IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 659/92

THE ROSEBANK MALL (PTY) LTD APPELLANT

VERSUS

JOHANNESBURG CITY COUNCIL

RESPONDENT

CORAM: HOEXTER, BOTHA, EM GROSSKOPF, KUMLEBEN et VAN DEN HEEVER JJA

DATE HEARD: 13 MAY 1994

DATE DELIVERED: 30 MAY 1994

J U D G M E N T

HOEXTER JA:

The appellant company is the registered owner of Erf 198 Rosebank ("Erf 198") in Johannesburg. The respondent is the City Council of Johannesburg. Pursuant to the then applicable but since repealed provisions of the Transvaal Town-Planning and Townships Ordinance No 25 of 1965 ("the 1965 Ordinance ") the appellant sought an amendment of the town-planning scheme applicable to Erf 198. The amendment scheme was approved in turn by the respondent and by the Director of Local Government. Thereafter, and on 29 April 1987, notification was given in the Transvaal Provincial Gazette that the Administrator had approved the amendment of the

Johannesburg town-planning scheme 1979 by the rezoning of Erf 198 subject to certain conditions.

The 1965 Ordinance provided for the levying by a local authority of a monetary contribution ("a development contribution") in respect of certain properties within its jurisdiction. The relevant section was sec 51 which contained lengthy and elaborate provisions dealing with matters such as the appraisement of market values with a view to determining a development contribution; the mode of its determination; notice to affected owners; objections to appraisements and the consideration thereof; avoidance of payment of a development contribution, or the reduction in the amount thereof; lapsing of the obligation to pay a development contribution; the use to which a development contribution would be put; and various matters allied to the above. Section 51 is quoted in full in the recent judgment of this court in Johannesburg City Council v Norven

Investments (Pty) Ltd 1993(1) SA 627 ("the Norven case"). The section is so long that its full provisions will not be repeated here.

Subsection (1) of sec 51 read as follows -

> "51(1) Notwithstanding anything to the contrary in this Ordinance, other than the provisions of s 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."

The development contribution was used by the local authority, in the first place, to defray expenditure in connection with a town-planning scheme in operation (sec 51(10) read with sec 50). Whenever an interim scheme (a draft town-planning scheme adopted by a

local authority) which was an amendment scheme (the amendment, extension or substitution of a scheme in operation) became an approved scheme (one approved and put into operation by the Administrator), the local authority was enjoined to set in motion the process for the determination of the development contribution to be levied in respect of the properties affected thereby (sec 51(2) and (3)). A valuer had to be appointed to make two appraisements of the market value of every property included in the amendment scheme: one of the market value of the property after the coming into operation of the amendment scheme, and the other of the market value of the property upon the assumption that the scheme had been rejected by the Administrator. The difference between the two valuations then represented the extent to which the market value of the affected property had been enhanced as a result of the approval and the coming into operation of the amendment scheme. The development

was determined at one-third of such difference. It was owed to the local authority by the person who, at the designated time, was the registered owner of the property concerned (sec 51(4) (a) and (b)). Subsection (5) of sec 51 read as follows -

> "51(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 subsection (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."

7 On 10 June 1987 the Town-Planning and Townships Ordinance, No 15 of 1986 ("the 1986 Ordinance") came into force. It repealed the whole of the 1965 Ordinance. Such repeal, together with certain savings provisions, was enacted by sec 141 of the 1986 Ordinance. As originally promulgated it read as follows -

> "141(1) Subject to the provisions of this section, the laws referred to in the Schedule to this Ordinance [whereof the 1965 Ordinance was one] are hereby repealed to the extent set out in the third column of that Schedule. (2) Where any matter is, on the date of the commencement of this Ordinance, pending before the Administrator, the Board, a local authority, a valuation board, a valuation appeal board or a compensation court in terms of any provision of a law repealed by subsection (1), it shall be dealt with as if this Ordinance had not been passed.

(3) Any claim to compensation in respect of a town-planning scheme approved in terms of a law repealed by subsection (1) shall be dealt with as if this Ordinance had not been passed.

(4) Anything done in terms of a provision of a law repealed by subsection (1) and which may be done in terms of a provision of this Ordinance, is hereby deemed to have been done in terms of the last-mentioned provision."

On 8 January 1992 sec 141 of the 1986 Ordinance was amended by the insertion of a proviso to subsection 141(2) in the following terms -

> "Provided that such matter shall remain pending for as long as a development contribution, payable in terms of a provision of a law repealed by subsection (1), has not been paid."

Pursuant to the provisions of sec 51(5) of the 1965 Ordinance the respondent on 1 December 1987 sent a

letter by registered post to the appellant. The letter made reference to the Administrator's approval of the amendment in question on 29 April 1987, and then proceeded to say -

> "In terms of section 51 of the Town-Planning and Townships Ordinance, 1965, a development contribution of R1 200 000 is payable on this rezoning.
>
> The appraised market value in terms of section 51(2) of the Ordinance on 29 April 1987 of the property rezoned is R20 600 000.
>
> The appraised market value of the property in terms of section 51(3) of the Ordinance on the assumption that the Amendment Scheme had been rejected by the Administrator is R17 000 000.
>
> The Council objects to the aforementioned appraisements."

Thereafter the appellant also objected to the appraisements. The procedure consequent upon such objections is governed by paragraphs (c) to (f) of subsection 51(6). Paragraph (g) of that subsection reads-

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

The dispute was to have come before the valuation board but was postponed from time to time. On 4 April 1990 the appellant's attorneys addressed a letter to the respondent paragraph 6 of which quoted the provisions of sec 141(2) of the 1986 Ordinance. In paragraph 7 of the letter the attorneys for the appellant proceeded to say -

> "At the time of commencement of the 1986 Ordinance the Scheme was not pending before any of the persons referred to in paragraph 6. Accordingly we have advised our client that the 1965 Ordinance including section 51 ceased to have any effect as regards the Scheme after 10 June 1987. That being the case, no development contribution is payable by our client."

The respondent disagreed with the contention thus advanced on behalf of the appellant. During July 1988 the respondent notified the appellant that it would refuse to approve its site development plan unless the appellant lodged a guarantee for the development contribution. During May 1989 the appellant furnished the required guarantee.

During February 1992 the appellant sought in the Witwatersrand Local Division: (1) an order that on 10 June 1987 no matter concerning liability for payment of a

development contribution in relation to the amendment scheme in question was pending before the Administrator, the townships board, a local authority or a valuation board as contemplated by sec 141(2) of the 1986 Ordinance; and (2) an order that the respondent redeliver to the applicant the aforesaid guarantee.

The application, which was resisted by the respondent, came before MacArthur J. The court a quo dismissed the application with costs, such costs to include the costs of two counsel. With leave of the court below the appellant appeals to this court against the whole of the judgment.

In the course of its judgment the court a quo pointed out that sec 51 of the 1965 Ordinance had imposed upon the respondent a legal duty to investigate and determine what amount, if any, was to be levied as a development contribution; and then added -

> "This was a compulsory tax which had to be levied once the notice was published in the Provincial Gazette, and it does not matter, in my view, that the actual amount was not known. The dies cedit had arrived."

(Cf in this connection the remarks of Nienaber JA in the Norven case (supra) at 635A-636A).

Turning to the provisions of sec 141(2) of the 1986 Ordinance, the learned judge considered that there should be assigned to the word "pending" its ordinary meaning in the context of that subsection; and he rejected a submission on behalf of the appellant that in the absence of evidence as to what the respondent had done before 10 June 1987 it could not be said that there was a matter "pending before" the respondent. In this connection MacArthur J remarked -

> "I think this submission is without merit, particularly when regard is had to the provisions of section 51. The procedures set

> out in sections 51(2) and (3) and (4) and (5) are all matters which the respondent was obliged to do, and whatever had been done or was still to be done as at the date of the commencement of the 1986 Ordinance, they were all matters pending before the respondent, and this must be so as a matter of English.
>
> It follows that the final assessment and the recovery of the development contribution must be dealt with as if the 1986 Ordinance had not been passed."

In this court counsel for the appellant sought, in the course of a very comprehensive argument, to persuade us that the conclusion reached by the court below was wrong and that upon a proper construction of sec 141(2) in the particular context in which it occurs no matter could be said to have been "pending before" the respondent on 10 June 1987. I shall not here recapitulate his various submissions because ultimately one is thrown back upon the words of sec 141(2) of the

1986 Ordinance; and as a matter of plain English it seems to me, with respect, that the conclusion of MacArthur J was entirely correct.

The proviso to sec 141(2) came into operation (on 6 March 1992) after the appellant had launched its application in the court below. Counsel for the appellant therefore based his argument on sec 141(2) as originally promulgated. It is upon the true construction of sec 141(2), in its original form, that the whole case hinges.

I agree with counsel for the respondent that in sec 141(2) the word "pending" bears its ordinary meaning of something begun but not yet completed. The subsection refers to " ... any matter . . . pending", These are very large terms. Not only are they broad enough naturally to sustain the interpretation put upon them by MacArthur J, but, so it seems to me with respect, the restrictive construction suggested on behalf of the appellant is

strained and unsound. It was urged that the appellant should be taxed in terms of the 1986 Ordinance - a novel course not suggested either in the correspondence or in the affidavits. It was further contended that in truth the appellant could not be taxed at all inasmuch as none of the persons or bodies mentioned in sec 141(2) was adjudicating on (instead of "dealing with") the matter when the 1965 Ordinance was repealed. This contention seeks to accord to the word "before" a specialised meaning not merited by the context in which it appears.

In the contextual setting in which the word "levy" here occurs, its natural signification is, I think, to "raise and collect." Since it is the duty of the respondent to levy the development contribution the conclusion appears to me to be irresistible that for so long as a development contribution which is payable remains unpaid it represents a matter pending before the respondent. Having arrived at the above conclusion by

reference to the wording of subsection 141(2) as initially promulgated, I would add that in my view the words supplied by the subsequent proviso are no more than declaratory of the legislator's original intention.

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

GG HOEXTER
JUDGE OF APPEAL
BOTHA JA)
EM GROSSKOPF JA) KUMLEBEN
JA) CONCUR VAN DEN HEEVER
JA)