

SANDTON TOWN COUNCIL

Appellant
(Defendant/Excipient a quo)

and

ERF 89 SANDOWN EXTENSION 2
(PROPRIETARY) LIMITED

Respondent
(Plaintiff a quo)

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

SANDTON TOWN COUNCIL

Appellant
(Defendant/Excipient a quo)

and

ERF 89 SANDOWN EXTENSION 2
(PROPRIETARY) LIMITED

Respondent
(Plaintiff a quo)

CORAM: HOEXTER, NESTADT, VIVIER, KUMLEBEN, JJA
et VILJOEN, AJA

HEARD: 10 March 1988

DELIVERED: 31 March 1988

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

The respondent is a private company which is the registered owner of an erf ("erf 89") in Sandown Extension 2 Township. The appellant is a local authority constituted in terms of the Local Government Ordinance 17 of 1939 (T), as amended ("the Ordinance"). In terms of sec 134(b) of the Ordinance the appellant gave the respondent notice of the former's intention to lay stormwater pipes across erf 89 by the taking of the right to do so. The provisions of sec 134 of the Ordinance empower the appellant to carry out sewerage and drainage work. For purposes of the present appeal the relevant provisions of sec 134 are the following:-

"For the purpose of carrying out any drainage works the council may -

- (a) cause such ... drains, and pipes to be made, laid..... and maintained either within, or outside the municipality as may be necessary for effectually draining the municipality or any portion thereof
- (b) carry such drains or pipes through, across, or under any public road, street, square, or open space, or any place laid out as or intended for a public road, street

street, square, or open place either within or outside the municipality, without paying compensation and, after giving reasonable notice in writing to the owner or occupier of their intention, perform the same acts in respect of any land within oroutside the municipality on making compensation for any damage done, the amount whereof, if not mutually agreed upon, being determined by arbitration, provided that, in determining any compensation payable by the council hereunder the existence of any sanitary passage through or over which the council has a right of access to any private land or building for the purpose of sanitary service and which right the council may be willing to surrender, shall be taken into account;" (My underlining)

Considering that the presence of the stormwater pipes on erf 89 would reduce the value of the property, the respondent claimed payment of R205,200 as damages from the appellant. The appellant refused to pay damages on the basis claimed by the respondent. — In the Witwatersrand Local Division the respondent instituted an action against the appellant. In terms of sec 134(b) of the Ordinance read with sec 26(4) and sec 21(1)(b) of the

Expropriation

Expropriation Act 63 of 1975, it claimed compensation in the sum of R205 200,00 "as and for actual financial loss". The appellant excepted to the respondent's claim. Having heard argument thereon, LE GRANGE, J dismissed the exception with costs, including the costs consequent upon the employment by the respondent of two counsel. With leave of this Court the appellant appeals against the whole of the order made by the Court below. The judgment appealed against has been reported: 1986(4) SA 576(W).

From the respondent's particulars of claim as amplified by the annexures thereto it appears that the case pleaded by the respondent is the following. Erf 89 is zoned for business rights. The respondent computes the loss in value of erf 89 flowing from the laying of the stormwater pipes across it as follows. It says that if an office building be erected upon erf 89 the presence of the stormwater pipes will permit of 76 fewer parking bays being accommodated in the basement of the building than would

otherwise

otherwise have been the case. The appellant excepted to the respondent's claim on the ground that it failed to disclose a cause of action. The basis of the exception was that upon a proper interpretation of sec 134(b) of the Ordinance compensation was claimable in respect only of direct physical damage to the land itself.

In this Court the submissions advanced on behalf of the appellant by Mr Heher may be outlined somewhat as follows. He allowed that the carrying of stormwater pipes across erf 89 necessarily involved an interference with the physical state of the land; and that such interference no doubt created a correlative legal duty upon the appellant to fill all excavations made in the course of laying the pipes and to make good and restore the ground surface to the condition wherein it had been before the execution of the works. It was then said that the damage for which compensation was payable was confined to reparation for any

failure

failure on the part of the appellant to make good and restore the surface of the land upon completion of the works. What the meaning of the phrase "on making compensation for any damage done" did, however, not include was pecuniary loss to the owner of erf 89 due to a diminution of the value of the land caused by the presence of the pipes.

The argument addressed to us in support of these broad submissions falls into two parts. While recognising the strong presumption in our law against confiscation of rights, and although in general conceding what he described as "the liberal approach" governing the matter of compensation in the interpretation of expropriation legislation, the first contention raised by Mr Heher was that the Court below had failed to appreciate that in truth the appellant's exercise of its power under sec 134(b) in the present case was not in character kindred to expropriation; that pursuant thereto no transmission of any right by the

the respondent to the appellant and no enrichment of the latter at the expense of the former had taken place; and that on this account "compensation for any damage done" should be restrictively interpreted and confined to mere physical damage. As a corollary to this argument it was also urged that a narrow construction upon the phrase was here warranted because any ensuing restraint upon the respondent's property rights in respect of erf 89 was simply the result of a "control measure" applied by the appellant in order to promote public health and convenience.

In my opinion the first contention must fail. Ownership of land connotes the existence of an aggregate of distinct and valuable rights inhering in the owner. These include not only the right to exclusive possession and the right of disposal, but also the right to the use and enjoyment of the land for all lawful purposes. Accepting then (as for purposes of the exception the Court a quo correctly accepted)

the

the averments of fact made by the respondent, the following situation emerges. The respondent may lawfully use erf 89 and turn it to account by erecting an office building thereon. The economic exploitation of an office building on erf 89 entails the provision of a certain number of parking bays in the basement of such building. The presence of the stormwater pipes laid across erf 89 precludes the provision of the required number of parking bays. In the result the exploitation of the business rights attaching to erf 89 has become less profitable to the respondent; the presence of the pipes inhibits the use to which erf 89 may lawfully be put and has therefore reduced its value. These facts afford, I think, a useful example of an owner of land being partially divested, without his consent, of one of his rights to ownership. It is to be noticed, moreover, that in terms of sec 135(1) of the Ordinance all pipes for the disposal of drainage constructed by the appellant vest in the latter. In all these circumstances it is tolerably clear, in my opinion, that the right

right taken by the respondent is a taking akin to expropriation. I agree, with respect, with the observation made by JANSEN, J (as he then was) in Pretoria City Council v Blom and Another 1966(2) SA 139(T) at 144A in relation to sec 84(b) of the Ordinance (which empowers a council to lay pipes and wires for the conveyance of electric current, gas and water) that -

"This power to override private rights appears to be in many respects analogous to a form of expropriation."

The second contention advanced by Mr Heher, if I understood him correctly, amounted to the following:

With reference to decisions of this Court such as Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 and Breede River (Robertson) Irrigation Board v Brink 1936 AD 359, counsel for the appellant pointed out that the exercise of a statutory power whose effect may be injurious to the rights of the subject does not necessarily create a

legal

legal obligation to pay compensation for the injury on the part of the public body exercising the power. Counsel urged upon us that such decisions were founded upon a recognition of the principle that the financial resources of public bodies clothed with statutory authority for the discharge of public functions should not lightly be exposed to undue depletion. From this it followed, so ran the argument, that where in the context of the exercise of statutory permissive powers the legislature had in fact provided for payment of compensation for damage thereby occasioned, any ambiguity in a provision for compensation should be resolved by the adoption of a restrictive construction adverse to the injured subject.

In my judgment the second contention is also unsound. Whatever considerations may impel a court to conclude, in a case where the legislation is silent as to compensation for ensuing damage, that what has been sanctioned is

is the invasion of private rights without compensation, it is difficult to see how such considerations can in any wise be relevant to an appraisal of the very different situation in which express provision has been made for compensation for damage to the subject; and in which the sole inquiry is confined to an interpretation of the true ambit of such compensation. To the extent that the phrase in sec 134(b) "compensation for any damage done", when viewed in its contextual setting, yields ambiguity, I am unable to agree that a court should be disposed to approach the problem of interpreting it restrictively and adversely to the party entitled to claim compensation. Here relevant is the canon of construction succinctly stated in Minister of Railways and Harbours of the Union of South Africa v Simmer and Jack Proprietary Mines, Limited 1918 AC 591 (PC). Dealing with a Raadsbesluit passed by the Legislature in derogation of the rights of the subject

LORD

LORD SUMNER remarked in the course of his opinion

(at p 603) :-

"Under these circumstances their Lordships think that the construction ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction....."

(See further in this connection the decisions to which reference is made at 579F/G of the judgment by the learned Judge in the Court below.)

The word "damage" in various and differing contexts has often been the subject of judicial debate and decision. I do not think that the many authorities thereanent cited in the appellant's heads of argument lend much assistance in the present case. While the phrase "compensation for any damage done" is at least susceptible of

of the narrow meaning which counsel for the appellant would assign to it, one must bear in mind that the word "damage" is one of wide and general import. I find myself in complete agreement with the following remarks contained (at 580 B/C) in the judgment of LE GRANGE, J:-

"If the word 'damage' is used in its ordinary sense, the meaning of the phrase 'compensation for any damage done' is, in my view, wide enough to include within its scope not only compensation for any 'physical damage' occasioned by the execution of the defendant's drainage works, but also for any pecuniary loss caused to the plaintiff by the impairment of the 'value or usefulness' of the land in question."

Counsel for the appellant submitted that the use in sec 134(b) of the verb "done" in association with the word "damage" tended to signify mere physical damage rather than damage comprising also consequential pecuniary loss.

I am unable thus to read these two words. So linked to the word "damage" ^hto the verb "done", in its natural and ordinary meaning

meaning, conveys, I consider, nothing more or less than "caused". It is noteworthy that in the Afrikaans text of sec 134(b) the phrase in question is rendered as:-

".....teen vergoeding vir enige skade
veroorsaak" (My underlining)

I proceed to consider whether in other parts of the Ordinance there are to be gleaned helpful indications of a legislative intent reinforcing either the scantier compensation urged by the appellant or the ampler recompense suggested by the respondent. Counsel for the appellant sought to derive support for his construction by contrasting "compensation for any damage done" with certain provisions in sec 67 of the Ordinance. This section empowers a council to close streets permanently or to divert them. In terms of sec 67(4)(a) provision is made for the payment of -

".....compensation for any damage or loss sustained" (My underlining)

BY

by a person whose interests are adversely affected by the closing or diversion of a street. Dealing first with the use in this subsection of the verb "sustained", there seems to me to be no substantial notional difference between "damage done" and "damage sustained". The verb "sustained" is more fittingly employed in the context of sec 67(4)(a) because the "damage or loss" is here related to a "person" adversely affected. Dealing next with the words "damage or loss", this phrase at first blush might seem to connote a rather broader concept than the single word "damage" used in sec 134(b); but this initial impression is counterbalanced, I think, by the consideration that "loss" is a synonym for "damage"; and that both words readily convey the meaning of "injury" or "impairment". Such assistance as Mr Heher is able to derive from the wording of sec 67(4)(a) appears to me to be rather meagre.

As a feature sustaining the broader construction of the phrase in question Mr Wulfsohn^{who} (with Mr Pincus)

appeared

appeared for the respondent, called our attention to the provisions of subsection (1) of sec 135 ("Vesting of sewers in council and rights of access thereto"). This subsection gives a council the right of access to private property for the purpose of inspection and maintenance of sewers and pipes. To this end it empowers a council to uncover and expose sewers and pipes, but subject to a stipulation in the following terms:-

"....provided that the council shall repair all damage caused by such entry and inspection."

In the light of the above counsel for the respondent urged that had the legislature in sec 134(b) intended the narrow construction for which the appellant contends, a more appropriate wording for the compensatory provision would have been:-

"....on making compensation for any failure on the part of the council to repair all damage caused by the carrying out of the drainage works."

While

While there may be some force in this point made by Mr Wulfsohn, it is not, -I think, a very cogent one.

Taking a broad view of these (and other) provisions in the Ordinance to which we were referred by counsel on both sides, it seems to me that beyond the provisions of sec 134(b) itself there is little which affords material assistance in the resolution of the problem of construction whereon the result of this appeal hinges. At all events I find no definite and clear language anywhere else in the Ordinance to bolster up the construction for which the appellant contends. Accepting (as I have already found) that the power exercised by the appellant in taking the right in question is akin to expropriation, and further accepting (as for purposes of the exception one must) that the value of erf 89 has been substantially reduced by the taking of the right, what operates decisively in the case is the presumption against the taking or extinguishment of a valuable right to property without compensation. In my opinion

opinion the Court below rightly construed sec 134(b) in favour of the respondent; and it properly dismissed the appellant's exception.

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

G G HOEXTER, JA

NESTADT, JA)
VIVIER, JA)
KUMLEBEN, JA)
VILJOEN, AJA)

Concur