Case No 37394

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF PUBLIC WORKS Appellant

v

AI HAFFEJEE NO Respondent

CORAM : 13 M GROSSKOPF, SMALBERGER, VIVIER,

NIENABER and MARAIS JJA

HEARD : 27 FEBRUARY 1996

DELIVERED : 25 MARCH 1996

J U D G M E N T

MARAIS JA

MARAIS JA

On 20 April 1986 a property vesting in the respondent in his capacity as the administrator of the estate of the late I M Haffejee was expropriated by the appellant in terms of s 13 (1) of the Development Trust and Land Act 18 of 1936 read with the provisions of the Expropriation Act 63 of 1975. The expropriation took place pursuant to a notice sent to the respondent on behalf of the appellant. In the notice an amount of R20 500 was offered as compensation under s 12 (1) (a) and (2) of the Expropriation Act ("the Act") and the respondent's attention was directed to the fact that the offer :

> "shall, in terms of the provisions of section 10 (5) of the said Act, be deemed to have been accepted by you if an application for the determination of the compensation is not made to a compensation court or division of the Supreme Court with jurisdiction within eight months (or such longer period as the Minister may allow) from the date of the offer of compensation, unless it has prior to the expiration of this period, been agreed to submit the dispute

regarding the amount of compensation to arbitration or to have the compensation determined by a compensation court;"

This offer was rejected by the respondeat. So were subsequent offers, the final one being made at the end of January 1992. Previously the respondent had indicated that an offer of R80 410 would be acceptable.

Subsequent to the expropriation the appellant from time to time granted the respondent extensions of the period of eight months mentioned in the excerpt quoted above. The final extension accorded on 6 July 1992 was up to 20 August 1992.

On 6 August 1992 the respondent lodged an application for compensation in the compensation court for the area of jurisdiction of the Natal Provincial Division. In the application, which was served on the appellant's attorneys on 14 August 1992, the respondent claimed the

amount of R80 410.

On 30 April 1993 the appellant initiated motion proceedings against the respondent in the Natal Provincial Division. He contended that because of amendments to the Act brought about by the Expropriation Amendment Act 45 of 1992 ("the amending Act") the compensation court had been "abolished" as from 1 May 1992; that the respondent's aforesaid application was accordingly a nullity, and that in terms of s 10 (5) of the Act the respondent was deemed to have accepted the appellant's final offer. The appellant sought declaratory orders to that effect. The respondent then filed a notice of opposition in which it was submitted that the amending Act did not have retrospective operation and thus did not affect claims for compensation which had arisen before 1 May 1992 whether or not such claims were actually pending in the compensation court at that date.

It is necessary at this stage to refer to a number of the provisions of the Act and the amending Act. In terms of s 1 of the Act "compensation court" was defined as "a compensation court established by subsection (1), or under subsection (2), of section 16." Omitting provisions which are not material to this appeal, s 14 (1) of the Act provided that:

> "the compensation to be paid by the State for any property expropriated by the Minister or for any right to use property taken by the Minister, shall, in the absence of agreement, on the application of any party concerned be determined -
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> (1) if the amount of compensation claimed is one hundred thousand rand, by a compensation court;
>
> (2) if the amount of compensation claimed is one hundred thousand rand or more, by the provincial or local division of the Supreme Court of South Africa, in whose area of jurisdiction the property in question is or is situated."

S 16 (1) of the Act made provision for the establishment of a

compensation court for the area of jurisdiction of every provincial division with jurisdiction to determine compensation in terms of the Act in respect of property which was or was situated within such area of jurisdiction. In terms of subsections (4) and (5) a sitting of a compensation court was to be before a president appointed by the Minister from the ranks of judges or former judges of the Supreme Court of South Africa, magistrates or former magistrates who held or had held the rank of magistrate for at least ten years, or advocates or attorneys of not less than ten years' standing.

Reference should also be made to s 10 (5) of the Act which read as follows :

"(5) If an amount has been offered as compensation, the owner concerned shall be deemed to have accepted the compensation offered, if -

(a) an application for the determination thereof is not made by that owner to an appropriate court contemplated in section

14 (1) within eight months (or such longer period as the Minister may allow) from the date of the offer of compensation concerned; and

(b) The Minister has, not later than thirty days prior to the expiry of such period, by written notice served as contemplated in section 7 (3), directed the attention of the said owner to the preceding provisions of this subsection,

unless it has been earlier agreed to submit the dispute to arbitration."

The amending Act, which came into operation on 1 May 1992,

deleted the definition of "compensation court" in s 1 of the Act,

substituted new sections 10 and 14 and repealed s 16. As a result of the

amendments sections 10 (5) and 14 (1) now read :

"10 (5) (a) Unless the Minister and the owner have agreed otherwise the latter shall be deemed to have accepted an offer made to him by the Minister in terms of subsection (1), (2) or (4) if he fails to make an application to a court referred to in section 14 (1), for the determination of the compensation, before the date determined by the Minister by written notice addressed to him.

(b) A notice in terms of paragraph (a) shall be addressed to the owner concerned not later than eight months prior to the

date contemplated therein, and the Minister shall not later than 60 days before such date by written notice direct the attention of such owner to the first-mentioned notice."

"14 (1) Subject to the provisions of subsection (7) of this section and section 10 (5) the compensation to be paid for any property expropriated by the Minister or for any right to use property taken by the Minister, shall, in the absence of agreement, on the application of any party concerned be determined by a provincial or local division of the Supreme Court in whose area of jurisdiction the property in question is or is situated on the date of expropriation."

It will be observed that the effect of the amendments ("the relevant amendments") was to delete from the Act all references to, and provisions dealing with, a compensation court. At least as regards expropriations which took place on or after 1 May 1992 an application for compensation must now be brought in a provincial or local division, irrespective of the amount claimed.

Although the appellant's first prayer (1.1) was formulated so

widely that it applied even to cases already pending in compensation courts, no serious attempt was made in either the court a quo or this court to argue that the amending Act precluded the continuance of such cases in the compensation courts. It was common cause that the issue which had to be decided was whether an application could be initiated in a compensation court on or after 1 May 1992 in respect of a claim for compensation which had arisen before that date. Prayer 1.2 was consequential upon the granting of prayer 1.1 and was for a declarator that the proceedings instituted by the respondent in the compensation court were a nullity and of no force and effect. Prayer 1.3 was for a declarator that in terms of s 10 (5) of the Act the respondent is deemed to have accepted the appellant's final offer.

The court a quo found for the respondent and dismissed the application with costs. Its reasoning was that the amendments did not

retroactively affect vested rights, and that the respondent, having rejected the appellant's final offer prior to 1 May 1992, already had a vested right to lodge an application for compensation in a compensation court. Subsequently the appellant was granted leave to appeal to this court by the court a quo. However, leave to appeal against the dismissal of prayer 1.3 was neither sought nor granted and that issue is not before us.

In the written heads of argument filed on behalf of the respondent on appeal an argument in the nature of a point in limine was raised for the first time. It was contended that the question whether a compensation court was clothed with the competence to adjudicate on the merits of the respondent's application for compensation fell to be determined in the first instance by that court and not by the Natal Provincial Division.

Counsel who appeared to argue the case for respondent on appeal

was not the counsel by whom the written heads of argument had been drafted and he addressed no argument in support of the contention. In my view, there is no merit in the point. Where a tribunal is a creature of statute with no inherent powers (such as a compensation court), it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess. While de facto, and if only to decide whether or not to exercise its adjudicatory function, it might be obliged to consider the question itself if its jurisdiction was challenged in proceedings before it, its decision on that score would in no sense be one which has any status de jure and it would be amenable to challenge in a court of law even in the absence of any statutorily provided remedy by way of appeal or review. If it decided that it had jurisdiction and it was wrong, its hearing of the case would amount to an act which was ultra vires and of no force or effect. A party who contests the jurisdiction of

such a tribunal in the sense that the tribunal's very right to exist is disputed should not be obliged to seek a ruling on jurisdiction from it when it has no jurisdiction dejure to determine the question, and when its de facto decision thereanent would bind no one de jure and would be immediately vulnerable to being nullified by the decision of a court of law.

I now turn to the question whether, on an application of common law principles of interpretation or such provisions of the Interpretation Act 33 of 1957 as may be relevant, the changes brought about by the amending Act apply to a right of compensation which had arisen prior to the coming into operation of that Act, but had not yet been invoked by the lodging of an application for compensation in a compensation court.

In contending that the question should be answered in the

affirmative counsel for the appellant laid great stress on the procedural nature of the amendments. Now, although it has often been said that the presumption against statutory retrospectively does not apply to procedural provisions, the realisation has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation. Thus, in Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC) 836 b Lord Brightman said:

> "A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one

aspect of a case (e g because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."

And at p 839 d to f :

"Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive... Their Lordships consider that the proper approach to the construction of... [an Act]... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations."

The first passage was quoted with apparent approval in Euromarine

International of Mauren v The Ship Berp and Others 1986 (2) SA 700

(A) 709 - 710, and was referred to in Transnet Ltd v Ngcezula 1995

(3) SA 538 (A) 549 H. In the latter case Botha JA also commented on

the following passage in the judgment of Innes CJ in Curtis v

Johannesburg Municipality 1906 TS 308, 312 :

> "Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective."

Botha JA commented thus (at p 549 C-D):

> "Of even greater significance, for present purposes, is his statement that, to the extent which the law must regulate the procedure even though the cause of action arose before the date of promulgation, But to no greafer extent', the law is said to be retrospective. It is implicit in the words I have emphasised that in a situation where more is involved than the straightforward application of the new procedure to a cause of action which arose before promulgation, the convenient way of saying that the law is retrospective is no longer appropriate, and that other considerations must come into play."

In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not.

In casu the relevant amendments were undoubtedly procedural provisions. Their only effect was that an application for compensation in an amount of less than R100 000 was thenceforth to be initiated in a forum different from the one in which such an application had to be brought in terms of the unamended Act. And, as was said in Bezuidenhout v A A Mutual Insurance Association Ltd 1978 (1) SA

703 (A) 711 B - C, questions relating to in what courts proceedings are to be instituted are questions of procedural law.

Furthermore, should the amendments be given retrospective effect it will entail nothing more than the application of a new procedure to the respondent's pre-existing right to compensation; the only difference being that as from 1 May 1992 the respondent had to enforce that right to compensation in the Natal Provincial Division instead of a compensation court. There would be no adverse impairment of any pre-existing substantive right to compensation.

Counsel for the respondent sought in various ways to support the finding of the court a quo that the respondent was not hit by the amending Act because he had obtained, before 1 May 1992, a vested right to have the compensation due to him determined by a compensation court. He contended that there were clear indications in the amending

Act when read with the Act that the former Act was not intended to apply to a claim such as the respondent's. Pointing to the problem posed by part-heard and pending cases in compensation courts and taking as his point of departure the proposition that such cases would not be governed by the new procedure, so that the compensation courts concerned would continue to exist and function despite the abolition of s 16 of the Act and the provisions of the substituted s 14 (1), he contended that it was inappropriate to speak of an "abolition" of compensation courts when it was clear that they were to survive the amending Act. He suggested that it would be highly anomalous if the amending Act were to discriminate between claimants whose lights to compensation arose prior to 1 May 1992 and to allow some but not others the benefit of proceeding in the compensation court when such courts had not been abolished and still continued to exist and function. That indicated, so he argued, that no

such distinction was intended and that both classes of claimant remained entitled to have access to a compensation court.

The contention does not appear to me to be sound. Assuming for the sake of argument that the first premise (that cases actually pending in a compensation court as at 1 May 1992 were not hit by the amending Act and that there might have been compensation courts which survived the amending Act and could continue to function) is correct, it does not follow that it is inappropriate or inaccurate to characterise the changes wrought by the amending Act as amounting to an abolition of compensation courts. The manifest purpose of the amending legislation was to eliminate compensation courts from the expropriation scene and to direct all future claims for compensation irrespective of amount to the Supreme Court or to arbitration if the parties so agreed. The fact that the legislature may have had perforce and ex necessitate to allow such

compensation courts as had already been appointed and were already seized with claims to compensation to complete their tasks does not derogate from the plainly expressed intent of the legislature to do away with such courts with effect from 1 May 1992. The unavailability after 1 May 1992 of a compensation court to a claimant whose right to compensation arose before that date but had not been invoked in that court by that date is not the consequence of an anomalous act of irrational legislative discrimination against him or her. Nor does implied legislative willingness (if that is what it be) to allow claimants who had instituted claims for compensation in the compensation courts before 1 May 1992 to proceed with their claims in those courts amount to an arbitrary and unjustifiable favouring of such claimants. The disruption, inconvenience, wastage of time and money, and other complications which could attend insistence upon pending and, a fortiori, pending part-

heard cases being re-instituted before the Supreme Court are so obvious that they require no elaboration and there is no provision in the legislation for the mere transfer of such cases to the Supreme Court. Indeed, it is difficult to envisage how provision could fairly and effectively be made for the transfer of a case which is actually part heard. These considerations are entirely absent in a case such as the respondent's where proceedings had not been instituted by 1 May 1992. I find no indication, clear or otherwise, in any of this that a claim such as the respondent's was to continue to be maintainable in a compensation court.

While reluctant to espouse unqualifiedly the sweeping and, to my mind, quite untenable proposition that a litigant has a vested right in the forensic procedures which happen to be in force at the time when his right to claim arose, counsel for the respondent advanced a submission

which still contained vestigial remnants of that proposition. It was this. When compensation courts were first created a "special dispensation" from the need to proceed in the Supreme Court for claims of R100 000,00 or less came into being. That special dispensation was of value to claimants with such claims. The advantages of being able to proceed in compensation courts rather than in the Supreme Court were pointed out. I shall not list them all. I accept that they may have been regarded as advantages by some; it is conceivable that others may have regarded them as advantages they would prefer not to have. Be that as it may, the argument was that these advantages, although essentially procedural in character, had cost implications as well and amounted, if not to a right in the narrow sense in which the word is used when examining questions of retrospectivity, at least to a privilege which both at common law and in terms of s 12 (2) (c) of the Interpretation Act 33

of 1957 should be regarded as unaffected by the amending Act. Counsel for respondent cited the meanings assigned to the word "privilege" in dictionaries in support of the contention. In a loose sense the word is certainly capable of comprehending such advantages but that does not mean that they necessarily amount to a privilege in the specialised sense in which both the common law and the Interpretation Act employ that word. As we have already seen, the common law recognises no vested right in procedure simpliciter. See Curtis's case, supra at p 319. Were it otherwise, no procedural amendment would apply to cases or causes of action arising before their commencement and that is certainly not the law. Most procedural provisions regulating the institution and conduct of litigious proceedings have a cost implication and many have a tactical implication. Yet that has never in the past been regarded as imparting to them a special character taking them out of the realm of purely

procedural provisions and subjecting them to the presumption against legislative interference with vested rights. I see no good reason to commence doing so now. To label procedural provisions instead as conferrers of privileges does nothing, in my view, to improve their claim to be regarded as anything more than what they truly and essentially are, namely, purely procedural provisions designed to regulate the institution and conduct of litigious proceedings. So much for the common law.

The same applies, in my view, to s 12 (2) (c) and (e) of the Interpretation Act which read:

> "(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -
>
> (a) .....
> (b) .....
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
> (d .....
> (e) affect any investigation, legal proceeding or remedy in

respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned.

and any such investigation, legal proceeding or remedy may be substituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

There is no warrant for concluding that the legislature intended to use the word privilege in a loose and wide sense not found in the common law. There is nothing to indicate that it intended to deviate from the common law in this regard. Had it intended to do so, I would have expected it to provide a definition of the word which showed that it was to be interpreted in a wider sense than that attributed to it at common law. Thus, even if s 12 (2) of the Interpretation Act is applicable to a case where some provisions of a law (as opposed to the entire law) are repealed (as was held to be the case in Bell v Voorsitter van die Rasklassifikasieraad 1968 (2) SA 678 (A) 683 H - 684 A), I am unable

to accept that the amending Act affected any right or privilege of the respondent's within the meaning of those expressions in s 12 (2) (c). Counsel for respondent conceded, correctly so it seems to me, that once s 12 (2) (c) is found to be inapplicable, no succour for the respondent can be found in s 12 (2) (e). That is because the latter provision can operate only when a "right, privilege, obligation or liability" within the meaning of the former provision has been found to exist. Here, no such right or privilege existed.

To my mind, insuperable difficulties would arise if the interpretation contended for by the respondent were to be adopted. The compensation courts were not standing courts; they were appointed ad hoc as and when a case arose for consideration. It is implicit in the construction of the amending Act for which respondent contends that compensation courts would have to be appointed by the Minister after 1

May 1992 to hear applications instituted after that date by owners whose properties were expropriated prior to that date. Counsel for respondent was unable to point to any provision in the Act as amended which would empower the Minister to appoint such a court. He was driven to contend that the Interpretation Act might be the source of such power. No specific provision of that Act was identified by counsel as being an appropriate source of such a power and I am unable to find one. The conclusion that cases such as the respondent's may not be instituted in the compensation court appears to me to be inescapable and it follows that the appeal must be upheld with costs, including the costs of two counsel. The costs in the Court a quo require reconsideration. While the appellant has in the end achieved success in so far as he sought to prevent the respondent from proceeding with his claim in a compensation court, the respondent achieved success in resisting the appellant's claim

for a declaration that he be deemed to have accepted the appellant's offer.

No good reason was suggested why, in such circumstances, either party

should have to bear the other's costs in the Court a quo and I see none.

In my view, a fair order would be that each party pay his own costs in

the Court a quo.

Accordingly, the following orders are made :

The appeal is upheld with costs, including the costs of two counsel, and

the following is substituted for the order of the Court a quo :

"(1) It is declared that the application issued out of the compensation court under case no 2267/92 in the matter between the respondent and the applicant is of no force and effect by virtue of the provisions of the Expropriation Amendment Act 45 of 1992.

(3) The declarator sought by the applicant in prayer 1.3 of the Notice of Motion is refused.

(4) Each party is ordered to pay his own costs."

R M MARAIS

E M GROSSKOPF JA) SMALBERGER JA) VIVIER JA)
NIENABER JA) CONCUR