

SOUTH AFRICA / JUDGMENT

Adampol (Pty) Ltd. v Administrator, Transvaal (661/87) [1989] ZASCA 59; [1989] 4 All SA 776 (AD) (22 May 1989) [1989] ZASCA 59

COURT

Supreme Court of Appeal

BEFORE

Joubert, Hoexter, Botha, Vivier, Eksteen

CASE / FILE NUMBER

661/87

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Case No.: 661/87

**IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE
DIVISION**

In the matter between:

ADAMPOL (PTY) LTD Appellant
and
THE ADMINISTRATOR OF THE TRANSVAAL Respondent
CORAM: JOUBERT, HOEXTER, BOTHA, VIVIER et EKSTEEN, JJA
HEARD: 21 February, 1989 DELIVERED: 22 May 1989

JUDGMENT

HOEXTER, JA

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I have had the benefit of reading the judgments

respectively prepared by my Brother JOUBERT and my Brother BOTHA. I agree with the view expressed in the penultimate paragraph of the latter judgment that the decisive question in the appeal is whether or not sec 95A reveals a clear intention on the part of the legislature that its provisions should apply to expropriations that have taken place before its enactment. My Brother BOTHA concludes that no such clear intention is revealed. I would, with deference, disagree with that conclusion. In my opinion the meaning which the appellant's counsel seeks to assign to sec 95A is the correct one. For the following reasons I agree with the orders set forth in the concluding paragraphs of the judgment of my Brother JOUBERT.

What VAN DER MERWE, J conceived to be the initial inquiry

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inquiry in the problem of interpretation confronting him appears from the following passage in the judgment of the Court below:-

"The first question that must be answered, is the following. If interest is payable to an expropriatee prior to 25 September 1985, does it mean that the section will have retrospective effect?"

I venture to suggest that the first question which fell to be answered was rather this : What is the ordinary grammatical meaning of the words of the section? If such a meaning is apparent, and if it produces no obvious absurdity, repugnance or inconsistency, the inquiry ends there. The paramount principle, as has often been stated, is construction according to the plain import and effect of the words. In cases of ambiguity certain presumptions may be called in aid. One of them is the

presumption

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presumption against the retrospective operation of

statutes. Legislation which is truly retrospective, and which operates ex post facto, may in some cases run counter to natural justice; and where there is ambiguity the presumption against retrospective operation is a

strong one. The fact remains, however, that presumptions - whether they be weak or strong - have a purely auxiliary

function; and they may be invoked in the process of

interpretation only if the language in question is not clear. In *Parow Municipality v Joyce and McGregor (Pty) Ltd*

1974(1) SA 161 (C) VAN WINSEN, AJP observed (at 165H/166A) -

"However, these rules of statutory exegesis are intended as aids in resolving any doubts as to the legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought. Steyn in his work on *Uitleg van Wette*, 3rd ed., p. 2, states the position thus: '.....'n....

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'n reël waaraan alle ander

reëls ondergeskik is, naamlik dat indien maar eenmaal vasstaan wat die werklike bedoeling is wat die woorde wil uitdruk, aan daardie uitleg gevolg gegee moet word."

In his judgment my Brother JOUBERT holds that

the wording of sec 95A(1) is clear and unambiguous; and that the ordinary meaning of the words used involves no manifest absurdity, inconsistency or hardship. I arrive at the same conclusion. When one heeds and gives natural effect to the exact words of the section they signify, I think, that interest will be paid to an expropriatee:-

(a) calculated at the rate and in the fashion indicated in the section; (b) on any amount of compensation under sec 92 which on or after 25 September 1985 is payable but unpaid;

(c) in

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(c) in respect of an expropriation under

Ordinance 22 of 1957. Counsel for the respondent invites us to read the section as if, after the words:

"...on any outstanding amount of the compensation payable in terms of section 92...."

there should be slipped in, by implication, words having

the following effect:

"pursuant to a notice contemplated in subsection (1) of the latter section promulgated after the coming into effect of this section."

I confess that I am quite unable to see any reason for tinkering with the express words actually used by the legislature. In my judgment the words of the section are too plain and clear to admit of any such implication, which is negated by the use of the word "any" which prefaces the words "outstanding amount."

Any

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Any speculation as to the inscrutable workings of the legislative mind which is divorced from the actual words of the statutory provision in question does not appear to me to be particularly helpful. In the instant case it is said, for example, that in enacting sec 95A(1) the primary purpose of the legislature must have been to make provision for the payment of interest on amounts of compensation payable but outstanding in respect of expropriations taking place after the date on which the section came into operation. That conjecture may be sound. There are no less cogent grounds, I think, for another surmise. It seems to me to be reasonable to suppose that the legislature was mindful of the long delays which in practice frequently separate the date of expropriation and the date of payment of compensation; and that the legislature's use of words of

unqualified gene-

rality.....

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rality ("any outstanding amount") was prompted by a firm intention to help not only future expropriatees but also those to whom, at the date of the enactment, compensation had not yet been paid. For the above reasons I come to the conclusion that the Court below erred in deciding the stated case in favour of the respondent. In my judgment the words of sec 95A(1) in their ordinary meaning are conclusive: and they apply clearly and directly also to outstanding amounts payable in respect of expropriations preceding the date on which the section came into operation. This conclusion renders it unnecessary for me to express any firm opinion on the issue, much debated both in the Court below and on appeal, whether according to the construction for which the appellant contends the section operates with retrospective effect. I wish to

say,

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say, nevertheless, that in my view that question should be answered in the negative. The basis of the decision made by VAN DER MERWE, J in favour of the respondent was a finding that the construction proffered by the appellant did in fact involve retrospective operation; and, since the language of the section indicated neither expressly or by implication that there should be retrospective operation, that the presumption against retrospectivity had not been displaced.

In regard to the issue of retrospectivity the

test applied by VAN DER MERWE, J was the following:-

"The Ordinance will, in my opinion, be retrospective if it provides that as at a date prior to 25 September 1985 the law shall be taken to have been that which it was not."

The learned Judge was satisfied that the question indicated above should be answered in the affirmative. For

the

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the reasons briefly stated hereafter it seems to me, with respect, that the test used by the learned Judge should have yielded a negative result.

The test applied by VAN DER MERWE, J is one formu-

lated in the oft-quoted judgment of BUCKLEY, LJ in the case of *West v Gwynne* (1911) 2 Ch. 1 at 11/12:-

"Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."

It seems to me that in the instant case too the essential

inquiry.....

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inquiry relates to the ambit of sec 95A(1) rather than to retrospectivity in the true sense of the word. The provisions of sec 95A(1) decreeing the payment of interest on outstanding amounts are not foredated to a time earlier than 25 September 1985 : they govern the payment of interest only on amounts outstanding on and after that date. The distinction between retrospective operation and interference with existing rights is neatly illustrated by the situation with which the Court in *Parow Municipality v Joyce and McGregor (Pty) Ltd.* (supra) had to deal. In that case the respondent was a property-owning development company. In 1932 it had submitted and received approval for a plan of sub-division of land which included an area designated as "recreation ground". Subsequently thereto sec 127 of the Cape Municipal Ordinance 19 of 1951 provided:-

"The

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"The ownership of all immovable property to which the inhabitants of the municipality shall have or acquire a common right and of all public streets and the land comprised therein shall vest in the municipality; "

In an application by the Parow Municipality for an order compelling the respondent to transfer the aforesaid re-creation ground to the Municipality, the Court held that the recreation ground was a public street within the meaning of sec 127, and that sec 127 had vested the ownership thereof in the Municipality. In arriving at this conclusion VAN WINSEN, AJP, rejected the respondent's contention that if the ownership of the recreation ground were to vest in the Municipality sec 127 would be operating retrospectively. The Court pointed out that although sec 127 interfered with existing rights, ownership of the ground in question vested in the Municipality only

from

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from the date of promulgation of sec 127. At 164G/165C

VAN WINSEN, AJP remarked:-

"The section applies to a state of affairs existing at its inception, viz., that a certain area of land shewn upon an approved sub-division plan comprises a public street. The fact that the aforementioned requisites for its operation existed antecedent to the time when the section was promulgated does not in itself render it retrospective in its operation. Cf. *R v St Mary, Whitechapel*, 12 Q.B. 120 at p 127; *Master Ladies Tailors Organisation v Minister of Labour*,

(1950) 2 All E R 525 at p 527; *R. v A. Solicitor's Clerk*,

(1957) 1 W L R 1219. It would, in my view, have been retrospective in its operation if it had sought to provide that . as from a date anterior to its promulgation the local authority had become vested with ownership in what were then public streets. But this it does not do. The remarks of BUCKLEY, LJ in *West v Gwynne*,

(1911) 2 CH. 1 at p 11, quoted with approval by SCHREINER, ACJ, in *Shewan Tomes & Co Ltd v Commissioner of Customs & Excise*, 1955(4) SA 305 (A D), are apposite in this connection. The learned Judge observed as follows:

'During the argument the words 'retrospective'

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and 'retroactive' have been repeatedly used, and the question has been stated to be whether sec 3 of the Conveyancing Act, 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another

(In the rest of his quotation from the remarks of BUCKLEY, LJ in *West v Gwynne* (supra) VAN WINSEN, AJP cited the remainder of the passage already quoted earlier in this judgment. VAN WINSEN, AJP then proceeded as hereunder indicated). "See, too *Sarahbibi v Principal Immigration Officer*, 1957 (2) SA 175 (N) at p 180; *Scott v Artus*, 1964(3) SA 384 (E) at p 388. I conclude, therefore, that while it can be conceded that sec 127 does, as from the date of its promulgation, interfere with existing rights it does not operate retrospectively."

It seems to me, with respect, that in the above-quoted passage VAN WINSEN, AJP correctly stated the criterion to

be

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be employed in cases of this sort, and I proceed to apply it to the situation in the instant case. In providing what the law is to be with effect from 25 September 1985 sec 95A(1) undoubtedly interfered with the existing rights of the parties to this appeal. Before that date the respondent bore no obligation to pay interest on any outstanding amount of compensation owing to the appellant, and the latter enjoyed no right to claim such interest from the former. That fact, by itself, does not render the operation of sec 95A(1) retrospective. Nor, in my opinion, is its

operation rendered retrospective by the adventitious circumstance that the interest payable is to be computed from a date which may precede (and which, in the instant case does precede) 25 September

1985. In my view that factor is one quite extraneous to the inquiry.

Had....

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Had sec 95A(1) provided for the payment of interest not only on amounts outstanding from the date on which it came into operation, but also on amounts outstanding for any period prior to 25 September 1985 and which had been paid in full to the expropriatee before that date, then its provisions would have satisfied the criterion enunciated in *West v Gwynne* (supra) and applied in the *Parow Municipality* case (supra). It would then have decreed, ex post facto, the payment of interest in respect of transactions wholly past and perfected. However, as already pointed out, the section does no such thing. It provides for the payment of interest only on amounts outstanding on and after 25 September 1985. Sec 95A(1) provides what the law is to be with effect from 25 September 1985. It does not provide that at a past date the law shall be taken '

to

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to have been that which it was not. Reduced to essentials the contention advanced on behalf of the respondent in the present case (and the same may be said of the respondent in the *Parow Municipality* case (supra)) really comes to this: that prior to the date of the amending enactment he enjoyed a vested and entrenched right that in future the law governing his obligations would never be amended. That contention, is, I consider, an untenable one. I would allow the appeal. I concur in the orders proposed by JOUBERT, JA.

G G HOEXTER, JA

VIVIER, JA) EKSTEEN, JA) Concur

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