by the Administrator. The difference between the two valuations represents the extent to which the market value of the affected property has been enhanced as a result of the approval and coming into operation of the amendment scheme (cf **Stadsraad van Randburg v Ludorf NO en Andere** 1984 (3) SA 469 (W) at 474G-474I). The development contribution is calculated as one-third of this difference. It is owed to the local authority by the person who, at the designated time, is the

registered owner of the property concerned (s 51(4) (a) and (b)).

The crisp issue in these proceedings is when such development contribution is to be paid - when the betterment is assessed by the local authority or when it is exploited by the owner.

That issue was tested in the Witwatersrand Local Division when the respondent, as defendant, excepted to the claims of the appellant, as plaintiff, for the payment of certain development contributions. The appellant's particulars of claim stated broadly that certain amendments were effected to the Johannesburg Town Planning scheme at the instance of the respondent; that development contributions, determined in accordance with the provisions of s 51(2) and (3) of the Ordinance accordingly became recoverable in respect of certain properties owned by the respondent; and that these were "due and payable" in terms of s 51(4)(a). Payment was claimed of the balance owing together with *mora* interest and costs. The nub of the exceptions was that the particulars of claim lacked averments of fact which were essential to render such payments "due" in

the sense of being recoverable forthwith. The exceptions were upheld by Eloff JP with costs. The court **a quo** subsequently granted an application for leave to appeal to this court. Hence this appeal.

At its hearing the appellant alone was represented by counsel, but it was agreed between the parties, so we were informed from the bar, that no order for costs would be sought, whatever the outcome of the appeal, either in the court below or in this one. This, evidently, is a test case.

The appellant's particulars of claim encompass four claims. They are, minor details apart, in identical terms. They concern the levying of development contributions in terms of s 51 of the Ordinance due to the coming into operation, as approved schemes, of various amendment schemes, namely amendment scheme No 1/410 which came into operation on 3 November 1971 relating to stands 2594, 2596 and 2598, Johannesburg; amendment scheme No 1/638 which came into operation on 24 April 1974 relating to stands 2594, 2596 and 2598, Johannesburg; amendment scheme No 1/771 which came into operation on 16 June 1976 relating to

stands 2593, 2595, 2597 and 2599, Johannesburg; and amendment scheme No 162 which came into operation on 18 November 1981, relating to stands 2593, 2595, 2597, 2599 and 4693, Johannesburg. All of these stands, so it was alleged, were registered in the name of the respondent.

S 51 of the Ordinance governs the payment of development contributions. It is, I fear, necessary to quote it in full:

> "**Development contribution.**
> 51. (1) Notwithstanding anything to the contrary in this Ordinance, other than the provisions of section 89, or in any other law contained, a local authority shall, in accordance with the provisions hereinafter in this section enacted and in the general interests of any development within its area, levy a monetary contribution, to be known as a development contribution.
>
> (2) As soon as possible after the date upon which an interim scheme, which is an amendment scheme or a scheme referred to in section 46 (7) (k), comes into operation as an approved scheme in terms of section 37 (1), the local authority concerned shall appoint a person who is a member of the South African Institute of Valuers for the purpose of making an appraisement of the market value as at such date of every portion of land, excluding any improvements thereon, included in such scheme or instruct a valuer referred to in section 7 (1) of the Local Authorities Rating Ordinance, 1977, to in to make a like appraisement: Provided that the foregoing

provisions shall not apply where the local authority concerned is satisfied that any such portion included in such scheme will not be enhanced in value to any appreciable extent as a result of such scheme.

(3) Immediately after the conclusion of the appraisement of any portion of land in terms of the provisions of sub-section (2), a further appraisement as contemplated in that sub-section shall likewise be made to determine what the market value of every such portion, excluding any improvements thereon, would have been on the assumption that the said scheme had been rejected by the Administrator.

(4) The development contributions shall be determined at one-third of the amount by which the appraisement of any portion of land in terms of the provisions of sub-section (2) exceeds the appraisement of the same portion in terms of the provisions of sub-section (3) and shall be payable -

(a) in the case of an amendment scheme referred to in section 46 (7)(k), by the person who was the registered owner of the portion of land concerned on the date of the coming into operation of such amendment scheme; or

(b) in the case of any amendment scheme prepared by a local authority, by the person who was the registered owner of the portion of land concerned on the date upon which the exercise of any new right conferred by such amendment scheme, is commenced:

Provided that no development contribution shall be payable in respect of any portion of land included in such amendment scheme where such portion may be used only -

(i) for purposes of special residential or

residential 1 as defined in that scheme; or

(ii) for any purpose contemplated in section 5 (1) (d) (v), (vi), (vii) or (viii) of the Local Authorities Rating Ordinance, 1977.

(5) The local authority shall as soon as the development contribution has been determined in respect of any portion of land, inform the person who was the registered owner of such portion on the date of the coming into operation of the amendment scheme, at his last known postal address by registered letter of the amounts of the appraisements referred to in sub-sections (2) and (3) as well as the amount of such development contribution and shall at the same time draw his attention to the provisions of this section.

(6) (a) An owner referred to in sub-section (5) may, if dissatisfied with any appraisement made in terms of the provisions of sub-section (2) or (3), lodge an objection thereto in writing with the local authority concerned within a period of 60 days after receiving the registered letter referred to in sub-section (5).

(b) A local authority which is dissatisfied with any such appraisement, may, in the registered letter referred to in sub-section (5), state that it objects to such appraisement.

(c) Any objection referred to in -

(i) paragraph (a) shall be submitted by the local authority concerned within a period of sixty days after receiving such objection; or

(ii) paragraph (b) shall be submitted by the local authority concerned within a period of sixty days after the date upon which the registered letter referred to in sub-section (5) was posted,

to the valuation board constituted for such local authority in terms of section 14 (1) of the Local

Authorities Rating Ordinance, 1977, or in the case of the board as defined in section 1 of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943), to such valuation board as the board may determine, and such valuation board shall proceed forthwith to consider every such objection, and for this purpose the provisions of Chapters III and IV of that Ordinance shall, subject to the succeeding provisions of this section, apply **mutatis mutandis.**

(d) The secretary of the valuation board shall at least twenty-one days prior to the sitting of such board to consider any objection submitted to it, inform the owner and local authority concerned of the date, place and time of such sitting.

(e) Any such valuation board may increase or decrease any appraisement which is the subject of an objection in terms of the provisions of this sub-section and its decision shall be final or, in the case of an appeal to the appropriate valuation appeal board, the decision of such appeal board shall be final.

(f) The secretary of any such valuation board or valuation appeal board shall within seven days of the decision given in terms of the provisions of paragraph (e) or, where an appeal is withdrawn, within seven days of such withdrawal coming to the notice of the secretary of the valuation board, inform the owner and the local authority concerned thereof by registered letter.

(g) Pending the decision of a valuation board or valuation appeal board in terms of the provisions of paragraph (e), the payment of any development contribution shall, except where otherwise provided in this section, be suspended.

(h) Where as a result of an objection, an appraisement referred to in sub-section (2) or (3) is increased or decreased by a valuation board or valuation appeal board, the local authority concerned shall forthwith re-determine the amount of the development contribution and, if payment has already been made in respect thereof, such local authority shall collect or refund, as the case may be, the difference between the amount of such payment and the amount so re-determined.

(7) (a) If a development contribution is payable in respect of any portion of land and any owner referred to in sub-section (4) (a) desires to avoid the payment of such contribution or to reduce the amount thereof, he shall proceed in accordance with the provisions hereinafter in this sub-section enacted.

(b) Where an owner has decided to avoid payment of a development contribution as contemplated in paragraph (a) he may, within a period of 60 days from the date of the letter referred to in sub-section (5) or, in the event of an objection having been made in terms of the provisions of sub-section (6), the date on which the letter referred to in sub-section (6) (f) is posted, request the Administrator, through the Director to repeal the approved scheme concerned and shall notify the local authority concerned in writing thereof.

(c) Where the Administrator has received a request in terms of the provisions of paragraph (b), he shall, after consultation with the Board and the local authority concerned, either grant or refuse such request.

(d) In the event of a request being granted in terms of the provisions of paragraph (c), the Administrator shall publish a notice to that

effect in the Provincial Gazette.

(e) In lieu of a request referred to in paragraph (b), an owner who has decided to avoid payment of, or to reduce the amount of a development contribution as contemplated in paragraph (a), may, in accordance with the provisions of section 46, apply for a further amendment to the approved scheme, which gave rise to such contribution, within a period of 60 days from the date referred to in paragraph (b).

(f) Whenever an approved scheme, which is an amendment scheme, has been repealed by a notice referred to in section 48 (4) or paragraph (d), the obligation to pay any development contribution in respect of such scheme, shall lapse, and any such development contribution which has already been paid, shall be refunded.

(g) Whenever an approved scheme, which is an amendment scheme, is amended as contemplated in section 48 (5) or paragraph (e) by a further amendment scheme, the obligation to pay any development contribution in respect of such first-mentioned amendment scheme shall lapse and any such development contribution which has already been paid shall be refunded and to determine the development contribution payable in terms of the provisions of sub-sections (2), (3) and (4) in respect of such further amendment scheme, such first-mentioned amendment scheme shall be deemed to have been rejected by the Administrator.

(8) If -

(a) any appraisement as contemplated in sub-section (2) or (3) is not made within 6 months of the date upon which the relevant amendment scheme came into operation as an approved scheme in terms

of the provisions of section 37 (1); or

(b) the local authority concerned fails to comply with the provisions of sub-section (5) within 9 months of the date upon which the relevant amendment scheme came into operation as an approved scheme in terms of section 37 (1),

- no development contribution shall be payable.

(9) Subject to the provisions of sub-section (8), the development contribution in respect of any portion of land shall be paid -

(a) before a written statement contemplated in section 50 of the Local Government Ordinance, 1939, in respect of such portion is given, and the local authority is hereby empowered to withhold such statement until the development contribution in respect of such portion shall have been paid;

(b) before any building plan is approved in respect of any proposed alteration to any existing building on such portion or for any new building to be erected on such portion, where any such plan would not have been approved if the relevant amendment scheme referred to in sub-section (2) had not come into operation; or

(c) before such portion is used in a manner or for a purpose which, but for the coming into operation of the relevant amendment scheme referred to in sub-section (2), would have been in contravention of the town-planning scheme in operation:

Provided that -

(i) where the amendment scheme has been prepared by the local authority as contemplated in sub-section (4) (b) and

such local authority has been furnished with an undertaking by a prospective transferee of such portion that such transferee accepts liability for the payment of the development contribution in the event of his exercising any new right conferred on that portion by the amendment scheme and such undertaking is satisfactory to such local authority, such local authority may, or shall, where such portion has been received by such transferee as a beneficiary in a deceased estate, give the written statement referred to in paragraph (a) before such development contribution has been paid,

(ii) in the circumstances referred to in paragraph (b) or (c), the local authority may permit, on such conditions as it may decide, payment of the development contribution in instalments over a period not exceeding 3 years; and

(iii) the local authority may in any event on such conditions as it may decide, allow payment of the development contribution to be postponed for a period not exceeding 3 years if security for such payment has been given to the satisfaction of the local authority.

(10) Any development contribution levied in terms of the provisions of this section, shall, at the discretion of the local authority concerned, be used to defray the expenditure contemplated in section 50 or for such other purpose as the Administrator may approve, or may be credited to a Town-planning Fund established in terms of the provisions of section 52.

(11) Notwithstanding the foregoing provisions of this section, a local authority may, in lieu of any development contribution or portion thereof, accept land which, in its opinion, is of an equivalent value.

(12) The provisions of this section shall not apply in respect of a scheme submitted on or before the first day of May, 1965, to the Administrator in terms of the provisions of section 39 (1) of the Townships and Town-planning Ordinance, 1931."

The section creates an entirely new obligation - to pay a development contribution - and identifies the debtor who is to pay it. What it does not do, at least not in express terms, is to determine precisely when it is to be paid.

A debt, once established, is, as a rule, recoverable forthwith and as such is "due and payable", unless its enforceability has been deferred by a suspensive time clause (**dies certus an ac quando** or **dies certus an, incertus quando**) or a suspensive condition (**dies incertus an, certus quando** or **dies incertus an, incertus quando**) (**Nel v Cloete** 1972 (2) SA 150 (A) at 159E, 169D-170B; De Wet and Van Wyk **Kontraktereg en Handelsreg** 5th ed 146; 5 Lawsa par 204; Kerr **The Principles of the Law of Contract** 4th ed 394).

But even where the debt, whatever its source, is thus recoverable the better view is that a debtor will only be in **mora**, in the absence of a time fixed for performance, if he fails to perform after having been placed on terms to do so by a demand which, in the circumstances, is reasonable (**Nel v Cloete supra** 159E-160C; 164B-166H; **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1977 (4) SA 310 (T) at 348D-F; **Ver Elst v Sabena Belgian World Airlines** 1983 (3) SA 637 (A) at 644A-B, 647H-648B; De Wet and Van Wyk **op cit** 160 **et seq**; 5 Lawsa par 205, 206).

The crux of this case is whether the payment by the respondent of the development contributions which admittedly became payable in respect of its stands mentioned, had been deferred.

In several of its sub-sections, section 51 uses the word "payable" (e.g. s 51(4), 51(7) and 51(8)). Elsewhere it speaks of "payment" (s 51(6)(g)). In S 51(7)(f) and (g) mention is made of the "obligation to pay the development contribution" but it is only in s 51(9) that the wording is used "the development contribution ... shall be paid". Not surprisingly it

was on this sub-section that the attention of the court a quo was mainly focussed.

S 51(9) differentiates between three separate eventualities, namely

(a) when the owner requires a written statement as contemplated in s 50 of the Local Government Ordinance, 1939 (Transvaal). Such a clearance certificate is a prerequisite for the registration of transfer of land within a municipality. It is meant to show that all amounts owing to the local authority in respect of sanitary services or rates or water, electricity and similar charges have been paid;

(b) when the local authority's approval is sought for building plans which would not have been approved if the amendment scheme had not come into operation;

(c) when the owner proposes to use land in a manner or for a purpose which, but for the amendment scheme, would have been contrary to the town planning scheme then in operation.

In terms of the sub-section the development contribution "shall be paid" before any of these eventualities occur. In the earlier version of the

sub-section the terminology used, as elsewhere in s 51, was "payable - before". The current Afrikaans version, curiously enough, still employs the phrase "betaalbaar - voordat". (The English text, incidentally, was the one signed.) I shall revert to this modification in terminology a little later in this judgment.

Because the owner benefits from the amendment scheme in each of the three instances mentioned, the court a quo regarded s 51(9) as a strong indication that payment of a development contribution was deferred until the owner in fact derived the tangible advantage of selling the land at its increased value or of putting up a building in accordance with the new right accorded to the property or of using it in a manner formerly prohibited but now permitted by the amendment scheme. According to the court a quo s 51(9) was the only sub-section "which appears in plain terms to fix a date when payment of a development contribution is due". Sub-section 9, so it was declared,

> "in the context of the ordinance as a whole, reflects the policy of the law that the development contribution is payable when the owner actually plucks the fruits of the rezoning leading

to a higher valuation by, for example, putting it to use in the manner authorised by the amending scheme. Until the owner actually puts up the building which he could not have put up before the amendment, or uses it in the manner previously declared impermissible, or sells it at the higher price which it now commands, he does not actually experience the benefit. I also agree that the rationale of s 51 is that the development contribution should be paid:

(a) by reason of the benefit derived by the owner from the rezoning of the land and the resultant appreciation in value; and

(b) by reason of the burden on the local authority's infrastructure. (Cf **Venter v Randburg Town Council** 1968 4 SA 302 (W) at page 308B-E.)

It is important that the benefit conferred on the owner is in general not actually experienced, nor is the local authority burdened, until the right is exploited".

I am, with respect, unable to agree with this line of reasoning.

First, as a matter of language, it distorts the wording of the sub-section. The provision that a development contribution is to be paid "before" is interpreted in the judgment to mean "if and when", enfin, "not before". As such, both liability and exigibility would be suspended until any one of the three eventualities occurs: the obligation to pay the

development contribution is thus deemed to be subject to a suspensive condition. On that approach a development contribution is not even "payable" until one of the named events takes place. Far from being in conformity with "the context of the ordinance as a whole" this interpretation creates disharmony in the section itself: what is stated, in s 51(7)(a), for example, to be "payable" is now said to be "not payable" (compare, also, s 51(7)(f) and (g)).

Second, the use of the word "before" is inappropriate if the intention of the legislature was to fix a precise time for payment. It is an inherently imprecise concept, even if used in the sense of "at latest". How, for instance, is one to pinpoint the moment when an owner uses his land in a manner or for a purpose which, but for the amendment scheme, would not have been sanctioned? If a day certain had been intended, the legislature could readily have used an unambiguous term such as "when" or "as soon as" or "after" or "not before".

Third, the approach of the court **a quo** ignores the fundamental distinction which exists between the two

disparate situations specified in sub-sections 51(4)(a) and (b) respectively. Section 51(4)(b) deals with the situation where it is the local authority itself which initiates an amendment scheme. S 51(4)(a) refers to the situation where the owner of a piece of land does so in terms of s 46(7)(k), which is the section in the Ordinance providing for an application by an owner for the amendment of a town planning scheme in operation.

In the first of these two situations the emphasis will be on the general interests of development within the local authority's area. A particular owner of a particular piece of land within it may not derive a direct or immediate advantage from the consequent enhancement in value of his property. For him it may be a purely speculative advantage, which he neither sought nor desired and which was foisted upon him without his concurrence or co-operation. To burden him with the payment of what may be a not inconsiderable sum, may not be fair. One can therefore understand why the obligation to pay the development contribution was not imposed on the current owner of the land in question but on the person who happened to be the owner

"on the date upon which the exercise of any new right conferred by such amendment scheme is commenced" (s 51(4)(b)). The owner who is to derive the benefit is the one who is to make the payment. Payment of the development contribution is thus by implication deferred until a future event which may never occur.

S 51(4)(a) deals with a different situation and with different considerations. Here it is the owner who, for reasons of his own, takes the initiative to have an amendment scheme proclaimed. The amendment relates to his property. Although it is to remain subject to the overriding consideration that it is to be in the interests of development in the area as a whole (s 51(1)), the primary objective of the rezoning is to benefit him. He is the one who is likely to reap an immediate benefit from the amendment scheme, either by the direct exploitation of the change in circumstance or as a result of the enhancement in the value of his property. If a development contribution is accordingly to be paid he is the obvious party who should do so. There is, in his case, no need for deferment.

The purpose of s 51(4) is to identify the party liable to pay the development contribution and not to determine the time for its payment. But by identifying the debtor in sub-section (4)(b) with reference to a future event, the time for payment is by the same token deferred. No such delay is implicit in sub-section (4)(a). The debtor contemplated in sub-section (4)(a) is defined with reference to the date of the coming into operation of the amendment scheme, although the extent of the debt (the development contribution) is only to be determined with reference to events which are yet to take place, more particularly the two appraisements. What is significant, at least for present purposes, is that the identification of the debtor in sub-section (4)(b) is directly linked to the exploitation by the then owner of the benefits wrought by the amendment scheme. By contrast, the identification of the debtor contemplated in sub-section (4)(a) is not so linked. In his case, unlike the other, there is no implication that payment is delayed until he derives a benefit from it. On the contrary, the implication is that the development

contribution is immediately payable, subject of course to the procedures providing for objection (s 51(5), (6) and (7)). The present case is one falling within sub-section (4)(a) and not (4)(b). Deferment is not inferred. Consequently s 51(4) tends to contradict, rather than to support, the reasoning of the court **a quo**.

A fourth reason for disagreeing with the approach of the court **a quo** is its misplaced reliance on the **dictum** of Nicholas J in **Venter v Randburg Town Council** 1968 (4) SA 302 (W) at 308B-E. The **dictum** reads:

> "In terms of sub-secs. (2), (3) and (4) of sec. 51 of Ord. 25 of 1965, the amount of the development contribution is related to the increase in value of a property consequent upon the approval by the Administrator of "an amendment scheme". This increase in value is in no way related to the deserts of the owner concerned, except only in so far as he may have made application for the amendment, but is the direct consequence of the amendment of the town-planning scheme concerned. And as the amendment increases the rights of the owner and the value of his property, so it is likely to impose additional burdens on the local authority: for example, it is apparent that a change from residential to business use of land may require more expensive roads, parking facilities and an increased Bantu population; and a change from "special residential" to "general residential" may bring about an increase in

> population, with increased demands on the facilities provided by the local authority."

An amendment scheme introduced at the instance of the owner himself (s 51(4)(a)), may well involve the local authority in the sort of general expenditure to which the **dictum** refers. It would be an immediate burden, contrary to what was stated by the court **a quo** in the last sentence of the passage quoted from its judgment. As such it ought to be instantly redeemable even if the development contribution were to be deposited into a general fund (s 51(10)). That consideration, it is true, applies with equal force where the local authority caused the amendment scheme to be introduced (s 51(4)(b)): but in that event it would most likely be a wider-ranging scheme, affecting a greater number of properties and owners, and generating a broader source of revenue from which to recoup the increased expenditure.

Fifthly, there is the scheme and wording of s 51(6)(g), a topic which was not expressly mentioned in the judgment of the court **a quo**. Pending the decision of the Valuation Board or the Valuation Appeal

Board the payment of the development contribution is suspended by an objection lodged against the amendment scheme except where otherwise provided in the section.

Suspension of payment on objection presupposes a payment which would otherwise have been due i.e. if no objection had been lodged against the amendment scheme; and the "exception" to the suspension in turn presupposes that the payment will remain due notwithstanding the objection.

Arguing in reverse one can, it seems to me, extract the following propositions from the wording of s 51(6)(g), read in the context of the section as a whole:

(a) An owner (whether he is an owner referred to in s 51(4)(a) or an owner referred to in s 51(4)(b)) who takes advantage of the amendment scheme is obliged to pay the development contribution i.e. if he commences to transfer the property or to build on it or to use it for a purpose that was prohibited before but has now been sanctioned (s 51(9)). That is so regardless of whether an objection has been lodged against the amendment scheme (s 51(6)(g)). (If an

objection had been lodged and has succeeded any payment he made is refunded to him in terms of s 51(6)(h) or (7)(f)).

(b) In cases not falling in category (a) (i.e. where the owner concerned has not yet commenced to take advantage of the amendment scheme), payment is suspended if an objection to the scheme is lodged (s 51(6)(g)).

(c) Conversely, if no objection is lodged, payment in cases not falling in category (a) is not suspended (s 51(6)(g)). The implication of the sub-section is, therefore, that payment is due even if the owner concerned has not commenced to take advantage of the amendment scheme. (The proposition is only true for an owner referred to in s 51(4)(a) since an owner referred to in s 51(4)(b) is in any event only liable to pay a development contribution once he has commenced to exercise the new right.)

The sub-section, thus analysed, contemplates that an owner referred to in s 51(4)(a) must pay the development contribution even before he has commenced to take advantage of the scheme in one or more of the

ways referred to in s 51(9). And if that is so it is of course in conflict with the conclusion reached by the court **a quo**.

Counsel for the appellant argued, in conclusion, that s 51(9) was conceived to benefit the local authority rather than the owner. It was designed, so it was submitted, not to fix the time for payment but to enable the local authority to withhold its co-operation, whenever an owner endeavoured to exploit his property in conformity with the amendment scheme, until the development contribution had been paid. In this sense it provided the local authority with additional leverage to exact payment of the development contribution. In the words of Curlewis J in **Cohen's Trustees v Johannesburg Municipality** 1909 TH 134 at 137, referred to with approval in **Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd** 1981 (4) SA 911 (T) at 917H:

> "The effect of this section is to give the council an embargo or hold on property in respect of which rates have been imposed..."

The impression that s 51(9) is an embargo section is strengthened on the one hand by the deliberate

change in wording from "payable" (in the precursor to the sub-section) to "shall be paid" (in the current sub-section); but weakened, on the other, by the consideration that in the eventuality referred to in s 51(9)(c) no prior co-operation from the local authority is required: there is nothing that the local authority can legitimately withhold in order to impel the owner to pay. But s 51(9)(c) in my opinion fulfils a function different from s 51(9) (a) and (b), one to which I have alluded earlier: it decrees that an owner (whether he is an owner referred to in s 51(4)(a) or one referred to in s 51(4)(b)) remains liable for payment of the designated development contribution if he commences to take advantage of an amendment scheme even if an objection against it has been lodged (s 51(6)(g)). S 51(9)(c) accordingly does not necessarily detract from the characterisation, with which I agree, of s 51(9)(a) and (b) as being embargo provisions.

S 51(9) is anything but a model of limpid draughtsmanship and there is some merit in holding, as the court **a quo** did, that a tax provision such as the

present one, if ambiguous, should be interpreted benevolently in favour of the taxpayer (cf **Johannesburg City Council v Victteren Towers (Pty) Ltd supra** at 337A). But that is only so when matters are otherwise more or less evenly balanced "for in a matter of doubt, we are bound to invoke the rule of interpretation **contra fiscum**" (**Estate Reynolds and Others v Commissioner for Inland Revenue** 1937 AD 57 at 70. See, too, **Israelsohn v Commissioner for Inland Revenue** 1952 (3) SA 529 (A) at 540F-H; **Commissioner for Inland Revenue v Widan** 1955 (1) SA 226 (A) at 235B-C; **Glen Anil Development Corporation Ltd v Secretary for Inland Revenue** 1975 (4) SA 715 (A) at 727F-G; **Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another** 1992 (4) SA 202 (A) at 216C-D; Steyn **Die Uitleg van Wette** 5th ed 111). Here the indications in the section, discussed above, outweigh this consideration.

For all these reasons I have been persuaded that the court **a quo** erred in holding that the duty to pay a development contribution in the present case only arose if, and thus was deferred until, the owner in some way or other sought to profit from the amendment scheme.

In my opinion s 51(9) does not defer the payment of a development contribution which has become payable in terms of section 51(4)(a). That means that a development contribution can be recovered from an owner referred to in s 51(4)(a) even if none of the events referred to in s 51(9) has yet taken place. The failure to aver that such an event had occurred accordingly does not render the particulars of claim excipiable. The exceptions, in short, should not have succeeded. As for the costs, the parties, as stated earlier, had subsequently agreed that no order for costs would be sought, either in this court or in the court below.

The appeal is upheld. The order of the court a **quo** is altered to read: "The exceptions to the particulars of claim are dismissed."

P M Nienaber
Judge of Appeal

EM GROSSKOPF JA]
EKSTEEN JA ] CONCUR
HOWIE AJA ]
VAN COLLER AJA ]