

ANDERSON AND OTHERS v. JOHANNESBURG 121  
MUNICIPAL COUNCIL.

1915. November 25, 26, 30. WARD, J.

*Municipality.—Election of Councillors to Committees.—Transvaal Ord. 9 of 1912, sec. 26 (5).—Meaning of Committee.—Remedy of Councillor not elected.—Declaration of right and interdict. Johannesburg Municipality.—Standing Orders 78 and 79.—Whether directory or imperative.—Procedure as to election of Committees.*

Section 26 (5) of Transvaal Ord. 9 of 1912 provides as follows: "Every councillor shall be elected by the Council to serve on at least one Committee."

*Held*, that whether or not the sub-section imposes a corresponding duty to serve, it confers a clear right on every member of a Town Council to be elected to at least one Committee.

*Held*, further, that the word Committee in the sub-section means a committee to which is delegated some portion of the powers and duties of the Council; and not a committee appointed merely to advise on general principles without such delegation of powers and duties.

*Held*, further, that the election of committees by a Council was not void if the sub-section had not been complied with, nor was a councillor not elected to at least one committee entitled, *ipso jure*, to be placed on the last committee elected; but

*Held*, further, that any councillor not elected to at least one committee may claim a declaration from the Court that he is entitled to be so elected; and the Court will interdict all the committees of the Council from performing their functions until such election is made in such manner as may seem meet to the Council.

*Held*, further, that the right to claim such declaration arises, and may be enforced, as soon as all the Committees contemplated by the sub-section and at the time in existence have been elected.

Standing Orders 78 and 79 of the Johannesburg Town Council, having the force of law by virtue of sec. 102 of Ord. 9 of 1912, provide, *inter alia*, that before the first meeting of the Council after the annual election the Town Clerk shall obtain from each member a statement showing not more than three Committees in the order in which such member would prefer to serve on them, and that, in the event of an election for any committee being necessary, the names of members applying for, and nominated to, such Committee shall be separately submitted to ballot.

*Held*, that the provision as to the obtaining of a statement from each member of the Council is merely directory, and that, consequently, the election of committees is not invalidated by failure on the part of the Town Clerk to obtain such statement; but

*Semble*, every councillor is entitled to an opportunity of supplying such a statement and, when he does so, he is entitled to have his name submitted to the Council for election to the committee or committees specified by him; and, if his name is not so submitted, the election of such committee or committees will be set aside as invalid.

Return day of a rule calling on the respondent Council to show cause why certain committees elected by it should not be declared illegally and invalidly elected, and why such committees should not be interdicted from performing any of their functions until properly elected. The facts and the arguments of counsel appear fully from the judgment.

*J. Taylor* (with him *A. Alexander*), for applicants; *E. Esselen K.C.* (with him *J. T. Barry*), for respondent.

*Cur. adv. vult.*

*Postea* (November 30).

WARD, J.: The petitioners in this case have been duly elected members of the Municipal Council of Johannesburg. On the 17th November, 1915, a special meeting of the Municipal Council was held for the purpose, *inter alia*, of appointing committees of the Council. In the agenda of the meeting, a copy of which was in the possession of every member of the Council, attention was drawn to sec. 26 of the Local Government Ordinance (No. 9 of 1912), and to Standing Orders 78 and 79 of the Council. It gave a list of the standing and special Committees, being seven standing committees and four special committees and recommended: (a) that the Council appoint the seven standing committees; (b) that in the case of each committee, with the exception of the General Purposes Committee, the Council appoint seven members; (c) that in the case of the General Purposes Committee the Council appoint the maximum number of members allowed under the terms of reference, viz., four; and (d) that for the purposes of ballot, where the same is necessary, the Council adopt the method of voting proposed in the report. It was recommended with regard to special committees that four be appointed, viz.:—(a) One of seven members to deal with all questions in connection with the Town Hall and the municipal offices; (b) one, consisting of the chairman of the various other committees, appointed on the 6th November, 1915, for the various purposes to be re-appointed; (c) one to consist of five members to report on a general system of housing of natives; and (d) one of five members to enquire and report on the principle of departmental work. Prior to the meeting the Town Clerk obtained from each of the petitioners a written statement showing not more than three standing committees in the order in which each of the petitioners preferred to serve on the same in

accordance with the provisions of Standing Order 79, which I will refer to again later. The Town Clerk, in his affidavit, says in reference to this that David Anderson's list contained four names, while Charles Rowe indicated two committees by placing a cross against their names, but without indicating any order of preference.

Standing Orders 78 and 79 read as follows:—

"78. The Council shall, as soon as may be convenient after the annual election of Councillors, proceed to the appointment of the Standing Committees and to the settlement of the references to be made to them. The Council may appoint new Committees at any time."

"79. Before the first meeting of the Council after the annual election, the Town Clerk shall obtain from each member a statement showing not more than three Standing Committees in the order in which he would prefer to serve on them, and a member shall be deemed to have applied for appointment on each Committee shown in his statement. If the applications for the Committee, together with any nominations made at the meeting of the Council when the Committees are appointed, exceed the maximum number of vacancies thereon, the names of the members applying and nominated shall be submitted to ballot by the Council, and the vacancies shall be filled by the members receiving the most votes. If the applications and nominations for the Committee do not exceed the maximum number of vacancies thereon, the name of each member applying and nominated shall, unless the Councillors present shall unanimously consent to his application, be separately submitted to ballot, and a member whose name is so submitted shall only be elected if he receives the votes of a majority of the Councillors present."

The Town Clerk says he duly forwarded to every member of the Council before the meeting a form for the purpose of enabling such councillor to furnish a statement referred to in the Standing Order, and some councillors did not fill up the form. The petitioners say that this neglect was wilful on the part of many councillors because they feared that such a declaration of preference might possibly result in the overthrow of their aspirations. According to the agenda paper, a schedule of the applications for each committee was to have been submitted at the meeting of the Council. The Town Clerk said in his affidavit that no such schedule had been submitted to the Council since the year 1911, as in that year and since some members have on every occasion failed or refused to supply such lists, and he is not aware of any machinery enabling him to compel any member of the Council to lodge such a statement of preference. But I do not find it anywhere stated in the affidavits that the preferences put in by the petitioners were not before the meeting and that these members were not balloted for in respect of these committees for which they had expressed a preference. In the case of every standing committee the number of applications

or nominations for each committee was greater than the number of appointments to be made on the respective committees, and consequently the appointments had to be voted upon. The Works Committee was the last committee to be appointed, and before nominations were called for, the Town Clerk read out to the meeting the names of the councillors who had not yet been elected to a committee. The petitioners were not appointed to any of the standing committees. Thereafter, some of the special committees were appointed, and Charles Rowe and David Anderson were appointed as members of the special committee on the housing of natives.

The committee on departmental and contract work stood over by consent and has not yet been appointed.

The petitioners now complain that the committees appointed on the 17th November, 1915, have been illegally and invalidly appointed and claim a declaration to that effect. They also claim a declaration that the several committees shall be elected in due form, and that the petitioners shall each be appointed to act upon one, at least, of the standing committees. They further claim an interdict prohibiting these committees from exercising their functions. The claim is based upon two grounds:—(1) That Standing Orders 78 and 79 have not been complied with and, therefore, the elections are invalid; (2) that under sec. 26, sub-sec. 5, of Ord. 9 of 1912 every councillor shall be elected by the Council to serve on at least on one committee.

With regard to the first point, the respondent says that the provisions of Standing Orders 78 and 79 are directory merely, and not compulsory, and that consequently the non-compliance with such orders does not invalidate the election. The law with regard to the question as to whether any particular section in a statute is meant to be directory or imperative is generally very difficult of application. I have been referred to a considerable number of cases in which the words used have been held to be imperative, and I have since the hearing consulted more such cases, and also many where the words used have been held to be directory. In the case of *Howard and Others v. Bodington* (2 P.D. 203), Lord PENZANCE says, at p. 211: "Mr. Jeune was good enough to refer me to Sir Benson Maxwell's book 'On the Interpretation of Statutes,' and to quote a number of cases from it (Maxwell 'On the Interpretation of Statutes,' Ch. X, II., sec.3, pp. 330 to 345). Since the matter was argued I have been carefully through those cases, but upon

reading them all, the conclusion at which I am constrained to arrive is that you cannot learn a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind after reading them is to come to the conclusion which was expressed by Lord CAMPBELL in the case of the *Liverpool Borough Bank v. Turner*. Lord CAMPBELL was then sitting as Lord Chancellor. In an appeal from the Vice-Chancellor, and in giving judgment, his Lordship says this: 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' "

I have not myself come across any case similar to the present one. Generally speaking, decisions with regard to the interpretation of the particular words of one statute or of one agreement are irrelevant in considering the meaning of words of another and entirely different statute or agreement. The present subject has come up for decision in our Courts on several occasions, but I do not recollect any case, nor have I been referred to one, which appears to me to give any assistance in arriving at a conclusion in the present case.

It has on more than one occasion been laid down that when a public duty has been imposed or a statute requires a duty shall be performed in a certain time or in a certain manner or under particular conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over the exercising of the duty would result if such requirements were essential and imperative. Mr. *Taylor* urged that those principles were not applicable in the present case because they were only applied in cases where third parties to the acts or duties to be performed were concerned, as for instance if a person outside the Town Council were disputing the

validity of any act done by a committee of the Council. He urged that the word "shall," in sec. 79, shows that its provisions were intended to be imperative, and that where a privilege is conferred by the Legislature to be performed in a certain manner, the manner of performance was obligatory. Moreover, he pointed out that if there were any difficulty in getting the Town Clerk or the members of the Council to carry out their duty, the standing order could, by a resolution of the Council, be suspended and the election proceed in any such manner as it might direct. There is, of course, considerable force in this contention, that if the Council proceed to election under Standing Orders 78 and 79 they must carry out those orders in their entirety, the standing orders themselves, until suspended, having the force of law under sec. 102 of Ord. 9 of 1912. Cogent as this reasoning is, I am satisfied that the provisions of secs. 78 and 79 are not all imperative. For instance, it is provided that "before the first meeting of the Council after the annual election, the Clerk shall obtain a statement"; again, "The Council shall, as soon as may be convenient after the annual election, proceed to the appointment of Standing Committees." Therefore, the Standing Committees need not be appointed at the first meeting; indeed, the Council may, if it think fit, do away with all committees except the Finance Committee. I cannot think, then, that if the Clerk obtained the statements from the members after the first meeting of the Council, it would be necessary to suspend the Standing Orders before the election could be made. Provision is made for the nomination of members as well as for the statement for members of their preferences; moreover, this provision for statements being made by members is enacted for their benefit, and they are thereby enabled to put up for three committees without being nominated. That being so, I am of opinion that the obtaining of a statement from each member is directory only. But, on the other hand, it seems clear to me that members must have an opportunity of giving such statements, and when such a statement is handed in on behalf of any member he is entitled to be balloted for the committee which he mentions. If the Town Clerk neglected to put in any application, or the name of a councillor who had sent in his name in accordance with Standing Order 79 was not submitted for election to that committee I think the election of that committee could be set aside. But I do not find that there is a case of that sort here. It was mentioned during the argument that in one case the name of one of the peti-

tioners was not submitted for election to one of the committees he had selected. I have been unable to find any allegation to that effect in the papers. There is no claim on such a ground in the petition. I am of opinion, therefore, that the first cause of complaint fails.

There is little doubt that this question would not have been raised by the petitioners if they had each of them been elected to a Standing Committee, and that brings me to the second cause of complaint. Sec. 26 of Ord. 9 of 1912 provides:—Sub-sec. (1), "The Council may appoint . . . such and so many committees, either of a general or a special nature, and constitute them of such number of councillors as it may think fit, for any purpose which it, in its judgment, would be better managed by means of a committee, and may delegate . . . to any such committee . . . any powers or duties," etc. Sub-sec. (4), "Every committee appointed by the Council may be dissolved after notice of motion to that effect by the vote of the majority of the whole Council." Sub-sec. (5): "Every councillor shall be elected by the Council to serve on at least one committee." The complaint is that the petitioners have not been elected to serve on any committee. What is the answer of the Town Council? It is said that sub-sec. (5) is a dead letter, and that it cannot be enforced by the Court for these reasons:—(a) There is nothing in sec. 26 of Ord. 9 of 1912 defining what committees are referred to, the Council are not bound to appoint all their committees at once, and may add to the committees at any time, and consequently there can be no complaint because *non constat* that any one of the petitioners may not be elected to a committee. (b) That in any event the application is premature and the applicants should have waited a reasonable time to see whether the Council does not appoint them. (c) That sec. 26 does not refer to Standing Committees, which are referred to only in sec. 29 of the Ordinance and in the Standing Orders, and that there is still a Special Committee to be filled, and that Charles Rowe and David Anderson have been appointed to a Special Committee. (d) That the remedy has been misconceived because it is not the Municipality that has failed to put the petitioners on a committee, but the majority of the members voting by ballot. (e) That there is no sanction for any order of Court because the Municipality cannot control the majority of councillors, and if the elections take place again the majority may adopt the same course they did before, and the Court

will not know who is disobeying the order because the vote is by ballot.

These reasons I will deal with in order set out. (a) Now it is perfectly true that sec. 26 sub-sec. (5) is a very difficult section to apply. Sec. 26 itself is a section of some standing and was a section of previous acts providing for municipal government. But when Ord. 9 of 1912 was passed it was evidently deemed advisable to make provision to prevent a majority from ousting a minority from any part of the management of the town, and it is somewhat curious that the first time, so far as I am aware, a complaint is made that any member has been completely ousted from such management is in this case, which occurs at the very first Council for this borough elected under the new Act. However that may be, the Provincial Council endeavoured to effect its object by adding sub-sec. 5 to sec. 26. There is no doubt that a real difficulty is caused by the absence of any definition of the words "Standing Committee" in sec. 29. The petitioners contend that sub-sec. 5 confers a right and also imposes a duty, that the intention of the Legislature was to compel every member to serve on a committee which falls under the terms of sec. 29, so that he can become disqualified from continuing a councillor for non-attendance.

I do not think the decision of this point is necessary in the case. Whether sub-sec. 5 imposes a duty or not it is clear to my mind that it confers a right on every member of the Council to be elected to at least one committee. Now, what is meant by committee in that section? It is a committee appointed by the Council for any purpose which may be better managed by it, and it may have any of the powers or duties of the Town Council delegated to it. "Manage" means to "administer or control." It implies controlling or handling; and I am satisfied that it does not include a committee appointed to give advice on general principles, which, strictly speaking, is not entrusted with any powers or duties of the Council. The Municipality has, in accordance with its custom, appointed seven Standing Committees, to which is entrusted the management of the affairs of the Council. It is perfectly clear that under section 78 of the Standing Orders the Council may appoint new committees at any time. It is not the practice to do so. If it found that some of the matters falling within the scope of one committee could be better dealt with by a new committee it can certainly appoint such new committee. Equally true is it, though it was not urged before me, that vacancies may occur on



any of the committees already appointed. But sub-sec. 5 of sec. 26 is not, in my opinion, being carried out by saying that if the petitioners have patience and will wait they may be rewarded. They may be waiting for dead men's shoes or the Greek Kalends, for all one knows, only to find in the end that patience, like virtue, is its own reward. It may be pointed out that the last paragraph of sec. 79 of the Standing Orders contemplates every member being on a Standing Committee. I think the first answer fails, and the reasons I have given apply to the second. Circumstances may arise where councillors have to wait for a reasonable time before being elected to a committee. In the present case all the committees have been elected, and there is no reason to wait any longer. With regard to (c), as I have stated above, it is not necessary to decide as to the meaning of "Standing Committee," but I am of opinion that the committee that is still to be filled is not one of those committees to which sec. 26, sub-sec. 5, refers. The committee is to be, if appointed, a committee of five members, to enquire into and report on the principle of departmental and contract work in all respects and make recommendations to the Council in accordance with their findings. It has not been entrusted with a purpose to manage. The subject of departmental and contract work falls within the scope of other of the Standing Committees. Under Standing Order 21 it is not competent to move an abstract resolution on any paragraph of a report of any Standing Committee. Messrs. Rowe and Anderson have been appointed to a committee to report on a general system of housing natives. The Parks and Estates Committee appears to have the actual management of this.

I come now to the answers (d) and (e), which deal with the remedy. If I am correct in coming to the conclusion, as I have done, that the rights of the petitioners under sec. 26, sub-sec. 5, have been infringed it would be strange if they are to be without a remedy. The maxim of law is, where there is a right there is a remedy, and it would be a confession of failure on the part of the Court to hold that because the elections are by ballot that therefore it cannot insist upon an applicant's right to election being enforced. In my opinion the petitioners have a right to be elected on to one or other of the seven committees of the Municipality, which have been appointed. It does not matter to the Court how that object is effected. If my opinion is correct it must be effected. The Municipality has full power to suspend its

Standing Orders. It has full power of re-election, or to alter its committees by increasing the number of members or reducing or increasing the number of committees; and I do not think it is any answer to say that if it be declared that the committees elected are illegal or that the applicants are entitled to be elected that the Municipality as such may not be able to give effect to the order because a majority voting by ballot may not carry it out. It is not for me to suggest the means the Municipal Council is to adopt to elect the petitioners to a committee. I am satisfied that it is within the power of the Council to elect them, and it is merely a question of procedure.

Finally, a word must be said with regard to the point raised by Mr. *Esselen* that this is not a case for an interdict, that the slight injury to the petitioners cannot weigh against the inconvenience caused by the dislocation of the business of the town. In the first place, if my opinion is correct, the petitioners are being deprived of a very important right which cannot be measured in money, and, in the second place, I see no necessity for the dislocation of the business of the town. If any inconvenience arises it is due to the fact that the majority are endeavouring to override the rights of the minority. At the same time I do not think the non-election of a member of the Council to any committee renders the election of the committees void, nor can it, in my opinion, be held that the petitioners are entitled *ipso jure* to be on the last committee elected. When it was clear to the Council that some members of the Council were left unelected to any committee, it was the duty of the Council to rectify the matter by adopting such course as seemed to it meet. I cannot, therefore, declare that the committees have been illegally or invalidly appointed. But I can declare that the petitioners are entitled to election; and seeing that, as matters stand, if the committees appointed proceed with their work, it may easily happen that the applicants will be deprived of any chance of being elected to, or having a voice in, the election of some members of, the General Purposes Committee, I think these committees should be interdicted from proceeding with the exercise of their functions. This matter is one of some difficulty, because there may easily be cases where it is convenient for the Council to elect some of the Standing Committees at one time and postpone the election of the others. But that is not the case before me, and in those cases there can be no reason to suppose that a seat on a committee will not be provided for each member of the Council.

The order, therefore, is as follows:—It is declared that each of the petitioners is entitled to election on at least one or other of the Standing Committees appointed by the Council, and such committees are hereby interdicted from exercising their functions until such election is made. The respondent must pay the costs of these proceedings.

Applicants' Attorneys: *A. S. Benson*; Respondents' Attorneys: *Lance & Hoyle*.

[P.M.]

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MOSES v. MOSES.

1915. December 8. DE VILLIERS, J.P.

*Husband and wife.—Judicial separation.—Alimony and costs.—*  
*Primâ facie case.—Necessary allegations.*

Allegations by a wife of continuous interference in her domestic affairs by a mother-in-law, who "treated her like a slave," and of having been struck on a single occasion by her husband, who declined to restrain the mother-in-law, are not sufficient to show that cohabitation has become dangerous or, at least, intolerable to the wife; and such allegations, therefore, will not support an application for costs and alimony pending an action for judicial separation. *Wentzel v. Wentzel* (1913, A.D. 55), followed.

Application by a wife for costs to enable her to bring an action for a decree of judicial separation, and for alimony *pendente lite*. Applicant alleged in her petition that she "lived with her husband for about three months after marriage, and was then compelled to leave him on account of cruelty." The application was ordered to stand over for the purpose of a further affidavit by the applicant giving particulars of the alleged cruelty. She had now filed an affidavit in these terms: "I repeat my statement that my husband continually ill-treated me, and that I was compelled to leave my home on account of such ill-treatment. From the time of our marriage until I left I was under the entire control of my husband's mother-in-law, who treated me like a slave. I complained to my husband and asked to be allowed to do my own cooking and household duties, but he refused my requests, and said that if I did not obey her orders he would beat me. I continued the same way for a time and again complained to my husband, whereupon he hit me