Privy Council Appeal No. 133 *of* 1918.

Marshall's Township Syndicate, Limited - - - - *Appellants*

v.

Johannesburg Consolidated Investment Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1919.

Present at the Hearing :

VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD SHAW.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* VISCOUNT FINLAY.]

This is an appeal by special leave from a judgment of the Appellate Division of the Supreme Court of South Africa. It raises a question of some importance as to the powers of a Provincial Council constituted under the South Africa Act, 1909 (9 Edward 7, Chapter 9).

In the Union of South Africa established by that Act, the legislative power of the Union is vested in the Parliament consisting of the King, a Senate and a House of Assembly. By Section 59 of the Act, Parliament has the power of making laws for the peace, order, and good government of the Union. The Union comprises the Provinces of Cape of Good Hope, Natal, Transvaal and Orange Free State. In each province there is a Provincial Council elected by the persons qualified to vote for the election of members of the House of Assembly of the Union (Sections 70 and 71). There is conferred upon the Provincial Council in each province by Section 85 power to make ordinances in relation to thirteen classes of subjects enumerated in the section, of which (i), (vi), (xii) and (xiii) are as follows :—

"(i) Direct taxation within the province in order to raise a revenue for provincial purposes :

"(vi) Municipal institutions, divisional councils, and other local institutions of a similar nature :

"(xii) Generally all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province :

"(xiii) All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council."

The power of making ordinances does not exclude the power of legislation by Parliament, and any ordinance made by a Provincial Council is to have effect in the provinces as long and as far only as it is not repugnant to any Act of Parliament (Section 86). The Provincial Council may recommend to Parliament the passing of any law as to any matter in respect of which the Council is not competent to make ordinances (Section 87). In order to be valid an ordinance must be assented to by the Governor-General in Council (Section 90), and when so assented to it has the force of law within the province, subject to the provisions of the Act (Section 91).

The power of making ordinances in relation to "municipal institutions" includes the power of authorising the making of rates for the purpose of such municipal institutions. Such bodies as municipal institutions cannot have any effective existence without rating powers, and it was admitted by the appellants that under Section 85 (vi) ordinances may be made in relation to rating.

The question in the present case arises upon an ordinance of the Transvaal Province (No. 1 of 1916), amending the Local Authorities' Rating Ordinance, 1912, styled "the principal ordinance." The owner under this ordinance is the person primarily liable for the payment of rates, and Section 12 of the ordinance of 1916 provides as follows :—

"12. Any provision in a contract existing at the date of the taking effect of this Ordinance or hereafter entered into whereby any person primarily liable for payment of any rates imposed pursuant to this Ordinance in respect of any rateable property seeks to render any person interested under or subsequent to himself as lessee of such rateable property or any part thereof liable absolutely or conditionally to pay such rates or any part thereof in lieu or stead of himself shall be null and void."

Pursuant to this ordinance the Municipal Council of Johannesburg imposed a rate in respect of the half-year ended the 31st December, 1916, of 2*d.* in the pound. This rate has been paid by the plaintiffs, Marshall's Township Syndicate, Limited, as owners of eight stands in Marshall's Township within the municipality, which the respondents Johannesburg Consolidated Investment Company, Limited, hold under lease from the appellants. There was a separate lease for each stand. They were all in the same terms and were executed in 1893. Each contained the following clause :—

"7. The lessee shall in respect of the said stand be bound to pay all such rates and taxes as now are or may hereafter be levied thereon by

Government or any Municipal, Sanitary, or other board or body having power to levy the same: and in case of a general rate or tax over the property of the lessors, the lessee shall be obliged to pay his *pro rata* share of the same."

The appellants having paid the rate sued the respondents under this covenant. The defence was that the covenant was invalidated by Section 12 of the Ordinance No. 1 of 1916 above quoted. The facts were stated in the form of a Special Case for the opinion of the Court, the question being whether the enactment contained in Section 12 of Ordinance No. 1 of 1916 is *ultra vires* of the Provincial Council.

The case was heard in the first instance by Mr. Justice Ward, who decided in favour of the plaintiffs, the lessors, holding that Section 12 was *ultra vires*, and that the Council had no authority to invalidate such a covenant for the transfer of the lessor's liability for rates to the lessee. This decision was reversed by the Appellate Division of the Supreme Court of South Africa, who held that the enactment was *intra vires*, and that the covenant sued on was therefore null and void.

It was conceded that the Provincial Council had power to make ordinances as to rates for municipal purposes, but it was contended that the authority of the Council was exhausted when they had provided for the immediate incidence of the rate by throwing upon the owner the liability to the municipal authority. It was urged that the immediate incidence of the rate is all that concerns the municipality, and that the Provincial Council in legislating as to municipal institutions can deal only with the immediate incidence of the rate, and has no authority to interfere with its ultimate incidence under any contract between lessor and lessee.

It appears to their Lordships that the appellants' contention on this point is not well founded. The scope of the authority of the Provincial Council cannot be so limited. Authority to deal with rating involves authority to deal with the question of its ultimate incidence as between several persons interested in the property rated. It may be considered to be in the interest of the municipality that the rate should be borne by the owner and that he should not be permitted to transfer the liability to the lessee. If the Council take this view it falls within the scope of their authority to give effect to it. It is a mistake to treat the interest of the municipality in rating as exhausted when provision is made for the payment of the rate to the municipal authority. The legislative body which has power to deal with rating has power to deal with its ultimate incidence as among those who have rights in the rateable subject, unless prohibited expressly or by implication from so doing. Of such prohibition there is not a trace in the Statute creating these Provincial Councils and defining their powers. If, in the opinion of the Parliament of the Union the power has been exercised in a manner which is inexpedient, the ordinance can at any time be repealed or modified by Act of Parliament.

It was urged that if Section 12 be valid it would also be within the power of the Provincial Council to make illegal an insurance by the lessor against the increase of rates as this would involve a transfer of the burden to the underwriter. This was urged as a *reductio ad absurdum*. It is, however, obvious that it is one thing to deal with the incidence of a rate as between the interests in the land and another thing altogether to prohibit contracts of indemnity with underwriters or insurance companies who have no interest in the land, and the same observation applies to any collateral contracts, in regard to rates with other parties, strangers to the land. The Provincial Council has confined itself to dealing with the incidence of the rate as between those interested in the land in respect of the rate as assessed, and this falls within its province in legislating as to municipal institutions. To forbid insurance and other collateral contracts in respect of rates would be quite another thing.

It was urged that Section 12 is retrospective, in that it deals with existing contracts and that this is enough to render it invalid. Their Lordships are unable to accept this view. The fact that legislation is retrospective may be a strong argument on the inquiry, whether it is just or expedient. But if power is given to the Provincial Councils to deal with rating by ordinance, they have the same power of making any enactment relating thereto with retroactive effect as Parliament would have had, subject always to the power of Parliament to repeal or modify such ordinances. That the enactment is retrospective does not make it *ultra vires*.

For these reasons their Lordships entirely agree with the decision of the Appellate Division of the Supreme Court of South Africa.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

MARSHALL'S TOWNSHIP SYNDICATE, LIMITED,

v.

JOHANNESBURG CONSOLIDATED INVESTMENT COMPANY, LIMITED.

DELIVERED BY VISCOUNT FINLAY.

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