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N v H

DURBAN (NINGIZUMA) COMMUNITY COUNCIL — 1st Appellant

EDWIN THEMBA NGOBENI — 2nd Appellant

and

THE MINISTER OF CO-OPERATION AND DEVELOPMENT — 1st Respondent

PORT NATAL ADMINISTRATION BOARD — 2nd Respondent

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

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| DURBAN (NINGIZUMA) COMMUNITY COUNCIL | First Appellant |
| EDWIN THEMBA NGOBENI | Second Appellant |

and

| | |
|---|---|
| THE MINISTER OF CO-OPERATION AND DEVELOPMENT | First Respondent |
| PORT NATAL ADMINISTRATION BOARD | Second Respondent |

CORAM: MILLER, TRENGOVE, CILLIé, VAN HEERDEN, JJA, et NICHOLAS, AJA

HEARD: 7 MAY 1985

DELIVERED: 24 MAY 1985

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J U D G M E N T

MILLER, JA :-

By Government Notice No 823 published in Gazette No 8667 of 22 April 1983 the first respondent

promulgated / .....

promulgated amendments to the then existing regulations "relating to tariffs of fees and charges for the Black residential areas situate at Durban" and elsewhere. The amendments would serve to increase the rentals payable for occupation of dwellings falling within the area of the Durban (Ningizuma) Community Council, the first appellant herein. (The second appellant is an interested resident in the area.) The Government Notice in question revealed that the enactments relied upon by the first respondent as the sources of his power to make and promul= gate such regulations were sec 22(1)(b) of the Black Affairs Administration Act, No 45 of 1971 ("the 1971 Act") read with sec 11(1)(e)(i)(aa) of that Act and with sec 38(3) of the Blacks (Urban Areas) Consolidation act, No 25 of

1945 / .....

1945 ("the 1945 Act"). The amendments to the regulations were said in the Government Notice to have been made "after consultation with the Administration Board of the Port Natal Area". That board is the second respondent in this appeal.

The appellants applied in the Durban and Coast Local Division of the Supreme Court, upon notice of motion, for an order declaring that Government Notice No 823, "in so far as it purports to increase rentals" was "null and void and of no force and effect". The basis of the application was that consequent upon the implementation of the provisions of the Community Councils Act, No 125 of 1977 ("the 1977 Act") in terms of which the first appellant was established, not the first respondent but the first appellant

was / .....

was vested with the power of making regulations in relation to rentals, fees and other charges and that the amendments in question were therefore ineffectual for want of power in the first respondent to make them. A rule nisi was issued, upon the return date of which the respondents opposed the application. The Court a quo, LEON, J, upheld the respondent's contentions in regard to the seat of the relevant powers and accordingly set aside the rule nisi. Leave was granted by the Court a quo to appeal to this Court.

The judgment of the Court a quo, in which are quoted the statutory provisions referred to in the Government Notice, is reported at 1984(2) SA 222. It will be convenient, and will facilitate the reading of

this judgment, to reproduce that part of the judgment a quo, at pp 224 - 5:-

> "Section 38(3)(o) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 reads as follows:
>
> 'An urban local authority may, by resolution passed after at least seven days' notice thereof at a meeting ..... make regulations not inconsistent with this Act, as to all or any of the following matters .....
>
> (o) tariffs of fees and charges (with due regard to the cost of providing any accommodation for educational purposes in the interests of the residents of a Black residential area) for rent, water, electricity, sanitary, health, medical and other services or any consolidations of such services and the collection and recovery of such fees and charges.'
>
> Section 11 of the Black Affairs Administration Act 45 of 1971 grants powers to an administration board established in terms of s 2 of that Act. Section 11(1)(e)(i)(aa) reads as follows:
>
> 'The object of a board is to administer within its administration area matters affecting Blacks so as to give effect to the purposes of this Act,

and to that end a board shall, in addition to any other powers vested in it by or under this Act or by any regulation in force, in terms of s 22, .....

(e) within its administration area be vested and charged with -

(i) all the rights, powers, functions, duties and obligations -

(aa) of an urban local authority in terms of the Blacks (Urban Areas) Consolidation act 25 of 1945 ...;'

Section 22 of the Black Affairs Administration Act of 1971 provides:

'Notwithstanding the provisions of s 11(1)(e)(i)(aa) .....

(a) the powers conferred thereby on a board shall not include the power to make regulations under any law mentioned or contemplated therein:

(b) any such power which but for the provisions of para (a) would have been exercisable by a board, shall be vested in the Minister, and may be exercised by him either generally or in relation to the administration area of any particular board or part of such area.'"

It is / .....

It is clear that upon the coming into operation of the 1971 Act the newly created boards became vested with powers such as urban local authorities had been empowered to exercise in the areas concerned, but that a sharp distinction was drawn between administrative powers and legislative powers in the sense of making regulations. The latter powers were specifically excluded from the powers vested in the boards and were vested instead in the Minister, who could exercise them generally or in relation to the areas of boards or parts of such areas. (Sec 22(1)(a) and (b) of the 1971 Act.) In Jacobs v Minister of Black Administration and Development and Others 1978(1) SA 741 (NCD) at p 744, VAN DEN HEEVER, J, undertook a brief historical survey, up to and including the 1971 Act,

of legislation in this field. I quote from the learned Judge's conclusion:

> "The pattern that seems to emerge is that there is progressively a divorce between legislative and administrative government as regards Blacks, previously conjoined and both exercised by the urban local authorities ..... Now management boards are to be purely administrative bodies. Act 45 of 1971 takes this development further."

The Community Councils Act, 1977, was clearly designed inter alia to vest in the councils created in terms of sec 2 thereof, substantially those administrative functions and powers which urban local authorities had exercised in terms of the 1945 Act. This is evidenced by several of the provisions of the 1977 Act, for example, sec 1(2), which provides that "this Act" and the Urban Areas Act are

to be construed "as if they formed one Act", and

sec 5(1)(m), which provides that the council

> "shall have, with regard to any power or duty which, immediately before the date on which such power was vested in it or it was charged with such duty was exercised or performed by an administration board, all the rights, powers, functions, duties and obliga= tions of an urban local authority in terms of the laws mentioned in section 11(1)(e) of the Black Affairs Administration Act, 1971 (Act No 45 of 1971)."

And sub-sec (2) of sec 5 provides that "rights, powers, functions, duties and obligations vested in a community council by virtue of the provisions of sub-section (1)(m) shall subject to the provisions of this Act devolve upon such council to the exclusion of the administration board or any other urban local authority". The specific, as distinct from the general descriptions of the functions,

duties and powers of the council are to be found in sub-sec (1) of sec 5 of the 1977 Act. Of the many functions, duties and powers there described those contained in sub-secs (i) and (ii) of sec 5(1)(a) are of particular importance in this case and, in fact, form the subject of the true issue in the case. They read as follows:

"5. Powers and Duties of a Community Council

(i) A Community Council -

(a) shall in respect of its area and subject to the Minister's directions exercise such powers and perform such duties in respect of those of the undermentioned matters as may be vested in it and with which it may be charged by the Minister, after consultation with the administration board concerned and such community council:

(i) the allocation and administration of the letting of accommodation to single persons or to persons as if they were single;

(ii) the allocation and administration of the letting of dwellings, buildings and other structures."

The powers described in these two sub-secs ((i) and (ii))were amongst those duly vested by the Minister in the first appellant. The contention on the appellant's behalf is that properly construed in their full context, these powers include the power to determine rentals and other charges; the words more particularly relied upon for this conclusion are "the administration of the letting of dwellings" in (ii) above.

There was a dispute on the papers on the question whether the proclamation of R823 was made without prior consultation with the first appellant and no doubt because of that the parties agreed at the hearing in the Court a quo that the Court be asked to decide "only a single issue"; that issue, as formulated in the judgment,

together with "the agreed consequences", reads as follows:

> "The issue to be decided is whether or not the Minister's vesting of the power to allocate and administer the letting included the power to fix rentals and charges for other services. If the answer is in the affirmative, the application must succeed. If the answer is in the negative, the application must fail."

The learned Judge's formulation of the agreed single issue and the consequences of the findings thereon, was not challenged before us and therefore the single issue before this Court is whether the Court a quo was correct in answering the posed question "in the negative".

LEON, J, observed (at p 226) with reference to the Shorter Oxford English Dictionary, that the "ordinary meanings of the verb 'administer' and the noun 'admini= stration' embrace the activities of management, carrying

on and acting in relation to the management of affairs ..."

Other shades of meaning but with a similar general conno=

tation are: performance of a service (in a capacity),

performance of duties; management, direction, superinten=

dence. (Webster's Third New International Dictionary.)

Ordinarily, one who was charged with the "administration",

and no more, of a complex of dwellings which were available

for letting would know that he was expected to manage the

business or enterprise. It would be a bold manager so

charged who would think that he could take it upon himself

to fix and from time to time to alter the rentals and other

charges.

Such relatively limited meaning and connotation of

"administration" in the context, viz., that it does not include the

power / .....

power of deciding upon and proclaiming rentals and other charges, is strongly supported by the background of the legislation, which it is proper to take into account for purposes of interpretation. As I have shown above, the 1971 Act, after vesting in a board the whole body of "the rights, powers, functions, duties and obligations" of an urban local authority took care to detach therefrom the power to make regulations under any law mentioned or contemplated therein. A similar but not identical, severance of legislative powers from administrative powers and functions is to be seen in sec 5(b) of the 1977 Act, which relates directly to powers vested in a Council in terms of sub-sec (i). It is noteworthy, too, that included in the list of

powers and duties in sec 5 there are items in respect of which the Council is directly empowered to levy charges. They are sec 5(1)(a)(vii) and sec 5(1)(j). The first relates to control over the keeping of dogs and the im= position of levies on the keeping of dogs; the second, to levies for specific services or purposes on persons residing in the area. I mention these provisions in order to show that when it was intended to vest in the Council the power to levy charges such intention was given clear and direct expression.

When considering the meaning and scope of a power simply of "administration" in the context of sec 5(1)(a)(ii) of the 1977 Act, it is necessary to bear in mind that the fixing of rentals for dwellings and decisions

thereafter to increase or decrease existing rentals or charges usually involve considerations of both finance and policy. If the grantor of the power to administer the concern, whether such grantor were a private company, or an institution, or a government department, desired and intended that not it but its appointed administrator should make such decisions in respect of finance and policy and to give legal effect to them, it is highly unlikely that it would have used the word "administration" to convey such purpose and intent.

It appears to me, therefore, that the grant of the power and duty of administration in sec 5(1)(a) would not embrace the power to decide upon and to give

legal effect to alterations in the existing rentals and other charges unless there were strong indications in the Act considered against its background, or in other circumstances which it was proper to take into account, that the word "administration" was not used in its ordinary and usual sense. I do not find such indications.

I have not overlooked the agreement between the first appellant and second respondent as to the manner in which the powers conferred on the first appellant should be exercised. That agreement is described at p 225 of the judgment a quo; I do not think it necessary to reproduce it here. It is sufficient to say that that agreement, which carried the approval of the Minister, visualized that the first appellant might from time to time, upon request or other=

wise, consider adjustments to rentals and other charges. Mr Gordon tentatively suggested that this might be helpful in the interpretation of sec 5(1). I am satisfied that it is not. It shows no more than that the appellants reached an agreement with the approval of the Minister. Such an agreement could have no bearing on sec 5(1) of the 1971 Act; only Parliament could amend the Act.

Finally, Mr Gordon, in the course of his argument, laid stress upon sec 5(1)(m) of the 1977 Act, the terms of which have been set out above. Reading this provision together with sec 38(3)(o) of the 1945 Act, referred to earlier herein, and secs 22(1) and 11(1)(e)(i) of the 1971 Act, he contended that the legis= lator's purpose was that the council should have all the

powers which an urban authority had, including the power to make regulations regarding rentals and other matters. That being so, he said, the Minister was denuded of the powers granted to him by sec 22(1)(b) of the 1971 Act. For the resolution of such a contention it would be necessary to carry out a detailed investigation of all the relevant legislation in order to determine whether the ultimate effect of the several enactments was, indeed, to relieve the Minister of all or some of his powers. This is an issue which goes far beyond and is fundamentally different from the agreed "sole issue", the resolution of which the parties agreed would be decisive of the case. The Court a quo correctly decided the sole issue placed before it for decision and this appeal must therefore fail.

The / .....

The appeal is dismissed with costs, which shall include costs in respect of two Counsel.

S MILLER

JUDGE OF APPEAL

TRENGOVE, JA )
CILLIé, JA ) CONCUR
VAN HEERDEN, JA )
NICHOLAS, AJA )