



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 9095/18

In the matter between:

DFPT FINANCE NPC
HORTGRO (PROPRIETARY) LIMITED

First Plaintiff / Respondent
Second Plaintiff / Respondent

and

VINTAGE DISTRIBUTORS (PTY) LTD

Defendant / Applicant

Date of hearing: 2 November 2021

Date of Judgment: 23 November 2021 (delivered by email to the parties' legal representatives. The Judgment shall be deemed to have been handed down at 12h30)

JUDGMENT

Henney, J

Introduction:

[1] This is an interlocutory application for the delivery of trial particulars, launched by the defendant, to an action instituted by the plaintiffs against the defendant, for a claim for levies which the plaintiffs are empowered to claim from the defendant. The Minister of Agriculture, Forestry and Fisheries ("the Minister"), on 6 November 2015, acting under sections 13 and 15 of the Marketing of Agricultural Products Act 47 of 1996 ("the Act"), and notices in Government Gazette number 39375 ("the notices"), established a statutory measure for the collection of levies from producers of apples

(R602) and pears (R606) in certain regions. The defendant is a producer and exporter of apples and pears in the region of Vyeboom, Grabouw.

[2] The levies are imposed and calculated according to volumes and formulas, as defined in paragraph 6 of the notices. The levies are payable to the plaintiffs under paragraph 7 and 8 of the notices, and the payment is to be made not later than 60 days following the month wherein a quantity of apples was delivered for export or sale.

[3] The plaintiffs allege in their particulars of claim that over the approximate period from 1 October 2016 to 30 September 2017 levies in the total amount of R1 120 959,92 were imposed on the defendant, of which only R500 000 has been paid, the balance of R620 959,92 remaining outstanding as of 30 April 2018. The plaintiffs therefore allege that the defendant is indebted to them in the amount of R620 959,92. Mr Fagan SC, assisted by Ms Thiart, appears for the plaintiffs, and Mr Schreuder SC for the defendant.

The defendant's Plea:

[4] The defendant in its plea states that the payments made by it, had been made under the erroneous impression that the Minister was duly authorised to establish statutory measures for the collection of levies, from producers of apples and pears in certain regions, and/or were made under protest. It further contends that the establishment, by the Minister, of measures for the collection of levies from producers of apples and pears in certain regions, as alleged in the plaintiffs' particulars of claim, was unauthorised and accordingly null and void. The levies imposed on the defendant, as referred to in paragraph 7 of the particulars of claim, were accordingly unauthorised and unlawful.

[5] In this regard, the defendant submits that sections 5 and 9 of the Act provide for the discussion, consideration and the taking of decisions by the National Agricultural Marketing Council ("the Council"), regarding statutory measures to be submitted to the Minister for consideration, in respect of statutory measures for the collection of levies from producers of apples and pears in certain regions, by way of notice in the Government Gazette. Section 9(1)(f) and 9(2) of the Act provides for reports to be compiled and submitted to the Minister in respect of these statutory measures; section

10 provides for a request in writing to the Minister for the establishment, continuation, amendment or repeal of statutory measures; while section 11 provides for reports to be furnished by the Council to the Minister; for adequate publication of notice to affected groups; for consideration of objections or representations by affected groups; and for the appointment, if necessary, of a committee in terms of section 7, to consider such objections or representations and to advise the Council.

[6] The defendant submits that, having regard to these provisions of the Act, the Minister acted without authority when establishing statutory measures and determining levies on apples and pears respectively, as published in Government Gazette 39375 on 6 November 2015. Consequently, the defendant is not liable for payment of such levies to the plaintiffs.

[7] The defendant, on 17 May 2019, also filed a counterclaim for repayment of the amounts it had paid as a result of the unlawful and unauthorised imposition of the levies. In response thereto the Plaintiffs filed a special plea and plea in reconvention on 24 May 2019, wherein they, inter alia, for purposes of this application, averred that, based on the claim in reconvention (which is premised on a finding by this court that the Minister and the Council acted without authority and unlawfully), the Minister and Council should have been joined as parties, because they have a direct and substantial interest in the outcome of the claim in reconvention.

[8] The plaintiffs then requested, inter alia, that the claim in reconvention be stayed pending the joinder of the Minister and the Council, and that the defendant be directed to join those parties.

[9] The defendant, in response, withdrew the claim in reconvention. The plaintiffs nevertheless insisted that the Minister and the Council have a direct and substantial interest and, given the failure of the defendant to have continued with its claim in reconvention, and to have joined the Minister and the Council as defendants in reconvention in respect of that claim, these issues cannot be determined by this court by way of a collateral challenge.

[10] In reply to this, on 19 June 2019, the defendant filed a rejoinder, wherein it rejoined issue with certain allegations the plaintiffs made in their replication. In this regard the defendant stated that: 'Whilst it is correct that the defendant withdrew its claim in reconvention it is denied that it did so in response to the plaintiffs' allegation that the Minister and the Council have a direct and substantial interest in the outcome of the matter.'

This application:

[11] As a result of the plea, on 14 January 2021, the defendant made a request for trial particulars¹, in so far as the defendant launched a collateral challenge wherein it disputed the legality of, and/or authority for, the establishment by the Minister of statutory measures for the collection of levies, as alleged in paragraph 4 of the plaintiffs' particulars of claim, and the imposition of levies on the defendant, as alleged in paragraphs 7 to 11 of the plaintiffs' particulars of claim. In this request for trial particulars, the defendant requests answers to the following:

- 1) Was a request in writing delivered to the Minister, in terms of section 10 of the Act, by a directly affected group, including the first and /or the second plaintiff, to establish, continue, amend, or repeal one or more statutory measures before the Minister established the statutory measures for the collection of levies from producers of apples and pears, as alleged by the plaintiffs? If the answer to this question is in the affirmative, a copy of such a request in writing is required and the plaintiffs are required to state when such a request was made.
- 2) Did the Council publish a notice, terms of section 11 of the Act, setting out the particulars of the request and an explanation in connection therewith in the Gazette, and such magazines or newspapers as may be sufficient in order to bring the request to the attention of the directly affected groups, and inviting such directly affected groups to lodge any objections or presentations relating to this request within a specific time? If the answer to this question is in the affirmative, a copy of such notice, as published in the Gazette and magazines and newspapers, is required and the plaintiffs are required to state when such notice was published.

¹ Pages 18 to 20 of the Index 4.

- 3) Did either of the plaintiffs deliver a request, in terms of section 11(1) of the Act, for the referral by the Minister of a request for the establishment of statutory measures to the Council for investigation and for a report thereon? If the answer to this question is in the affirmative, copies of the request and report are required and the plaintiffs are required to state when the request was made and the report delivered, respectively.
- 4) Did the Council, in terms of section 11(6) of the Act, send a copy of its recommendations regarding the introduction, amendment or appeal of a levy, to the parliamentary committees for their information? If the answer to this question is in the affirmative, the plaintiffs are required to provide a copy of such recommendations, state when they were sent to the parliamentary committees, and what response, if any, was received thereto.

[12] Plaintiffs, in reply to this request, on 27 January 2021, stated that: 'None of the requests for trial particulars arises from allegations made by the plaintiffs in the particulars of claim as amended. Instead they arise from allegations made by the defendant in its plea. The requests are therefore interrogatory in nature, and the further particularity that has been sought is moreover not strictly necessary to enable the defendant to prepare for the action. In the premises, the plaintiffs decline to provide the further particularity that has been sought.'

This resulted in the launching of this application, by the defendant, on 4 August 2021.

[13] The plaintiffs' reasons for refusing to file trial particulars as requested, apart from what is stated above, are the following:

The plaintiffs submit that when a plaintiff in proceedings relies on a publication in the Government Gazette – be it a statute, regulation or a notice – it is not required to allege and prove that the publication was valid. The plaintiffs submit that, normally, if reliance is for instance placed on a regulation, it is not necessary to allege and prove that the cabinet Minister who made the regulation in question acted within the scope of her statutory authority when doing so. Allegations of that kind are simply not made; all that would normally be alleged, is the fact that the regulations were published in the Government Gazette and therefore exist. They submit that the reason why a plaintiff is not required to allege and prove this, is because of the fundamental legal principle

of *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*, which means that all acts are deemed to have been performed lawfully unless the contrary is proved.

[14] They submit that this does not mean that the validity of a statute, regulation or notice published in the Government Gazette cannot be challenged. It can indeed be challenged in an inappropriate case, and may be challenged collaterally, but the onus is on the party making the challenges to prove its invalidity. The presumption of validity must be rebutted and the contrary must be proved. It is only once the invalidity of an administrative action has been proved in evidence, that the *omnia praesumuntur* principle ceases to have effect.

[15] The plaintiffs in this action claim payment from the defendant of levies payable by producers and exporters of apples and pears, the defendant being such a producer and exporter. The defendant's obligation to pay levies arises from statutory measures for the collection of levies from producers and/or exporters of apples and/or pears. The establishment by the Minister of these measures is reflected in the notices published on 6 November 2015 in the Government Gazette. The publication of the notices by the Minister is not in dispute in the pleadings. Accordingly, *omnia praesumuntur* and the onus is on the defendant to allege and prove the invalidity of the notices.

[16] The defendant denies liability to pay the levies to the plaintiffs, and this denial is amplified by alleging that the establishment of the statutory measures by the Minister was unauthorised, unlawful and accordingly void. It also alleges in this regard that there had been a failure to comply with certain terms of the Act. According to the plaintiffs, the defendant sets out a shopping list of such alleged failures pertaining to sections 10, 11, 11(1), 11(2)(c), 11(2)(d), 11(6) and 13 of the Act and implicating not only the Minister but also the Council.

[17] The plaintiffs submit that the defendant in its plea, however, merely sets out these relevant provisions of the Act and alleges that the Minister and the Council did not do whatever the provisions referred to required them to do. This the defendant does notwithstanding its onus. According to the plaintiffs, the defendant's allegations are lacking in any factual foundation and particularity and, in an unusual attempt to

remedy this shortcoming, the defendant delivered a request for trial particulars, wherein it requested the plaintiffs to provide particulars as to the Minister's and the Council's alleged failures to comply with the relevant provisions of the Act. The plaintiffs submit that what the defendant is effectively doing, is asking the plaintiffs to provide further particularity in the defendant's allegations of invalidity, which is not the purpose of further particulars.

[18] As an example, they submit that the defendant pleads, firstly, that section 11(1) of the Act 'provides, inter alia, for referral by the Minister of requests for the establishment of statutory measures [to] the Council [for] investigation and the report thereon' and alleges that 'the Minister eager to receive such a request and did not refer such request to the Council [for] investigation and the report thereof'.

[19] Secondly, the defendant also requested from the plaintiffs the following further particularity: 'Did either of the plaintiffs deliver a request in terms of section 11(1) of the Act for referral by the Minister of a request for the establishment of statutory measures to the Council for investigation and for a report thereon? If the answer is in the affirmative, copies of the request and the report are required and the plaintiffs of the parties thereto when the request was made in the report delivered, respectively.'

[20] The plaintiffs submit that the defendant says, extraordinarily so in light of its pleaded case, that it is 'unable to determine the extent to which the Minister followed the statutory prescriptions'.

The plaintiffs submit that, by making this extraordinary statement, the defendant thus acknowledges that its plea has no factual foundation, and is merely a shot in the dark. It is not permissible to make allegations in a pleading that have no factual foundation. According to the plaintiffs, it is particularly not permissible to do so and then to insist that the other party should fill in the blanks.

[21] The plaintiffs oppose the application to compel them to deliver trial particulars on four grounds:

- 1) Firstly, because it is incumbent upon the defendant to prove the allegations made in its plea. The plaintiffs' case is that they have come to court on the

basis that the statutory measures are valid, as they are entitled to do. It is for defendant to allege and prove that the statutory measures are invalid due to the Minister's or the council's failure to have complied with certain provisions of the Act, and in proving its defence, it is not open to the defendant to call on the plaintiffs to give further particulars of the defendant's allegations pleaded in defence.

- 2) Secondly, because the onus rest on the defendant to prove the invalidity of the statutory measures, it is not required of the plaintiff to prove the validity thereof. The defendant's attempt to build its application to compel on the plaintiffs' reliance on the statutory measures is misplaced. The plaintiffs' reliance is based on the fact of publication, by merely proving the existence of the notices. The *omnia praesumuntur* principal permits of such reliance without the need to adduce any evidence. The defendant is relying on allegations of invalidity of the statutory measures in its own plea, as a foundation for the further particular sought, which it is precluded from doing, as it is not the function of further particulars to assist a party to prove allegations which it has itself made.
- 3) Thirdly, the defendant is collaterally challenging the wrong parties. Despite challenging the validity of the statutory measures based on the Minister's and the Council's alleged failure to comply with certain provisions of the Act, the defendant has not taken any steps to join the Minister and the Council in terms of these proceedings. The plaintiffs submit that a collateral challenge is available 'only if the right remedy is sought by the right person in the right proceedings', and absent the participation of the Minister and the Council these are neither the right proceedings nor the right parties.
- 4) Fourthly, because these are not the right proceedings or the right of parties to a collateral challenge, the defendant is now in a position where it is seeking further particulars from the wrong party. The plaintiffs submit that they merely collect the levies payable in terms of the statutory measures. They are not the authors of the notices, nor did they have anything to do with the establishment of the statutory measures, and they do not possess the requisite information. The plaintiffs are in a position in which they

cannot respond to the defendant's request for further particulars, nor is it appropriate that they should be compelled to do so.

[22] The Plaintiffs further submit that the defendant is purporting to raise a collateral challenge by hoping to defend itself in civil proceedings, for payment of outstanding levies to the plaintiffs, by challenging the validity of the statutory measures.

[23] They further submit that it is a well-established principle in our law, as laid down in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*² ("Oudekraal"), that 'our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

Further that it is not impermissible for them to place reliance on this principle merely because the defendant has a right, in the present instance, to raise a collateral challenge to the validity of the statutory measures, where the defendant, because of its failure to comply, is threatened with coercive action by the plaintiffs. The plaintiffs submit, as was held in *Oudekraal*, that a collateral challenge to the validity of an administrative action is only available when the right remedy is sought by the right person in the right proceedings, and submits that this is not the case here.

[24] The present action between the defendant and the plaintiffs is not the 'right proceedings, nor are the parties the 'right persons'. This is so because the defendant is challenging the validity of the statutory measures based on the Minister's and the Council's alleged failure to comply with certain provisions of the Act. The plaintiffs merely collect levies that are payable in terms of the statutory measures. They are not the authors of the notices, nor did they have anything to do with the establishment of the statutory measures. The defendant, despite being aware of this, because it was raised in the pleadings, has failed to take steps to join the Minister or the Council.

[25] They submit that the defendant's reliance on the case of *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*³ ("Cable City") to support its submission that the joinder of the Minister was not necessary, is misplaced for various reasons. These are, inter alia, that the administrative action complained of in that

² 2004 (6) SA 222 (SCA) para 26.

³ 2010 (3) SA 589 (SCA).

particular case had already been found to be unlawful in another judgment, based on a previous finding that the particular notice that constituted the administrative action in that case was unlawful, and it was considered to be a defence against a refusal to pay levies in terms of that notice; Cable City in that case was also not seeking a declaration of constitutional invalidity, nor had it asked for the notice to be set aside and accordingly rule 10A did not find application. In this particular case, the defendant is not relying on a previous decision or settled legal precedent as a ground for refusing to pay levies. It is merely relying on the alleged invalidity of the statutory measures, which invalidity has not previously been challenged or adjudicated upon.

[26] The defendant in this case is also effectively challenging the constitutional validity of the statutory measures and rule 10A does find application. In its replying affidavit, the defendant alleges that the levies were unlawfully imposed by the Minister who exceeded his or her powers in terms of the enabling legislation and because the statutory measures made by the Minister to empower the plaintiffs to collect levies are invalid. For the defendant to succeed with its defence that its refusal to pay levies is justified because the statutory measures are invalid, the trial court will have to make such a finding, which is a constitutional finding as to the validity of a law.

[27] The plaintiffs submit that the Supreme Court of Appeal has on occasion⁴ found that it is inappropriate for courts to make orders declaring policy directives invalid without providing the relevant organs of state an opportunity to intervene, which is no different to the present matter. The plaintiffs therefore submit that absent the participation of the Minister and the Council, these are not the right proceedings or the right parties for the collateral challenge raised by the defendant.

[28] Therefore the plaintiffs submit that, because of the defendant's failure to join the Minister and the Council, it has sought further particulars from the wrong party. This was clearly stated by the plaintiffs in their answering affidavit, where they said that they are not in possession of the record of decision-making that resulted in the publication of the notices and that they were not the decision-makers. They therefore lacked the requisite information and knowledge to furnish the further particulars sought

⁴ Dean of the Law Faculty, University of the North West, and others v Masisi 2014 (6) SA 61 (SCA) para 10.

by the defendant. The defendant is the party alleging that the notices are invalid, and the plaintiffs' adversary in the action. It is for the Minister and the Council to respond to the allegations by the defendant, who has failed to join them. The plaintiffs submit that they are not in a position in which they can be expected to respond to defendant's request for trial particulars.

The defendant's submissions:

[29] The defendant submits that because of its general denial that the statutory measures have been lawfully and validly established by the Minister, it remains for the plaintiffs to prove the validity of the establishment of the statutory measures, which is an essential feature of their claim. Based on the cause of action pleaded by the plaintiffs, a collateral challenge to the validity of administrative actions of the Minister and the Council is available to the defendant. In such a case, the court will have no discretion to allow or disallow the raising of this defence.

[30] It was for these reasons that the defendant requested the trial particulars, on the basis of the issues in respect of which the defendant joined and rejoined in relation to crucial allegations raised by the plaintiffs in their amended particulars of claim and replication, to which the defendant filed a request for trial particulars. These trial particulars were called for in so far as the legality of, and/or authority for, the establishment by the Minister of statutory measures for the collection of levies, as alleged in paragraph 4 of the plaintiffs' amended particulars of claim, and the imposition of levies on the defendant, as alleged in paragraphs 7 to 11 of the plaintiffs' amended particulars of claim, are concerned.

[31] The defendant submits that the first ground for the refusal of the trial particulars requested by them, which is that they do not arise from allegations made by the plaintiffs in the amended particulars of claim, falls to be rejected, as the plaintiffs bear the onus of proving the legality of the Minister's determination of the levies. In this regard they submit that the plaintiffs rely on a number of cases⁵ for their contention that they are not required to allege and prove that the Minister's regulations are valid.

⁵ MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) paras 102-103 and fn 75; Administrateur van Suidwes - Afrika en 'n Ander v Pieters 1973 (1) SA 850 (A) at 864 D; Philips v SA Reserve Bank and others 2013 (6) SA 450 (SCA) para 48; Njongi v MEC, Department of Welfare, Eastern Cape, 2008 (4) SA 237 (CC) paras 44-46.

These cases, the defendant submits, do not deal with the onus, but instead with the maxim *omnia praesumuntur rite esse acta*.

[32] The defendant submits that the SCA similarly did not express a view on where the onus lies, but confirmed the application of the maxim *omnia praesumuntur* in the case of *Phillips v SA Reserve Bank*. According to Mr. Schreuder, in none of these cases, the court determined that the onus was on the person challenging the decision-maker's authority.

[33] The defendant also submits that, on the other hand, these cases referred to by the plaintiffs are to be distinguished from the present one, and that the onus to prove authority on the part of the Minister rests on the party seeking to coercively enforce tariffs which the Minister made on the strength of the impugned authority. In this regard the defendant relies on the case of *South African Local Authorities Pension Fund v George Municipality*⁶ ("*George Municipality*"). According to the defendant, the other important basis on which the authorities that the plaintiffs rely on fall to be distinguished from the present matter, is in the context of the debate regarding the incidence of the onus, which is that when a defendant launches a collateral challenge to administrative action, it is not asking the court to exercise its discretionary powers to review and set aside as invalid the administrative action, but is merely raising a defence to the validity or otherwise of the Minister's and/or Council's power to make these statutory measures for the implementation and enforcement of the levies.

[34] The defendant submits that from a procedural point of view, the steps to be followed by the parties in a matter such as the present include:

- 1) the defendant raises a collateral challenge in its pleadings by raising as his defence the invalidity of the decision-maker's decision because of the lack of a prescribed statutory step;
- 2) it is incumbent on the plaintiffs to prove at the hearing that the requisite statutory step has been taken;
- 3) the defendant will succeed with its collateral challenge defence if the existence of the prerequisite statutory step is not proved.

⁶ WCHC case number 20644/08.

[35] The defendant further submits that the question surrounding the onus in collateral challenges was categorically and unequivocally answered by the SCA in *South African Local Authorities Pension Fund v Msunduzi Municipality*⁷ (“*Msunduzi Municipality*”). The defendant also referred to *National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry v Photocircuit SA (Pty) Ltd and others*⁸ (“*Photocircuit*”) and *Department of Transport & Others v Tasima (Pty) Ltd*⁹ (“*Tasima*”).

[36] The defendant therefore submits that based on these cases, from the SCA as well as the CC, it must follow that the maxim *omnia praesumuntur* does not relieve the plaintiffs of the onus to prove the validity of the levies which they seek to impose and enforce on the defendant.

[37] It further submits that the plaintiffs’ reliance on the case of *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and others*¹⁰ (“*Magnificent Mile*”) (where reference was made by Madlanga J to *Aquila Steel (SA) (Pty) Ltd v Minister of Mineral Resources and Others*¹¹) (“*Aquila Steel*”) for the contention that the onus is on the defendant to rebut the presumption of validity, and that it could not call on the plaintiffs to give particulars which will assist in preparing a defence that it has alleged and that it must prove, is flawed. This being because these cases were not concerned with collateral challenges raised between the correct parties in the correct proceedings in which a coercive action was sought to be imposed on the party challenging the invalidity of the administrative actions in question. Both these matters are concerned with the assertion of mineral rights and of the party being faced with coercive measures. It submits that in *Magnificent Mile* one of the pivotal questions to be answered was whether the rule in *Oudekraal* was applicable, so that an invalid grant had to be set aside before pre-existing old order rights could be asserted.

[38] The defendant further submits that it may very well be that an applicant in review proceedings, which were launched to set aside an invalid administrative act, may bear the onus to rebut the presumption of validity on the same basis as he bears the onus to plead and prove his grounds for review.

⁷ 2016 (4) SA 403 (SCA) para 37.

⁸ 1993 (2) SA 245 (C).

⁹ 2017 (2) SA 622 (CC) paras 82-96.

¹⁰ 2020 (4) SA 375 (CC).

¹¹ 2019 (3) SA 621 (CC).

[39] The position is, however, quite the opposite when it comes to that of a party raising a collateral challenge, as was emphasised in *Msunduzi*, where it was said that it remained for the appellant (in this case the plaintiffs) to prove the validity of the act which is an essential feature of their claim.

[40] Regarding the second ground for the denial of the particulars as requested, which is that they are not strictly necessary to enable the defendant to prepare for trial, the defendant submits it should similarly be rejected, as the defendant is entitled to be provided with the requested particulars so as to prevent it being surprised at the trial when the plaintiffs prove their case regarding the Minister's authority and the legality of his/her determination of levies. I do not think it would be necessary to deal with the issue non-joinder raised by the parties, as I am only requested to deal with this application on the basis of the provisions of rule 21(4).

Evaluation:

[41] In *Oudekraal*¹² it was held that:

'It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.'

A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'. The court further noted that it is important to bear in mind that in those cases in which the validity of an administrative act may be challenged collaterally, a court has no discretion to allow or disallow the raising of that defence. The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisites for the legal force of the action that follows and, *ex hypothesi*, the subject may therefore not be precluded from challenging its validity. This is to be distinguished from cases where a court is asked to set aside an invalid administrative act in proceedings for judicial review, where it has a discretion to grant or to withhold the remedy.

¹² Fn 2 above, paras 35-37.

[42] The court went on to say that it is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy (i.e. collateral challenge or judicial review) thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a singular remedy that arises whenever an administrative act is invalid. An analysis of the problems that arise in relation to unlawful administrative action recognises the value of certainty in the modern bureaucratic state, a value that the legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation, and it is also to give effect to the principle of legality, which is fundamental to our legal order. The court went on to say that while the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the state cannot generally be against the subject unless the initiating act is legally valid.

[43] The defendant, based on these well-established principles and the case it has pleaded, is entitled to raise a collateral challenge to the statutory measures upon which the plaintiffs base their claim for the payment of the levies. The questions thus to consider are, firstly, whether the maxim *omnia praesumuntur rite esse acta* (“the maxim”) or the presumption of validity (“the presumption”) is applicable in a matter such as this where a collateral challenge is raised. Secondly, on who does the onus fall to prove the validity or invalidity of the statutory measures. Thirdly, if not on the plaintiffs, then whether plaintiffs are obliged to supply the defendant with the trial particulars on which the basis of the collateral challenge rests.

The applicability of the maxim:

[44] The maxim has a wide field of application where its use has through precedent become compulsory in certain factual situations; it operates as a presumption of law, but for the rest is often used as a presumption of fact, in the sense that a court draws

an inference on the basis of accepting that matters have taken their regular course.¹³ Parties often rely on presumptions to obviate the need to prove certain facts.

[45] The application of this presumption in this particular case is based on the fact that when an official performs an action in the course of his or her duties, it is presumed that he/she was properly appointed and that the authority to perform that action was conferred on him or her. This presumption further has as its effect that there has been compliance with all the formal requirements for regular or valid government action. It is thus accepted, by relying on this presumption, that, in the absence of evidence to the contrary, the procedural requirements and other formalities have been complied with, and also that any condition precedent to the validity of the performance of an act by the authorised public official has been fulfilled.¹⁴ In *S v Thornhill*¹⁵ thus the following was said:

‘The ambit of the presumption of regularity expressed in the maxim *omnia praesumuntur rite esse acta* is not well-defined. In Hoffman and Zeffert *The South African Law of Evidence* 4th ed at 548 it is said that because of its indefinite scope, its limits can only be illustrated by examples. The learned authors nevertheless proceeded to define it thus –

“If an official purports to have exercised a power which is effective only upon compliance with certain formalities, it will be presumed that all the necessary formalities have been observed.”

[46] In *Phillips*, referred to by Mr. Fagan, the practical effect of the presumption was illustrated where the court said:

‘I am satisfied that it can be accepted that the notice was date-stamped by the registrar’s representative and placed on the notice board designated for the purpose and that it remained there for 20 days. The maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* (all [official acts] are presumed to have been duly performed until the contrary is proved), on which the appellant’s counsel relied, applies, as it did, for example, in *Cape Coast Exploration Ltd v Scholtz and Another* 1933 AD 56. In that case one of the issues was whether the first defendant had been sent a letter from the Civil Commissioner for Namaqualand notifying him that his diamond-prospecting certificate had been withdrawn. A

¹³ Schmidt and Rademeyer: ‘The Law of Evidence’ (LexisNexis, Durban) at 5-21, para 5322.

¹⁴ *Ibid.* at 5-22, para 53221.

¹⁵ 1997 (2) SACR 626 (C) at 634.

copy of the letter had been found in the commissioner's office but no evidence was led to the effect that the original had been posted. Wessels CJ said (at 76):

“Absolute proof is well-nigh impossible where the frail recollection of men is a factor, and especially is this the case when we have to deal with the recollection of officials who almost automatically do much of their routine work. Hence the importance of the maxim *omnia praesumuntur rite esse acta*. See *Byers v Chinn and Another* (1928 A.D. at p. 332). We must presume that an official will carry out the ordinary routine work of his office, for in our experience this is what usually occurs. Hence we must presume that if an official letter is written and a copy filed, that the former is dispatched in the ordinary course of business to the person concerned and that he has received it.”

It seems therefore that this maxim has been applied for decades in our law, in cases where a party is obliged to prove the authority and the validity of the official conduct that results in administrative action. It does not relieve the party raising a collateral challenge from the evidential burden of proving the invalidity of the administrative action, expressed by the maxim.

[47] Mr Schreuder, appearing for the defendant, submitted that in circumstances such as the present, where a collateral challenge is raised, this presumption finds no application, and he referred to a number of cases to support this proposition¹⁶. But none of those cases was any reference made to the presumption. In none of those cases was it relevant to the dispute, was there any reliance placed on the presumption, or did it find any application.

[48] In *Msunduzi Municipality*, the decision that was challenged as administrative action was the amendment of the rules of a pension fund, where the pension fund did not, firstly, rely on the presumption because it was not an administrative act performed by an official in the course of his or her duties. In that particular case, it was purely a factual question in the face of a denial that the pension fund rules were properly amended, in the absence of any evidence during trial to prove such an amendment. Secondly, even if the act of amending the pension fund rules by its board could be considered an action by an official body in the course and scope of its duties, there was no reliance placed on the maxim *omnia praesumuntur rite esse acta*, for the court

¹⁶ See cases referred to in para 33 and 35 supra

to hold, as Mr. Schreuder contended, that the maxim or presumption does not apply in cases where collateral challenges are raised.

[49] The court in *Msunduzi Municipality* did not consider the issue, it was not relevant to the case and there was no definitive decision that the presumption is not applicable. On the facts of the case, in the absence of the decision-maker (the fund) relying on the presumption, and where the decision-maker accepted that there was an onus on it to prove the amendment of the pension fund rules, the court found that it failed to do so with the evidence it had presented during the trial. This is evident from a reading of the judgment where, particularly, the following was said about the evidence presented by the decision-maker:¹⁷

‘We are asked to glean from various documents the existence of a rule amendment made pursuant to a resolution that was approved by the registrar. However, as Gyanda J found, and as the Municipality argues, the Fund is unable to show when the resolution amending rule 4.2.2.1B, as now reflected in the consolidated rules, was taken at a meeting of the Board of Trustees. . . . The annexures to the particulars of claim thus do not bear out the claims made. And the evidence for the Fund also did not support the particulars. The Fund has failed dismally in presenting its own case.’

And further at para 33:

‘The Fund has not provided any evidence at all that supports its claim that the amended rate of contribution was agreed to by its Board of Trustees and validly approved by the registrar . . .’

All that these cases seem to confirm is what was said in *Oudekraal* and the many other cases regarding a person’s right in proceedings, other than a review, to raise a collateral challenge to administrative action. It does not deal with the presumption and it does not emphatically state that the presumption does not find application in matters where a collateral challenge is raised to the administrative action.

[50] The only relevance of these cases seems to be that it lays down the principle that a person has the right to challenge administrative action collaterally, which the court has to accept or reject; none of these cases state emphatically that it absolves a

¹⁷ Fn 7 above, paras 29 – 31.

party from proving the invalidity of the contested administrative action. The right to a collateral challenge to administrative action is the right to a specific remedy, which is a substantive right. It is a right to raise an allegation of invalidity to administrative action that still needs to be proven. I agree with the plaintiffs' submission that the defendant's reliance on the decision of *Merafong City v AngloGold Ashanti Ltd*¹⁸ is misplaced, where they argued that, whereas the Constitutional Court in that case held that it is not an absolute obligation on private citizens to take the initiative to invalidate decisions affecting them and that there may be many occasions where an administrative decision should be treated as invalid, even though no action has been taken to strike it down, this does not mean that the Constitutional Court concluded that in the context of the *Oudekraal* decision the onus has shifted. I agree with the plaintiffs' submission that the Constitutional Court was merely saying that it is not always necessary to bring an application to strike down administrative action. The plaintiffs are also correct that the Constitutional Court did not say that when the validity of administrative action is challenged the onus is on anyone other than the party challenging it. If this holds true and is the correct legal position in matters like this, it would mean that statutory measures should be treated as invalid until the plaintiffs prove otherwise.

[51] I furthermore agree with the plaintiffs that if that were the position, it would lead to chaos if all administrative actions are presumptively invalid. This is precisely the opposite of what was held in *Oudekraal* and *Merafong*, which, in my view, did not propose anything to the contrary. The rule in *Oudekraal* was discussed in the majority judgments in *Magnificent Mile* and *Aquila Steel*, with specific reference to the presumption, or the *Oudekraal* doctrine, by Madlanga J in the Constitutional Court. Madlanga J in *Magnificent Mile* takes issue with the view of Jafta J, that the presumption that administrative action is valid may be rebutted without any court process and discusses the practical implications thereof. The importance thereof for this case is that a mere allegation of invalidity of administrative action would not be enough to rebut the presumption of validity without a court process. In this regard, Madlanga J states: ' . . . I understand the qualification proposed by the concurring judgment to be that the rebuttal of the presumption may take place without any court

¹⁸ 2017 (2) SA 211 (CC).

process. My immediate practical, if not legal, difficulties are manifold. Who rebuts the presumption? Who – outside of a court process – determines that the invalidity of the administrative action has been proven and that, therefore, the presumption that has been rebutted; and how do they do that? What if there is disagreement on whether the illegality has been proven? The approach of the concurring judgment has the potential of taking us to the very realm of uncertainty from which the Oudekraal rule removes us. It takes us to the real possibility of a free-for-all.'

[52] In this regard Cameron J in *Aquila Steel*, with reference to the principle laid down in *Oudekraal*, that an administrative decision is valid and binding until set aside in judicial proceedings, says the following:¹⁹

'But what the *Kirland / Oudekraal* doctrine does not do is to fossilise constitutionally invalid administrative action as indefinitely effective. For rule-of-law reasons and for good administration, the principle puts a provisional halt to determining invalidity, without bringing the process to an irreversible end. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands. . . . [L]egal remedies are the province of the courts, and the courts alone. . . . It is the court that must consider whether to undo the invalid act, and its consequences, before pronouncing the act invalid.' (Internal footnotes omitted.)

[53] From the above, it is quite clear that the presumption, in all proceedings, even where a collateral challenge is raised, would still be applicable unless, as in some cases, the presumption is not relied upon or relevant, and the onus would be on the party relying on the invalidity of the administrative action. In all cases where a collateral challenge is raised by a party raising such a defence or challenge, the court has no discretion to allow or disallow the raising of that defence or challenge. The question that remains is how and by who the presumption should be rebutted.

[54] The mere fact that a party has a right to raise a collateral challenge, and the court has no discretion to allow or disallow the raising of that as a defence, does not mean that the party raising that defence or challenge is absolved from proving the invalidity of the administrative action. As has happened in *Msunduzi Municipality* and *George Municipality* and where the presumption is not relied upon or relevant to the

¹⁹ Fn 11 above, paras 95-96.

dispute in issue, the party relying on the administrative action must prove the validity thereof.

[55] In coming back to this case, in my view, the presumption is applicable, and the statutory measures for the collection of the levies, on which the plaintiffs' claim is based, as published in the Government Gazette, are presumed to be valid. And based on the maxim *omnia praesumuntur rite esse acta*, it is further presumed that there has been compliance with all the formal requirements as prescribed by the law and that any condition precedent to the validity of the publishing of the statutory measures in the Government Gazette has been fulfilled. The plaintiffs therefore would not be required to allege and prove this fact, based on this presumption.

[56] There is no evidence, or a prima facie case, apart from the allegations made by the defendant in its plea, that the statutory measures are invalid. The onus would therefore be on the defendant to present evidence to rebut the presumption, and it cannot be expected of the plaintiffs to present them with the necessary trial particulars to do so.

[57] Given the conclusion I come to, for the purposes of the application in terms of rule 21(4), there is no need for me to decide whether the Minister or the Council should have been joined as parties to these proceedings. That was also not the purpose of this application.

Order

[58] In the result therefore I make the following order:

That the application that the plaintiffs be directed to furnish the defendant with trial particulars, as requested on 13 January 2021, is dismissed with costs, including the costs of two counsel.

R.C.A. Henney

Judge of the High Court