

FAWKES, J. (in
Chambers).
October 20th, 1911.

SIMPSON *vs.* BLOEMFONTEIN TOWN
COUNCIL.

Municipality.—Streets. — Expropriation. — Compensation.—Arbitration.—Ord. 35 of 1903, sec. 105.

Sec. 105 of Ord. 35 of 1903 provides for submitting to arbitration the amount of compensation only and not the liability to pay compensation.

The petitioner was the registered owner of an erf in Bastion Street, Bloemfontein. The respondents had sanctioned the construction of a bridge over the railway line opposite Bastion Street. The petitioner alleged that the embankment and bridge had deprived him of at least one half of his right of way in Bastion Street, and had directly caused considerable depreciation in the value of the property as appeared from the fact that, since the commencement of the work, the rental received in respect of the property had decreased and the petitioner had experienced difficulty in obtaining tenants. The petitioner put the amount of damage sustained at £500, and claimed that amount as compensation. The respondents had been approached with a view to arriving at a mutual agreement, failing which, to submitting the dispute to arbitration in terms of sec. 105 of Ordinance 35 of 1903.

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The applicant asked for an order compelling the respondents to appoint an arbitrator in terms of sec. 129 of Ordinance 35 of 1903, to determine, in conjunction

The material portion of sec. 105 of Ord. 35 of 1903 reads as follows :

"The Council is empowered within the municipality to make, alter and keep in repair any roads, streets and bridges that it may deem necessary . . . and for such purposes or any of them, may utilise any municipal property and may enter upon and conduct through and carry out, in or upon any private or Crown Lands, buildings or premises, any such work as it may deem necessary; and if any person shall suffer any loss or damage by any such things being done or any such work being so carried out, the Council shall pay to such person such compensation as may be mutually agreed upon by the parties concerned, or failing such agreement as shall be determined by arbitration in the manner hereinafter provided."

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with J. W. G. Steyn, the applicant's nominee, the matter or matters in dispute. Section 129 reads as follows:

"In all matters which are, under the provisions of this Ordinance, to be determined by arbitration each party shall appoint one arbitrator. Such arbitrators shall have the power to appoint a third as umpire. The decision of the arbitrators, or in case of their disagreement, of the umpire, shall be final and binding on all parties to the reference."

The respondents denied that the applicant had sustained any damage; and they further denied liability to pay compensation even if it should be shown that any damage had been suffered.

P. U. Fischer, for the applicant.

[FAWKES, J.: Does the last part of sec. 105 providing for the submission of questions of compensation to arbitration, refer to the first part of the section by which the municipality is empowered to make, alter and keep in repair any roads, streets and bridges? Does it not apply exclusively to the second portion empowering the municipality to utilise and enter upon private or Crown lands for carrying out such work as is deemed necessary?]

The provision in regard to arbitrations refers to the whole of the preceding portion of the section.

[FAWKES, J.: The Legislature cannot be presumed to have contemplated that the jurisdiction of the Courts would be ousted if a legal point were to be in dispute.]

Considerable inconvenience would be caused by the submission of a legal point to the Court and the reference to an arbitrator on a question of fact. Such a cumbersome process could not have been anticipated by the Legislature.

H. F. Blaine, K.C., for the respondents: Section 105 only contemplates arbitration when the damage is admitted and when the only point in dispute is the amount of compensation to be paid.

FAWKES, J.: The order must be refused on the ground that sec. 105 only requires the amount of compensation

to be determined by arbitration; in case of failure of the parties to agree to the amount the section would only enable the arbitrators when appointed to fix the amount of compensation to be paid by the Council. They are given no powers to determine the question of a liability for damage they are alleged to have caused when this is in dispute.

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[Applicant's Attorneys, BREBNER & REITZ.]
[Respondent's Attorneys, FRASER & SCOTT.]

[Reported by R. C. STRELTEN, Esq., Advocate]

MAASDORP, C.J., and
FAWKES & WARD, JJ.
August 26th, 28th, 29th,
30th and 31st : Sept.
1st, 2nd and 4th :
November 1st, 1911.

FRASER vs. HERTZOG.

*Defamation.—Damages.—Mitigation.—Education Act
35 of 1908.—Evidence.—Facts not contained in
Particulars.*

In an action for defamation where H. had given particulars in his plea of justification alleging misconduct on the part of F “in the course of his inspectorial duties”:—Held, that evidence in regard to casual private conversations was inadmissible, and that H. must be confined to the particulars supplied.

The defendant made use of the following words: “I could also say that which would put those inspectors to shame for ever” concerning the plaintiff, a school inspector:—Held, that the words were defamatory.—Held, further, that the following facts should be considered in mitigation of the amount of damages: (1) That defendant made use of the words in answer to a question subsequent to a political speech, and then only in consequence of certain cries of disapproval from the audience, and not in the course of the speech itself; (2) that the words were used with a view to gaining a political advantage over defendant's opponents in the audience