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ORANGE FREE STATE VERMIN CONTROL AND WILD LIFE PROTECTION SOCIETY v. GOUWS.

(ORANGE FREE STATE PROVINCIAL DIVISION.)

1969. *August* 8, 19. HOFMEYR, J.

Game.—Hunt club which is a body corporate.—Membership fee due.—Claim for.—Sec. 2 *of Ord.* 11 *of* 1967 (*O*) *not* ultra vires.

Section 2 of Ordinance 11 of 1967 (O) is not *ultra vires* the Provincial Council and the applicant, which is a body corporate in terms of the section, is entitled to claim a membership fee from an owner of land in the Province.

Stated case in terms of Rule of Court 33 (1) and (2). The facts appear from the judgment.

J. J. F. Hefer, for applicant.

H. J. O. van Heerden, for respondent.

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Cur. adv. vult.

Postea (August 19th).

HOFMEYR, J.: The plaintiff is the Orange Free State Vermin Control and Wild Life Protection Society which is commonly known as Oranje-jag. The Society is a body corporate in terms of sec. 2 of Ord. 11 of 1967 (O).

The defendant is a farmer of the farm "Bankies", district Ladybrand and the plaintiff sues him for membership fees for the years 1968 and 1969.

Defendant denies liability and the issue between him and the Society rests solely upon legal questions which are decisive for a great number of other persons who also refuse to pay membership fees.

Because there is no issue in respect of the relative facts, the parties agreed:

(*a*) that the case shall be heard directly by this Court although the amount claimed falls within the jurisdiction of the magistrate's court, but that no claim for costs will be made;

(*b*) that a written statement of the facts in the form of a stated case in terms of Rule of Court 33 (1) and (2) will be placed before the Court.

For the purposes of this judgment it is not necessary to repeat all the stated facts. Reference will only be made to the facts which are of importance for the motivation of the judgment. The parties agree that membership fees would be due to plaintiff if the legal questions should be decided in its favour.

In connection with the legal questions the parties hold the following points of view:

Plaintiff avers that defendant is liable to pay the amounts claimed in terms of the provisions of Ord. 11 of 1967 and plaintiff's constitution as approved by the Administrator on 23rd July, 1968.

Defendant avers that the amounts are not due in view of the fact that sec. 2 of Ord. 11 of 1967 is *ultra vires* the Provincial Council—

(i) on the ground thereof that it contains the possibility of exceeding the Provincial Council's legislative authority, in view of the provisions of plaintiff's constitution and potential amendments thereof;

alternatively:

that it may involve matters in respect of which the Provincial Council has no legislative authority;

(ii) on the ground thereof that it in effect levies land tax and authorises plaintiff to collect it.

Plaintiff's point of view in connection with this averment is that—

(i) the Ordinance cannot be interpreted so as to vest authority in plaintiff or the Administrator to amend the constitution so as to exceed the legislative authority of the Provincial Council;

(ii) that the Ordinance does not levy land tax, but provides exclusively for the financing of a body which renders services in a sphere, properly entrusted to the Provincial Council.

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Mr. *van Heerden* in his address said that although he did not waive his other legal ground in his written heads of argument he would only address the Court in respect of the first submission and its alternative, which, in my opinion, can hardly be distinguished from the main submission.

I think that Mr. *van Heerden* acted wisely in not taking up the time of the Court in an endeavour to justify the submission that in effect a land tax has been levied and that the Ordinance is null and void because the imposition of such a tax falls outside the legislative authority of the Provincial Council.

Because the Provincial Councils within their sphere have sovereign legislative authority, it is not possible to attack any provision in an Ordinance solely on the ground that it is incomplete, ineffective, unreasonable or unjust. If a provision is reasonably expedient to promote the expressed object of the legislation it is an impossible task to submit that the object can also be attained in another or better way and without incidentally tending to exceed the powers of the Council. (See *Joyce and McGregor Ltd.* v. *Cape Provincial Administration,* 1946 A.D. 658 at p. 672 and *S.* v. *Le Grange,* 1962 (3) S.A. 498 (A.D.) at pp. 504 and 505).

In *R.* v. *Dickson,* 1934 A.D. 231 which was referred to in the case of *Le Grange,* the Appellate Division expressly confirmed the view of the

Court *a quo* that a measure of injustice was done to persons in the position of the appellant as a result of the way in which the city council exercised the powers conferred on it by the Provincial Ordinance in the specific case. Notwithstanding this the Appellate Division without hearing counsel for the State declared the Ordinance *intra vires,* although it conferred authority on city councils to restrict, regulate, control or completely prohibit, in specified areas, parking places of taxis and buses on private property. Such interference with the rights of owners of private property was, according to the Appellate Division, proper for the furtherance of the lawful object of the Ordinance (to wit, of conferring on city councils adequate powers of local government) and was accordingly held by the Court to be unassailable.

Where this is the point of view in the decided cases, it cannot, in my opinion, be argued successfully that sec. 2 (2) of Ord. 11 of 1967 is not reasonably conducive to the attainment of the objects of the Ordinance (Sec. 2 (2) provides that every owner of land must be a member of plaintiff and, subject to an exception which is not applicable here, must pay annual membership fees). The argument advanced on behalf of plaintiff that it makes possible the organisation of all owners of property in the Province in one body whereby the extermination of vermin can take place in an organised and effective way, is certainly not so arbitrary and farfetched that it must be dismissed. That the object could possibly be attained by different methods and that it may be unreasonable and unjust, may, as stated previously, not be successfully advanced in the case of a sovereign legislator. Mr. *van Heerden* did also not, as indicated previously, attempt to defend this point of view.

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R. v. *Ras,* 1938 T.P.D. 32 can be distinguished from the present case because "land" and "owner" are for the purposes of the Ordinance so defined and qualified that the Ordinance under consideration is not susceptible to the same criticism advanced in the *Ras* case, viz. that the scope of the Ordinance was too wide.

The Ordinance is, in my opinion, clearly not objectionable on the ground of this argument.

I next consider the only actual attack with which Mr. *van Heerden* persisted at the trial, viz. that sec. 2 of the Ordinance is *ultra vires* the powers of the Provincial Council because the possibility is created therein of exceeding the legislative powers of a Provincial Council.

Sec. 2 of the Ordinance, as far as it is relevant, reads as follows:

"2. (1) Subject to the provisions of this Ordinance, the affairs of Oranjejag shall be managed in accordance with the provisions of its constitution, as approved by the Administrator, and for this purpose it shall be a body corporate, capable of suing and being sued in its corporate name and of performing all such acts as are necessary for or incidental to the exercise of its powers and the performance of its functions.

(2) Every owner of land in this Province shall be a member of Oranjejag and shall pay annually to Oranjejag a membership fee not exceeding ten rand; Provided that—

(*a*) no membership fee shall be paid by a member if the size of the land of which he is owner on the date on which such fee becomes payable is less than 100 morgen in extent;

(*b*) membership fees may differ having regard to the difference in the sizes of the land of which members are owners on the date such fees become payable.

(3) The constitution of Oranjejag shall not be amended except with the approval of the Administrator.

(4) .....

....."

As Mr. *van Heerden's* argument developed during the trial it became clear that he agreed with Mr. *Hefer* that Provincial Councils are sovereign legislative bodies within their allocated sphere; that the Provincial Council of the Free State is competent to pass an Ordinance with the object of exterminating vermin; that such Ordinances are not objectionable on the ground of unreasonableness or similar grounds and that the Provincial Council is competent to pass Ordinances in respect of matters which are necessary to exercise the powers expressly granted to it.

Mr. *van Heerden* then poses the rhetorical question whether Provincial Councils may confer powers (e.g. to city councils) which fall outside its own authority. The answer to this must be in the negative.

Mr. *van Heerden* admits that the Provincial Council may confer on the Administrator an unlimited discretion, but with this proviso that it must be exercised within the limits of its own authority. According to Mr. *van Heerden* an Ordinance with only one section whereby power is conferred on the Administrator to regulate the extermination of vermin by regulations would be entirely competent.

If, however, the Provincial Council should purport to confer authority on the Administrator to start a university it goes without saying that such an Ordinance would be *ultra vires*. According to Mr. *van Heerden* it would be the case *ab initio* and not only the steps taken by the Administrator would be invalid.

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Mr. *van Heerden* had to admit that he could produce no authority where such an Ordinance was declared *ultra vires* before any action based thereon had been taken. It is also clear that in practice it can hardly ever happen because courts of law are not prepared to consider academic questions.

In this connection Mr. *van Heerden,* however, pointed out that plaintiff had in fact already applied the section in practice and that he instituted the present proceedings to enforce its provisions against plaintiff (*sic*) and others. The question before the Court is therefore not academic or hypothetical. If plaintiff's claim is invalid and not enforceable, it can, according to Mr. *van Heerden* be ascribed to the invalidity, of sec. 2.

On the facts Mr. *van Heerden* did not in this connection refer to any positive exercise of authority by plaintiff or the Administrator-in-Council which would have fallen outside the scope of the authority

vested in them by sec. 2. According to him the section must also be interpreted so widely as to include the approval of the provisions in plaintiff's constitution in connection with the protection of wild life. If this is indeed the case, it incidentally appears that this power would also not be *ultra vires* the Provincial Council because in the course of argument attention was directed to the fact that powers had been conferred on Provincial Councils to pass Ordinances for the protection of animals. (See Governor-General's Proclamation 177 of 1935 promulgated in terms of the power vested in him by Act 10 of 1913. This Proclamation remained in force, in terms of sec. 35 of Act 38 of 1945).

Mr. *van Heerden,* however, submitted that the fact that he was not relying on an earlier transgression of powers did not invalidate his argument because, logically the case where the Provincial Council vested powers in the Administrator-in-Council to start a university (something which naturally falls completely outside the powers of a Provincial Council) cannot be distinguished from the case where the Provincial Council clearly gave *carte blanche* to the Administrator to approve any constitution whatsoever placed before him. Both enactments would according to him, be *ab initio ultra vires* the Provincial Council, because the Council would have purported to have delegated more powers than it, itself possessed.

No fault can be found with the logic of this submission. The question is, however, whether the submission is in any way applicable to the stated case?

Whether the submission is applicable or not depends upon the real intention of the Provincial Council in sec. 2 of the Ordinance. It is naturally clear that the Court cannot undertake to qualify the wording of the Ordinance or to add anything to it and thus act as legislator. (See *R.* v. *Ras,* 1938 T.P.D. 32, and *Johannesburg City Council* v. *Arumugan and Others,* 1961 (3) S.A. 748 (T) at p. 771).

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I regard it my duty only to fathom the wording of the Ordinance by applying the accepted rules of interpretation.

Mr. *Hefer* submitted that the apparently unlimited and boundless powers conferred on the Administrator-in-Council are indeed not so unlimited and boundless as suggested by Mr. *van Heerden.* With this submission I readily agree.

The words of sec. 2 (1) must not be read in *vacua* but in the context of the Ordinance as a whole. The preamble of the Ordinance already indicates in general that the enactment is intended to provide for the extermination of vermin and related matters. Then sec. 2 (1) provides specifically that the affairs of the plaintiff are to be managed in accordance with the provisions of its constitution as approved by the Administrator and everything, according to the initial words of the subsection, must be done subject to the provisions of the Ordinance. (Although the Provincial Council, as stated previously, would have

been entitled to incorporate provisions in the Ordinance in connection with the protection of animals, it appears that the Provincial Council did not avail itself of the opportunity. It is, therefore, very clear that the Administrator is required only to approve constitutions which will give effect to the intention of the Ordinance (i.e. the extermination of vermin). If he does not do this he acts *ultra vires* the Ordinance but such behaviour would not make the Ordinance itself invalid. (See *R.* v. *Abdurahman,* 1950 (3) S.A. 136 (A.D.) at pp. 149-150).

The conclusion to which I come coincides with the principle enunciated in *Die Uitleg van Wette* by L. C. Steyn, 3rd ed., at p. 210:

"From the fact that each conferment of authority is directed at some object, it follows that the authority granted cannot be utilised to frustrate such object or for any other object or for no object at all."

It follows that sec. 2 of the Ordinance is not *ultra vires* the Provincial Council. In connection with the order of the Court I was requested merely to grant the amount claimed to plaintiff. As stated no order for costs was prayed for.

The defendant is, therefore, ordered to pay to plaintiff the amount of R5.

Plaintiff's Attorneys: *Van De Wall & Partners.* Defendant's Attorneys: *Symington & De Kok.*