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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. 3332/2008

In the matter between:

THABO MOFUTSANYANA DISTRICT MUNICIPALITY Applicant/Plaintiff

and

RUDNAT PROJECTS CC Respondent/Defendant

HEARD ON:	24 MAY 2012
CORAM:	MURRAY, AJ
JUDGEMENT BY:	MURRAY, AJ
DELIVERED ON:	12 NOVEMBER 2012

[1] This is an application for leave to amend the applicant's particulars of claim. On **11 June 2008** the Applicant issued

summons against the respondent under case number **3332/2008.** It sought to claim from the respondent payment of regional services levies and regional establishment levies (‘the levies”) in terms of the Regional Services Councils Act, Act 109/1985, (“the RSC Act”) and reg 11(1) of the regulations for the Calculation and Payment of Regional Services Levy and Regional Establishment Levy (“the regulations”).

[2] A similar application against Afgri Operations Ltd under case number 3724/2008 was set down with this application. By agreement only application 3332/2008 was argued and only one judgment is given since the facts, issues and arguments in both are virtually the same. The respondents in both applications are two of the thousands of entities in the Free State against whom the applicant issued summons in June 2008.

[3] Mr K Kemp, SC, and with him Mr S Grobler, appeared for the applicant and Mr Danzfuss, SC, for the respondents. Because of the long and chequered history of this matter, it is apposite to set out briefly the relevant background in order to view the application in its proper context.

[4] Section 12 of the RSC Act prescribed the specific mechanisms to be used for calculating and collecting the levies. For that purpose the Minister of Finance issued the regulations in terms of s 12(1)(b) read with subsection (1A) of the said Act and published under Government Notice No 340 of 17 February 1987 ("the Notice"). The regulations determined the parties and procedures authorised to calculate and administer the payment or collection of such levies.

[5] The reason why the applicant suddenly, on its own version, issued between 6 000 and 11 000 summonses in June 2008 against respondents who had never filed returns and had never paid levies before, was s 59 of the Small Business Tax Amnesty and Amendment of Taxation Laws Act, Act 9 of 2006 ("the 2006-Act") which determined that liability for any RSC levies for which summons was not issued by 30 June 2008, would lapse on that date. This followed on the insertion of subsection (1B) into s 12 of the RSC Act by s 19 of the Taxation Laws Amendment Act 9 of 2005 ("the 2005-Act") to impose a 2-year prescription period on the assessment of RSC levies.

[6] The applicant, on its own version, had no documents of the respondents. It could therefore not have known whether any of the registered respondents were indeed liable for unpaid levies, and if they were, for what amount. It simply estimated random amounts for the 2008-summonses which it then "*assessed*" and claimed from the thousands of respondents in terms of reg 11(1).

[7] By then, however, reg 11(1) had already been declared invalid in two different Provincial Divisions, namely in **ALGOA REGIONAL SERVICES v NEIL BUCHNER,** an unreported Eastern Cape Division judgment, case no. **1150/1994**, delivered on **5 June 1995**, and in **THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD** an unreported North Gauteng judgment, case no. **34431/2005,** delivered on 18 December 2007.

[8] In 2009 the Supreme Court of Appeal in **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD**, 2010 (3) SA 589 (SCA) in para [17] at 599B - C struck down reg 11(1). The provision was held to be invalid for

inconsistency with the empowering provisions, and therefore unlawful, rendering the council's assessment invalid. Maya, JA, in para [24] at 600F – H held that the Legislature never intended councils to have the power to summarily estimate levies and never granted the Minister authority to permit such exercise.

[9] The Constitutional Court in **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD,** (CCT 85/09) [2009] ZACC 34; 2012 (5) BCLR 445 (CC) (3 DECEMBER 2009) refused leave to appeal against the decision of the Apellate Division.

[10] Two months after issuing the flurry of summonses in June 2008, the applicant sought to amend its particulars of claim. A day after effecting the amendment, the applicant gave notice of yet another amendment. It then sought an order to compel the respondents to submit to the applicant a true and proper statement of account, the debatement thereof and other substantiating documents.

[11] Three entities, Steyn-Enslin, Rudnat Projects CC and Afgri

Operations Ltd in a test case excepted to the amended particulars of claim in this Court. They averred that the applicant's particulars of claim disclosed no cause of action since the RSC Act did not vest regional services councils with powers to estimate levies or to demand the statement and debatement of accounts from levypayers in default.

[12] On **23 February 2010** Mocumie, J, in **THABO MOFUTSANYANA DISTRICT MUNICIPALITY v STEYN-ENSLIN & PARTNERS; RUDNAT (PTY) LTD; AFGRI (PTY) LTD,** Case No. 4281/2008, upheld the exception.

[13] The applicant was granted leave to appeal to the Supreme Court of Appeal, but on one question only, namely whether the common law ought to be developed in terms of S 39(2) of the Constitution to vest councils with powers enabling them to demand delivery of a statement of account and the debatement thereof as an extension of the procedural remedy in litigation. That was the applicant's case on the papers.

[14] From the judgment of Mthiyane, JA, in **THABO MOFUTSANYANA DISTRICT MUNICIPALITY v STEYN-**

<u>ENSLIN & PARTNERS AND OTHERS</u>, 2012(3) SA 179 (SCA), paras [6] and [9], it is clear, however, that when the applicant during the hearing realised that reg 13(1) which prohibited councils from demanding books or records, stood in the way of a claim for the statement and debatement of accounts, its *viva voce* argument on appeal instead focused on its alleged right to press for the submission of returns in terms of reg 9(4) as part of its right to claim levies. Instead of asking for the common law to be developed to allow councils to demand statement and debatement of accounts, it then asked for the Court to be vested with the power to order reluctant levypayers to submit returns.

[15] The Court in para [5] stated that it was never the appellant's pleaded case that it required the submission of returns. The Court declined to develop the common law in view of the "*clear and sufficient*" "*wording of the legislation*" regarding the applicant's remedies in the absence of returns. The appeal was dismissed.

[16] The applicant now seeks to justify its renewed attempt at an amendment by relying as 'advice' on Mthiyane JA's two *obiter*

remarks in paras [10] and [12] that nothing prevented the appellant from seeking a mandamus for returns and that reg 13 provided the remedy in the form of an assessment by the Commissioner. Although Mr Kemp correctly conceded that the Appellate Division was never asked to consider prescription, he averred that the said *dicta* and the last part of the order, *"that the appellant may, if so advised, within 30 days hereof give notice of intention to amend its particulars of claim",* indicated that that Court did not consider the applicant's claim to be *"dead".*

[17] On **9 November 2011** the applicant accordingly filed its fourth Notice of Intention to Amend since the original summons was issued in 2008. The objection thereto led to the two opposed applications presently serving before this Court.

[18] The main issues in contention are whether the applicant's claim for returns has prescribed in terms of the Prescription Act; whether the respondent's liability for levies has lapsed in terms of s 59 of the 2006-Act and/or whether the applicant's and the Commissioner's authorisation for the calculation and recovery of levies has prescribed due to s 12(1B) of the RSC Act.

PRESCRIPTION:

[19] It is common cause that the word "debt" is used in its wide sense in the Prescription Act, Act 68 of 1969 ("the Prescription Act") and that a debt is not only the payment of a monetary amount but also an action. Both parties claimed to be relying on such wide meaning of "debt" as defined, for instance, in **ESKOM v STEWARTS & LLOYDS OF SA (PTY) LTD**, 1981 (3) SA 340 (A) at 334E – F:

"a debt is 'that which is owed or due; anything such as money, goods or services, which one person is under an obligation to pay or render to another'".

[20] Regarding a monetary debt it was made clear in **THE MASTER v IL BACK**, 1983(1) SA 986 (A) at 986H that:

"... the words "debt is due" in S12(1) of the Prescription Act 68 of 1969 mean that there must be a liquidated money obligation presently claimable by the creditor for which action could presently be brought against the debtor".

[21] Mr Kemp's main argument was that the levies are a tax, subject to a 30-year prescription period in terms of the Prescription Act. He averred, furthermore, that the rendering

of a return was an ancillary debt or "*a debt in respect of a tax imposed by legislation*" as defined in the said Act. With reference to **COMMISSIONER OF CUSTOMS & EXCISE v TAYOB,** 2002(6) SA 86 (T) he referred to the obligation to pay the levy as the main debt whose prescription in terms of s 10(2) of the Prescription Act would also destroy the ancillary debt to provide returns after 30 years.

[22] He maintained that the levies are not a fee or a charge or proportionate to services and goods rendered to the levypayers, but a tax, very like sales tax or income tax because they have the following features:

22.1 They are compulsory and arise *ex lege,* as with a tax; and are subject to a public law compulsion to pay in terms of s12(9);

22.2 They are imposed by general national legislation, in this instance by the RSC Act, and more specifically S12(1)(b) thereof, to generate revenue for the councils in the general interests of the public rather than for sectoral interests, e.g. in terms of s 12(5) for a Local Government Training fund and in terms of s 12(6)(d) for establishing and improving the infrastructure of transport services;

22.3 They are controlled by the Minister of Finance who also deals with tax affairs and disputes about levies and can be referred to the Special Tax Court under the Income Tax Act, Act 58 of 1962;

22.4 They are imposed on a wide sector of the community, being all economically active business entities, rather than on a particular interest group or a narrow sector of the population.

[23] He argued, furthermore, that such debt was automatically created by the promulgation of the Notice in the designated areas where the RSC levies applied. Once the areas were designated, he averred, everyone who conducted business in those areas would know that they were liable to register, liable to render returns and liable to pay, and that was all that was necessary to make such levypayers owe the money to the council and create the debt the applicant is now entitled to claim.

[24] Mr Kemp could not refer me to any case law in which the levies were indeed found to be a tax. The closest were two decisions in which indirect reference to taxation was made, namely **THE LAW SOCIETY OF TRANSVAAL v MINISTER**

OF CONSTITUTIONAL DEVELOPMENT, 1989 (4) SA 914 (T) in which the Court did not deal with the issue whether the levies are a tax or not, but referred to the "*tax burden on levypayers"* and to the RSC Act as being *in pari materi* to the Income Tax Act, and **ESKOM v BOJANALA PLATINUM DISTRICT MUNICIPALITY AND ANOTHER,** 2005(4) SA 31 (SCA) in which the Appellate Division assumed that the RSC levies were a tax even though it has never called them such or decided that they were indeed a tax.

[25] However, while it was indeed 'assumed' in **ESKOM v BOJANALA**, *supra,* in par [8] at 36H-37A that RSC levies *'constituted taxation'*, that 'assumption' was expressly based on *"RSC levies properly assessed, due and payable"* and "*RSC levies – properly assessed but unpaid"*. In par [9] the Court pertinently stated that *"it did not necessarily follow"* that a claim for a refund of "*RSC levies improperly assessed, and therefore not due, also constitutes taxation".* The Court's rationale for the latter is particularly apposite *in casu,* namely that the:

"c*ouncils had no power to collect or levy more by way of tax than was due to them in terms of Act 109 of 1985 and the* *regulations made thereunder. Such payments, even if believed to be due at the time, were thus not taxes but something else."*

[26] The respondent indeed averred that levies were not taxes but something else. With reference to **MAIZE BOARD v EPOL**, *supra*, Mr Danzfuss averred that the RSC levy applied to a limited sector only within areas delineated by the council, which areas could in terms of s 2(1)(b) of the RSC Act be excluded, changed or re-delineated. He also maintained that the RSC levies were not being collected from all inhabitants of the delineated areas or from the public in general, but only from economically active employers and enterprises registered for VAT in any delineated area.

[27] Although he conceded that s 12(6) did determine that a certain portion of the levies could be applied for the administration, improvement and maintenance of the infrastructure and for the transport system in the given area, as averred, he pointed out that s 4(1)(a) specifically prohibited councils from collecting tax on immovable property and that s 12(11) determined that the levies were deemed to be a "debt", not a "tax", to the council.

[28] Mr Danzfuss argued that tax cannot be imposed on tax and pointed out that on **21 August 1992** the Minister of Finance in Government Gazette Notice 2370 of August 1999 made Value Added Tax applicable to the Eastern Free State RSC levies presently under consideration. The applicant, in fact, claims VAT in the proposed *pro forma* return.

[29] For this argument he relied on **MAIZE BOARD v EPOL,** 2009 (3) SA 110 (D & CLD), para [27.3] at 121G where it was found that the levies levied by the Maize Board for purposes of service delivery, maintenance and administration, and which levypayers were obliged to pay, were not a tax, which is why VAT could be imposed on them.

[30] He argued, furthermore, that VAT is not payable on rates in municipal accounts, but only on the municipal services provided. He contended that it was apparent from Schedule 2 of the RSC Act that the Regional Services Council was indeed a service delivery organisation which *inter alia* provided water, electricity, sewerage, transport planning, roads, and passenger transport services.

[31] Mr Kemp's counter-argument was that when the RSC Levies were introduced they were intended to be a tax and the mere fact that VAT was subsequently imposed on those levies by the VAT Act did not change the original nature of the levies as a tax.

[32] Mr Danzfuss contended, furthermore, that the levies were not a tax but a different type of debt which is subject to the normal 3-year prescription period. He submitted that, had there been any question of a tax, a levy could only have become a tax subject to a 30-year prescription period once all the prescribed procedural steps had been followed and the levy had been properly assessed and was due and payable as a liquidated amount. In view of **ESKOM v BOJANALE**, *supra,* I find this argument persuasive.

[33] He maintained, furthermore, that a 3-year prescription period also applied to the duty to deliver a return. The latter, he contended, was a separate independent debt which merely constituted one of several administrative steps in the process of calculating a levy.

[34] That there is no unanimity about when a charge is a fee or a levy or a tax for purposes of the Prescription Act, is very clear from **EXTINCTIVE PRESCRIPTION** where, on p. 41, Loubser states with reference to some definitions in **MASTER v IL BLAKE & CO LTD**, 1983 (1) SA 986 (A) at 1000H, that a tax constitutes a pecuniary charge imposed by a public authority upon persons or property for public purposes but may also be called a "levy" or "duty", while a charge by a public authority for rendering services or performing its functions is a "fee", not a tax.

[35] The RSC Act itself in s 1 defined the RSC Levy not as a "tax" but as *"a levy"*

"(a) on remuneration … paid or payable by an employer to the employees employed or deemed to be employed by him within the region in question; and

(b) in the case of a person (other than a company) carrying on or deemed to be carrying on an enterprise in the region for his sole account or in partnership of one or more other persons on his drawings in relation to such enterprise. …"

[36] The RSC Act, furthermore, in terms of s 12(8) allowed the levies to be deducted "*as an operating expense for the purposes of income tax by any employer or person"*. And it determined in s 16 that no laws regarding *exemption* from taxes or levies were applicable to the RSC levies.

[37] Although s 11(a) of the Prescription Act assigns a 30-year prescription period to *"any debt in respect of taxation",* it is important to distinguish between a *'debt'* pertaining to taxation and other administrative matters pertaining to taxation. In **<u>ESKOM v BOJANALA</u>**, *supra,* at [13] at 38, for instance, the Court stated that:

"it seems to me rather that the expression "in respect of" *was used by the Legislature to cover ancillary debts claimable by the State such as interest and penalties"*

[38] *In casu* the debt claimed is delivery of a return, in other words an administrative duty, not a duly assessed, properly calculated debt.

[39] And even if the levies were indeed to be found to be a tax, the 30-year prescription period would not necessarily apply to the unassessed levies or to the administrative steps involved in

the determination of the levies. Even the Income Tax Act itself, for instance, imposes certain other prescription, limitation or expiry periods on specific powers relating to the recovery of taxes. S 79 thereof, for instance, limits to three years the Commissioner's authority to withdraw or amend an official's decision, notice or communication regarding taxation. S 79(1) limits the Commissioner's power to raise an additional assessment to three years from the date of an assessment (if any) in terms of which any amount which should have been assessed to tax was not so assessed, or in terms of which tax was assessed in a lesser amount than it should have been, except in cases of fraud or misrepresentation. S 73A compels a taxpayer to retain the relevant documentation for five years after submission of its income tax return. (See: **DE KOKER & URQUHART, INCOME TAX IN SOUTH AFRICA,** Vol 1A at 27-6).

[40] It is significant, as found in **OERTEL AND ANOTHER NNO v DIREKTEUR VAN PLAASLIKE BESTUUR,** 1983(1) SA 354 (A), that even though the 1969 Prescription Act is applicable to public law debts, it did not mean that every obligation to do or not to do something constitutes a debt for purposes of the Act.

It also stated that in extinctive prescription the emphasis is on default by the creditor and not on the conduct of the debtor. Although failure to pay tax is in most instances an offence, the 1969 Act does provide specifically for prescription of tax assessments in general.

[41] Thus, even if I were to decide, or to assume without deciding, as in **ESKOM v BOJANALA,** *supra,* that the levies, when properly assessed and due and payable would constitute ‘taxation’, in my view the viability of the applicant’s claim is ultimately determined by the two 2-year periods imposed on the Commissioner’s and the council’s powers by s 12(1B) of the RSC Act in 2005 and by s 59 of the 2006-Act The applicant denies that either of them affects its claim while the respondent avers that they are both fatal to the claim.

[42] In **EXTINCTIVE PRESCRIPTION** at p. 33-34 Loubser confirmed that the general 3-year prescription period applies to any liability of whatsoever kind that is subject to extinctive prescription *“and for which another prescription period is not specifically provided by the Prescription Act or any other Act”.*

He made it clear that where such other Act provides for particular prescription or limitation periods in respect of specific debts, the application of the Prescription Act is *excluded* to the extent that its provisions are inconsistent with the specific provisions of such other Act. (See also: **COMMISSIONER FOR CUSTOMS AND EXCISE v STANDARD GENERAL INSURANCE CO LTD,** 2001(1) SA 978 (SCA) at paras [12] and [13] at 985B/C-C and 985D-E.)

[43] One therefore has to examine the effect of subsection (1B) and of s 59 on the applicant's claim since both prescribe 2-year periods instead of any of the prescription periods in s 12 of the Prescription Act. In order to do so one needs to determine the nature of the provisions and the extent to which they are inconsistent with and would therefore oust the relevant provisions of the Prescription Act.

[44] That necessitates a closer look at the said provisions and the context in which they occur, and especially at the intention of the Legislature as it appears from the two Acts in terms of which the prescription, limitation or expiry periods were introduced. (See: **COMMISSIONER FOR CUSTOMS AND**

<u>EXCISE v STANDARD GENERAL INSURANCE CO LTD,</u> *supra,* at para [11].)

[45] In order to determine the effect of S 12(1B) on the claim and to determine whether the applicant can still rely on regulations 9(4) and 13, one needs to start with the enabling provision, s 12(1)(b). As was stated in **<u>THE MASTER v IL BACK</u>**, *supra,* at 1001C:

"no authority is needed for the statement that when interpreting an enabling statute, it, and the regulations passed pursuant thereto, must be construed in the light of its subject-matter and its objects to determine what it authorises."

[46] The object of s 12(1)(b) of the RSC Act was to empower the Minister of Finance to, by notice in the *Gazette,* determine in the manner in which the levies were to be calculated and paid, which he duly did in peremptory terms (*"shall be..")* in the regulations (set out in *'the Schedule'),* in the Notice promulgated as GN R340 in the *Government Gazette* 10613 of 17 February 1987.

[47] The introduction of the said s12(1)(b) Notice reads that the Minister of Finance:

"Under paragraph (b) of subsection (1) of section 12 of the Regional Services Councils Act, 1985 (Act No. 109 of 1985), read with subsection (1A) of the said section 12, … hereby determine that the regional services levy and the regional establishment levy shall be calculated and paid in the manner set out in the provisions contained in the Schedule."

[48] The said regulations were therefore promulgated in terms of two sub-sections, namely s 12(1)(b) which authorised the Minister to determine the method of calculation and payment of the levies and s 12(1A) which authorised the Minister to do all the things listed under s 12(1A), the relevant ones of which are set out below.

[49] S12(1A) empowered the Minister of Finance to "*in any notice contemplated in subsection (1)(b)" inter alia:*

"(c) determine how an amount upon which the regional establishment levy is payable shall be calculated;

(dA) authorise the Commissioner for Inland Revenue:

(i) to take such steps as the Commissioner may deem necessary to ensure that any levy payable under this Act is paid;

(ii) *to conduct audits of the affairs of any person who is or may be liable for the payment of any such levy;*

(iii) *to require any person to produce for examination any books, records or accounts or any other document which in the opinion of the said Commissioner are or may be necessary to determine the liability of such person or any other person for the payment of any such levy;*

(iv) *to determine or estimate the liability of any person for any such levy and to direct a council to make an assessment of such levy; and*

(v) *to furnish the council with a ruling or directives on the interpretation of any provision of Act or any such notice relating to the determination of the liability of any person for the payment of any such levy, which ruling or directive the council shall be obliged to apply;*

(*dB*) *authorise a council to administer, subject to any ruling or directive furnished by the said Commissioner under the provisions of paragraphs (dA)(v), any provision of this Act or of any such notice in so far as it relates to the determination of the liability of any person for or the payment or recovery of any such levy;*

(dD) *provide for an appeal against any decision of a council or the said Commissioner to the special Court referred to in S 83 of the Income Tax Act, 1962 (Act 58 of 1962) and for an appeal against any decision of the said court;*

(e) *make such other provisions as he deems necessary to enable a council to impose and claim any such levy."*

[50] In **CITY OF TSWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD,** (CCT 85/09) [2009] ZACC 34; 2010 (5) BCLR 445 (CC) (3 DECEMBER 2009) the Constitutional Court in footnote 6 quoted as follows from **ALGOA REGIONAL SERVICES v BUCHNER,** at pp 9-12:

"[T]he wording of subparagraph (1A)(e) specifically empowers the Minister to authorise things which are necessary *to enable the council to* impose *and* claim *a levy. Wide though the wording is, it relates solely to authority, firstly, for things which are essential to enable a council to assess what the levy is so that it can be imposed, and, secondly, for things which are essential for it to be claimed..."*

[51] This supports the submission by Mr Danzfuss that s 12(1) is a continuous section consisting of various components of the

action which the Minister of Finance was empowered to take regarding the determination and collection of the RSC levies. The empowerment of the Commissioner and the council to determine liability and to collect levies in terms of subsections (1A)(dA) and (1A)(dB), respectively, was their only authorisation to do so in terms of the Act and the regulations.

[52] The *sine qua non* for their powers therefore was the Minister's authorisation. That was made clear in **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v CABLE CITY** (SCA) *supra,* para [24] at 600F – H in which it was held that the legal force of the levies lay in the legal validity of the provisions made by the Minister's empowering the council to collect the levies, and that the Legislature never granted the Minister authority to permit councils to have the power to summarily estimate levies.

[53] It is indeed trite law that administrators have no inherent powers and that any exercise of public power which is not inferred from a lawful empowering source, such as legislation, is illegal or *ultra vires.* (See: **ADMINISTRATIVE LAW IN SOUTH AFRICA.** 2nd Ed, at 256.)

[54] I find nothing in the enabling legislation that empowered the Commissioner to assess the levypayers' liability or the council to collect such levies without authorisation by the Minister of Finance. (See: **<u>AFFORDABLE MEDICINES TRUST v MINISTER OF HEALTH ,</u>** 2006(3) SA 247(CC).)

[55] In 2005 the Legislature, by way of s 19 of the 2005-Act amended the said enabling provision by inserting into s 12 a further subsection:

"(1B) The Commissioner may not act under subsection (1A)(dA)(iv) and the council may not act under any authorisation in terms of subsection (1A)(dB) after the expiration of two years from the date the return from the employer or person concerned was received by the council or if no return was received, from the date on which a return was required to be submitted to the council unless the levy was not paid due to fraud or misrepresentation."

[56] Subsection (1B) was inserted by s 19 of the Taxation Laws Amendment Act No 9 of 2005 ("the 2005-Act") with effect from 8 June 2005. The Legislature's purpose with the said

amendment appears from the long title of the 2005-Act: namely:

"to amend the Regional Services Councils Act, 1985, so as to provide for a prescription period in respect of assessments".

[57] In order to determine what powers of the Commissioner would be curtailed by the 2-year prescription period introduced by subsection (1B), one needs to look at the specific words used in subsection (iv). In terms of subsection (1A)(dA)(iv) the Minister authorised the Commissioner to do three things;

57.1 to *determine the liability* of any person for a levy, or

57.2 to *estimate* the liability of any person for a levy; and

57.3 to *direct a council to make an assessment* of such levy.

[58] Subsection (1B) limits those subsection (iv) powers to two years. The prayers in Part B of the applicant's proposed amendment rely on exactly those powers, however: the applicant prays for the Court to authorise an "*estimate*" by the Commissioner after doing audits and examining books and records "for the purpose of "*determining the liability*" of the

respondent for such levies.

[59] A closer look at the powers conferred by the Minister on the Commissioner in subsections (i), (ii), (iii) and (v) in my view indicates that all of those powers are aimed at "*determining the liability*" of the levypayers for levies in order to enable the council to assess the levypayers for payment of the levies, which power is exactly what was limited to two years by subsection (1B).

[60] It appears therefore that such powers cannot escape the 2-year curtailment imposed by subsection (1B), especially in view of the concomitant curtailment of the council's powers to use the RSC Act and the regulations to determine and recover levies.

[61] I am therefore unpersuaded by Mr Kemp's argument that only subsection (iv) prohibited the Commissioner from determining or estimating liability for levies after the expiry of two years, and that he still retains the power to act in terms of the other subsections to determine liability, e.g. by way of audits and examination of books and records.

[62] The curtailment of the council's powers appears to go even wider than those of the Commissioner: subsection (1B) prohibits the council from acting under "*any authorisation under subsection (1A)(dB)"* to determine liability and to collect and recover levies after two years had expired from the due date of a return.

[63] The council's only authorisation to collect levies is that which was granted by the Minister in terms of subsection (dB), namely:

"*to administer any provision of the RSC Act or of any such notice"* in so far as it relates:

63.1 to the *determination* of any person's *liability* for levies; or

63.2 to the *payment* of levies; or

63.3 to the *recovery* of levies.

[64] Subsection (1B) therefore expressly prohibits the council from acting in terms of its authorisation to administer the payment of levies, the recovery of levies or the determination of liability for levies outside of the 2-year prescription period, whether in

terms of the provisions of the Act or in terms of the provisions of the Notice, i.e. the regulations.

[65] The council therefore has no authorisation to collect levies or to ask the Commissioner to determine liability without the Minister's authorisation. (See: **FEDSURE LIFE ASSURANCE LTD v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL,** 1999(1) SA 374 (CC) where the Constitutional Court in para [58] at 440D-E found that:

"*it seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."*

[66] With effect from 8 June 2005, therefore, subsection (1B) restricted to two years from the due date of returns the validity of the only authorisation that the council had been granted to use the provisions of the Act or the Notice to determine liability for levies or to recover levies. The council's powers to ask the Commissioner to assess or estimate liability, and its powers to ask for returns in order to collect payment of or recover levies were therefore restricted to two years.

[67] In part B of the proposed amendment the applicant prays for an order for *'payment'* of an amount *'assessed'* upon the respondent by the council, based on the Commissioner's determination of the respondent's liability. In other words, the applicant also asks for an order pertaining to exactly those of the council's powers that were limited to two years by subsection (1B).

[68] The Legislature's stated purpose with the introduction of subsection (1B) as set out in the long title of the 2005-Act, namely *"to introduce a prescription period for assessments"* taken with the clear wording of the Act in my view merely confirms that the Legislature did not intend the Commissioner's and the council's authorisation to perform the actions relied on for the relief prayed for in Part B of the proposed amendment to last beyond two years from 8 June 2005.

[69] Mr Kemp's averment that the relief prayed for would not depend on s 12(1)(b) but on s 12(11) which creates the debt

which the applicant now claims and on s 12(10) which gives concrete content to the debt by determining how to calculate the interest on the levy does not persuade, either. The only authorisation which the applicant had to recover levies, stemmed from s 12(1)(1A)(dB). It is my considered opinion that that authorisation was limited by subsection (1B).

[70] I therefore cannot accept Mr Kemp's averment that regulations 13 and 9(4) are still available to the applicant. The regulations, including regulations 9 and 13, are not original regulations or powers. They are derived powers in that the Minister in terms of the RSC Act had to authorise the Commissioner to determine liability and the council to claim payment and recover levies. The regulations therefore have no substantive status. Reg 13 merely specified in more detail the Commissioner's powers conferred in terms of subsection (1A)(dA). If such powers were to be used to determine or estimate liability for levies, therefore, their use would also be limited to two years by subsection (1B).

[71] Mr Danzfuss's proposition that reg 13 and s 12(1)(b) are actually the same provision since the power to place reg 13 on

the Statute Book stems from s 12(1A)(dA)(iv) and s 12(1A)(dB) is confirmed, in my view, by the definition of *"Act"* in reg 1, namely:

"Act means the Regional Services Councils Act, 1985, (Act No. 109 of 1985), including any regulation made under that Act and any notice published under that Act by the Minister of Finance in the Gazette".

[72] In my view the applicant therefore cannot be correct in alleging that reg 13 gives the Commissioner a separate substantive authorisation which he then has regardless of the provisions of s 12(1A)(dA)(1B). Thus I cannot agree with Mr Kemp the applicant can still use reg 13 to obtain the Commissioner's assistance if no returns are provided. All the regulations are part of the s 12(1)(b) Notice and as stated, the council's and the Commissioner's only empowerment to determine and collect levies stem from that Notice, and more specifically from subsections (dA) and (dB) thereof.

[73] In my view, furthermore, the introduction of subsection (1B) into the empowering provision in the RSC Act was clearly intended to pave the way for the Legislature's ultimate purpose of abolishing *"regional services councils and the levies that the*

Act allowed them to impose" with s 59 of the 2006-Act. (See: **CITY OF TSWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD,** (CC), *supra,* para 4 at 3.)

[74] The long title is now considered to be part of the statute for interpretative purposes and it is permissible to have regard to it, or to the preamble, to discover the intention of the Legislature or to confirm the clear and unambiguous meaning of a section. (See: **G E DEVENISH, INTERPRETATION OF STATUTES**, 2nd Impression, 1996, at 103 and 105.)

[75] The 2006- Act, in order to achieve its purpose (as stated in the long title) of withdrawing councils' power to claim RSC levies, introduced with effect from 1 July 2006 s 59 which provided as follows:

75.1 S59(2) :

"any regional establishment levy or regional services levy for which liability arose in terms of the Regional Services Councils Act, 1985 (Act 109 of 1985) ... before or on 30 June 2006 may be collected by a municipal council in accordance with the provisions of the Regional Services Councils Act";

75.2 S59(3):

“the liability for any regional establishment levy or regional services levy referred to in subsection (2) in respect of which a summons for the collection thereof has not been issued before or on 30 June 2008 lapses on that date”

75.3 S59(4)

“Subsection (2) is deemed to have come into operation on 1 July 2006.”

[76] The 2006-Act therefore granted municipal councils a 2-year window period, starting on 1 July 2006 and ending on 30 June 2008 within which to still claim unpaid levies in terms of the provisions of the RSC Act, the Notice or the regulations.

[77] It is clear from the wording of the provision that the 2-year window-period granted in S59(2) of the 2006 Act applied to calculation and collection of the levies by 30 June 2008 not only in terms of the provisions of the RSC Act itself but also in terms of the Notice and the regulations. Liability for any levies not so claimed by that date lapsed in terms of S 59(3).

[78] Instead of using the 2-year grace period between July 2006 and June 2008 to claim the returns and/or determination of the levies by the Commissioner in terms of the procedures expressly provided for that purpose by the RSC Act and the regulations, the applicant waited until two weeks before liability for all unclaimed levies would lapse and then, on its own version, launched the thousands of summonses based on estimates and "assessed" respondents who had never filed any returns and had therefore never paid any levies.

[79] The 2006-Act determined that the last levies Councils were authorised to claim, were those for June 2006. The last relevant return would therefore have been due 20 days later, namely on 20 July 2006. At the very latest, therefore, by 20 July 2008, because of subsection (1B) the Commissioner would have had to have done his determination of the respondent's liability and the council to have served such assessment on the respondent. Similarly, because of subsection (1B) if the council had wanted to rely on returns in order to assess the respondents' liability, by that date it would have had to have done so.

[80] In **CITY OF TSWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD,** (CC), *supra,* the Constitutional Court at 11 referred to the *"somewhat ambiguous legal status of the Notice"* which "*leaves the Notice lingering in a legal limbo"* since it has not yet been formally set aside and has therefore legally not been conclusively extinguished. It is indeed true that it seems incongruous for the Act to still be on the statute-book in view of the clear and explicit wording of s 59 of the 2006-Act , but it is my considered opinion that that is only because the Court has not been asked to consider the effect of subsection (1B) of the RSC Act and of s 59 of the 2006-Act in respect of prescription and lapsing of liability before.

[81] In my view the effect of subsection (1B) and of s 59 is exactly such that the RSC Act and the Notice can no longer be used to collect levies unless the defective summons issued in 11 June 2008 effectively stayed prescription in respect of the council's and the Commissioner's powers granted in subsections (dA) and (dB) and prevented the respondents' liability from lapsing in terms of s 59.

[82] The real question in the instant matter, in my view, is whether

in the light of the two 2-year limitation or prescription periods imposed by the 2005- and 2006 Acts, the respondent is liable to the applicant at all since more than two years have lapsed since, for instance, the cut-off date of 30 June 2012. (See: **COMMISSIONER FOR CUSTOMS AND EXCISE v STANDARD GENERAL INSURANCE CO LTD,** *supra,* para [10].*)*

[83] The next issue that needs to be determined, therefore, is whether the respondent's liability for levies lapsed after 30 June 2008 in accordance with s 59 of the 2006-Act and whether the council's and Commissioner's powers prescribed in accordance with subsection (1B) because of the defective summons issued on 11 June 2008. That would be the case if the proposed amendment introduces a new claim since service of the original summons would then not have interrupted prescription or stayed the lapsing of liability.

[84] In order to do so, one would first of all need to determine the true nature of s 59.

[85] For several reasons I consider s 59(3) to be providing for an expiry period ("vervaltermyn") rather than a prescription period. The first is the wording of the section, namely that *"liability ... lapses on that date".* The second is the purpose of s 59 as stated in the long title of the 2006-Act, namely *"to withdraw the power of the municipalities to levy and claim regional services levies".*

[86] In par [14] of **COMMISSIONER FOR CUSTOMS AND EXCISE v STANDARD GENERAL INSURANCE**, *supra,* for instance, Plewman, JA, found that nothing could better demonstrate the inconsistency of, for example, the delaying provisions of the Prescription Act, with the relevant provision of the Act under scrutiny than the words *'liability shall cease'*. In the instant matter that is exactly what s 59 of the 2006-Act provides, namely that *"the liability"* for a levy for which a summons for its collection has not been issued before or on 30 June 2008 *"lapses on that date".*

[87] The third reason is that, if s 59 of the 2006-Act is interpreted with reference to s 19 of the Taxation Laws Amendment Act 9 of 2005 ("the 2005-Act"), which just a year earlier inserted

subsection (1B) into s 12 of the RSC Act *"to provide for a prescription period in respect of assessments"*, the fact that both provisions imposed 2-year curtailments regarding the recovery of levies was no co-incidence. There is no indication that the Legislature did not deliberately decide not to use the words *"prescription period"* in the regard to s 59. Neither is there any indication that the words: *"to withdraw the power ... to collect regional services levies"* were not deliberately chosen to make clear its intention to abolish the council's powers. Such intention was made even clearer by explicitly providing for a cut-off date for liability exactly two years later, namely 30 June 2008.

[88] And the fourth reason is that the provision is compatible with what has been found to be one of the principal distinguishing characteristics of an expiry period as opposed to a prescriptive period, namely that expiry periods are *"viewed from the point of view of the debtor only"* and runs from the time that *"the debt arises in theory until the period has expired".* (See: **MEINTJIES NO v ADMINISTRASIERAAD VAN SENTRAAL-TRANSVAAL**, 1980(1) SA 283 (T), at 293.)

[89] The stated purpose of s 59, namely *“to withdraw the powers of councils to collect RSC levies”* in my view clearly confirms that the Legislature indeed intended to terminate such powers. (See: **MINISTER OF SAFETY AND SECURITY v MOLUTSI AND ANOTHER,** 1996(4) SA 72 (A) at 95.)

[90] *In casu* the condition imposed to prevent lapsing of liability was that summons must have been issued before 30 June 2008 to collect the levy. In the absence of impossibility, failure to comply with s 59 would result in the extinguishment of the plaintiff’s cause of action. (See: **MONTISI v MINISTER VAN POLISIE**, 1984(1) SA 619 (A); **MINSTER OF SAFETY AND SECURITY v MOLUTSI**, *supra,* p. 95.)

[91] S 15(2) of the Prescription Act determines that unless the creditor successfully prosecutes his claim under the process in question to final judgment, the interruption of prescription shall lapse and the running of prescription shall not be deemed to have been interrupted at all. I see no reason why the same principle would not apply to expiry periods. I respectfully

agree with Van Reenen, J, in **BRANDON v THE MINISTER OF LAW & ORDER AND ANOTHER,** 1997(3) SA 68(C), at 77C-I, that the purpose of the expiry period would be defeated if an amendment introducing a new cause of action, or, for that matter a new claim, were to be allowed.

[92] Since summons was issued before the cut-off date, one would have to determine if the defective summons indeed interrupted prescription and prevented the levy from lapsing. The claim instituted on 11 June 2008 could only have interrupted prescription of the applicant's claim or prevented lapsing of the respondent's liability for levies if it were prosecuted to finality. That would only be possible if the claim now sought to be introduced by the amendment were still the same claim as the original one instituted then.

[93] Unless the proposed claim is still recognisable as a claim for the same debt as that which was claimed in the 2008 summons, liability for the payment of the levies would therefore have lapsed on 1 July 2008.

[94] Mr Kemp averred that the debt has remained fundamentally the same, namely the respondent's obligation to pay the Rx due to the applicant. He maintained that the applicant relies on the wide sense of the word "debt" in the Prescription Act, Act 108 of 1969, and that all the amendments had merely been new quantifications of that debt. That might have been applicable had the claim *in casu* been for damages in a delictual claim. But it is not.

[95] The **IL** BACK-case cannot be support for this argument, either, since, as made clear in **BENSON AND ANOTHER v WALTERS AND OTHERS,** 1984 (1) SA 73 (A) at 82H, a debt is not due for the purposes of the Prescription Act unless it is or can be rendered immediately exigible at the will of the creditor. Furthermore, in **BACK** the relevant obligation was one to pay an already liquidated amount of money and the only question was whether that amount was presently claimable. The Appellate Division in that case did not pertinently consider the question whether the non-fulfilment of a mere procedural requirement for the institution of legal proceedings was a bar to the running of time against the creditor.

[96] The respondent, on the other hand, averred that the debt claimed in the present Notice of Intention to Amend is the duty to submit returns, not the duty to pay a random amount calculated by the applicant itself in terms of an invalid regulation as in the original summons. The question the Court should ask itself, it was submitted, is whether the random amount claimed in the 2008 summons is the same or materially the same as the proposed claim for delivery of returns, and in doing so to keep in mind that a mere overlap of facts is not enough to make it the same claim.

[97] Although Mr Danzfuss, in my view correctly so, conceded that the applicant did previously claim payment of an amount, he submitted that the grounds on which the proposed prayers were based, as well as the contents of the prayers were totally different, based on totally different provisions and regulations. He argued that the mere fact that the applicant in the end wants money, did not change the fact that by implication the debt which the applicant originally claimed was its right to obtain payment as part of its right to recover levies as compared to the respondent's obligation to furnish returns which is merely a preparatory administrative action preceding

calculation of the levy.

[98] Mr Danzfuss submitted that the returns which form the subject of this application, which is a claim for documents in the process of becoming a levy, should not be confused with a claim for a debt which is already a levy and which has the status of a levy. He pointed out that it is only once all the administrative and procedural steps had already been taken that the levy can be calculated and only then that the money can become due and payable. In other words, only then the debt is created.

[99] He maintained that the debt is now the duty to submit returns (one of several administrative steps prior to calculating the levy) as opposed to payment of the estimated amount which the applicant originally claimed. Although the *purpose* may be to calculate the claim with the furnished returns, the source and content of the prayers claimed, are totally different. And, as he pointed out, the test is not whether the claim has the same purpose, but indeed whether it is for the same debt.

[100] He also averred that although the theme is the same, namely

that the levypayer is liable for money, that the Applicant wants to claim the money, and that the Applicant needs the returns in order to be able to claim the money, the fact that the theme is the same only means that there is an overlap of similar averments. It does not mean that it is the same claim on the same cause of action.

[101] He therefore maintained that the proposed claim was a totally different claim, based on different statutory provisions, a different source in law, a different cause of action and different prayers which are not recognizable in the original unamended particulars of claim, and therefore constitutes a new claim. (See: **STANDARD BANK OF SA v ONEONATE INVESTMENTS (in liquidation)**, 1998(1) SA 811 (SCA).)

[102] Mr Kemp, on the other hand, averred that the applicant *in casu* had a pre-existing right to be paid the amount owed by the respondent and that it was that right that it now seeks to enforce. He argued that the calculation of the levy was just a procedural step which did not amend or complete the cause of action but merely determined the quantum of the levies.

[103] In order to assess the impact and implication of the proposed amendment and determine whether a new claim is indeed being introduced, one needs to compare the debt and cause of action in the original particulars of claim issued on **11 June 2008** with those in the proposed amendment. (See: **STANDARD BANK OF SA LTD v ONEANATE INVESTMENTS (PTY) LTD 1995(4) SA 510 (C)**, at 555B-C; **EVINS v SHIELD INSURANCE CO LTD**, 1980(2) SA 814 (A) at 836D; **IMPREFED (PTY) LTD v NATIONAL TRANSPORT COMMISSION**, 1990(3) SA 324 (T) at 329H – 330C.)

[104] I agree with Mr Danzfuss that the test to determine whether the cause of action is still the same is not whether the applicant's prayers have the same purpose, but indeed whether they are for the same debt. The *original* particulars of claim and the relief prayed for therefore has to be recognizable in the proposed amendment.

[105] In its original 2008 summons the applicant's stated cause of action was its *"statutory entitlement to recover"* from respondent *'being a person or entity not so exempted"* [from paying levies] the levies in terms of s 12 and s 12(1)(a) and

the interest in terms of s12(10) of the RSC Act and in terms of s 59(2) of the 2006-Act. Roughly speaking, the claim was for payment of an estimated amount.

[106] The applicant then in terms of reg 11(1) simply:

"*assessed the defendant to be liable to it in respect of regional levies probably payable in respect of the relevant period in the estimated amount"*

and claimed:

*"(1) payment of the amount of R 33 140,46***;**

(2) payment of interest on the aforesaid amount at the rate of 15.5% per annum a tempore morae, from date of issue of summons till date of payment;

(3) costs of suit."

[107] The applicant now seeks leave to amend its amended particulars of claim by deleting it in its entirety, save for the two paragraphs identifying the parties, and by substituting the entire body of the previous particulars of claim with new paragraphs 3 to 15 and new prayers. In the proposed

amendment the applicant relies on:

107.1 the respondent's obligation in terms of reg 9 to pay to applicant levies ... calculated in terms of regs 2-4 and 5-8

107.2 the respondent's obligation to provide applicant with monthly returns as from 1 March 2000, irrespective whether any relevant levy was payable or not;

107.3 breach of respondent's statutory duty to effect payment or render returns in terms of reg 9;

107.4 the applicant's own inability to "calculate, determine, levy and claim" because of such breach;

107.5 the applicant's entitlement to the provision of a statutory return;

107.6 applicant's entitlement to submit the matter to the Commissioner to determine liability in accordance with s 12 (1A)(dA) and reg 13;

[108] The proposed prayers are for:

"A. An order in the following terms:

1. that defendant be ordered to render to the plaintiff within sixty (60) days from the date of this order, a true and proper return in the form of annexure ***"A"*** *hereto for the relevant monthly periods of June 2004 to and inclusive of June 2006 irrespective whether or not any relevant levy is payable in respect of such month or period;*

2. payment by defendant to plaintiff within sixty (60) days from the date of this order of whatever amounts appear to be due to the plaintiff in respect of Regional Services Levies and Regional Establishment Levies as calculated and set forth in the monthly returns rendered in terms of prayer 1 above;

3. interest on the said amount at the rate of 11.5% effective from 1 July till 31 October 2004; 10.5% effective from 1 November 2004 till 31 October 2006; 11% effective from 1 November 2006 till 28 February 2007; 12% effective from 1 March 2007 till 29 February 2008; 14% effective from 1 March 2008 till *date of payment;*

4. *costs of suit;*

5. *further and/or alternative relief;*

B. *In the event of*

(i) *the defendant failing to render the returns as ordered in prayer **A.1** above; and/or*

(ii) *the defendant not paying in full any levy for which the defendant is liable; and/or*

(iii) *the plaintiff having reason to believe that the information submitted by defendant in any of the returns is incomplete, incorrect, suspect or unreliable and payment not being a full discharge of the defendant's true liability for levies*

that leave be granted to plaintiff to approach the above Court for an order in the following terms:

1. *payment by defendant of such amounts in respect of Regional Services Levies and Regional Establishment Levies as assessed upon the defendant by the plaintiff on such amounts as estimated by the Commissioner for Inland Revenue subsequent to an audit of*

the affairs of the Defendant and examination of the books, record, accounts, statements, tax invoices or any other documents which in the opinion of the South African Revenue Service are or may be necessary for the purpose of determining the liability of the defendant for such levies, such assessment from the Receiver being placed before this Court;

2. interest on the said amount at the rate of 11,5% effective from 1 July 2004 till 31 October 2004; 10,5% effective from 1 November 2004 till 31 October 2006; 11% effective from 1 November 2006 till 28 February 2007; 12% effective from 1 March 2007 till 29 February 2008; 14% effective from 1 March 2008 till date of payment;

3. cost of suit;

4. further and/or alternative relief."

[109] In the original particulars of claim the applicant relied on **its** statutory right to demand payment of the **levy**. In the proposed amendment it relies on breach of the **respondent's** statutory duty to submit **returns**. Neither the delivery of returns,

nor the referral to the Commissioner for the determination of liability has ever been claimed before, as is also clear from para [5] of **<u>THABO MOFUTSANYANA DISTRICT MUNICIPALITY v STEYN-ENSLIN & PARTNERS AND OTHERS</u>**, 2012(3) SA 179 (SCA).

[110] As found in **<u>FIRSTRAND BANK LTD v NEDBANK (SWAZILAND) LTD</u>**, 2004(6) SA 317 (SCA) at 322H:

"... the mere fact that there is some overlapping of factual allegations contained in the pre- and post-amendment particulars of claim is not enough... The right of action disclosed in the amended particulars of claim must at least be recognisable as the same or substantially the same as the right disclosed in the original claim".

[111] In **<u>ONEONATE INVESTMENTS (PTY) LTD (in liquidation) v STANDARD BANK OF SOUTH AFRICA</u>** LTD, 1998(1) SA 811 (SCA) at 826B-D, regarding the interruption of prescription, Zulman JA quoted with approval the following from ***<u>MAZIBUKO V SINGER,</u>*** *1979(3) SA 258 (W)* at 266A:

"*in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same* claim *is preferred, not whether the same* *cause of action (or any cause of action) was made out in the earlier process".* (See also: **PROVINSIE VAN DIE VRYSTAAT v WILLIAMS NO,** 2000(3) SA 65 (SCA).)

[112] In the instant case, I am unable to find that the proposed claim for the submission of returns based on respondent's breach of a statutory duty to submit returns is recognisable as the claim in the original summons of June 2008 for payment of a fictional, estimated amount based on the applicant's statutory entitlement to the payment of levies. As Zulman JA stated at 826H-J of **ONEONATE INVESTMENTS v STANDARD BANK OF SA** LTD, *supra,* the real question which arises is whether the subsequent pleading is inconsistent with the claim proffered in the initiating summons. In my view it is.

[113] I cannot find that the proposed amendment merely clarifies or adds details which do not appear in the original summons (See: **ONEONATE INVESTMENTS v STANDARD BANK OF SA LTD**, *supra,* at 826H), nor that it seeks to enforce a debt recognisable in the original summons. Neither can I find that the original claim was 'part and parcel' of the original claim and that the amendment merely introduces a fresh quantification of the original debt (as at 827B-C) (See also: **EVINS v SHIELD**

<u>INSURANCE COMPANY LTD</u>, 1980(2) SA 814A) or that the original cause of action was 'insufficiently or imperfectly set out' but nevertheless 'relied upon' throughout (as at 827C-D).

[114] In my view, rather, as found in **<u>MINISTER OF SAFETY & SECURITY v MOLUTSI AND ANOTHER,</u>** 1996(4) SA 72 (A) at 85B/C - D, the contention that the amendment should not be construed as introducing a new cause of action but merely as an amplification of the grounds upon which the cause of action rested which was originally invoked, cannot be upheld. The source of the obligation on which application now depends, differs from the one on which he originally relied. The same *facta probanda* cannot sustain the proposed claim and the amendment therefore constitutes a separate and distinct cause of action upon which the new claim is based.

[115] In **<u>ALFA LAVAL AGRI (PTY) LTD v FERREIRA NNO,</u>** 2004(2) SA 68 (O) in which a party initially claimed payment based on a contract but then amended to claim in terms of enrichment, the Court found that even though the claim was still for the same money, the debt was now the result of enrichment and even though the purpose still was to claim the

same money, the debt could not be regarded as the same or materially the same debt. (See also: **MINISTER OF SAFETY & SECURITY v MOLUTSI,** *supra,* at 85B/C – D, where both claims pertained to vicarious liability, but the source thereof differed; and **BRANDON v MINISTER OF LAW AND ORDER AND ANOTHER,** *supra,* at 78H/I-I/J where both claims were delictual in nature, but their elements and characteristics were not identical and the respective *facta probanda* for their proof differed.)

[116] I therefore find that the amendment seeks to introduce a new claim. It is trite law that where by way of amendment a new claim is introduced, prescription would only be interrupted as from the date the amendment is granted (See: **CORDIER v CORDIER,** 1984(4) SA 524 (C) at 532H-533A; **STROUD v STEEL ENGINEERING CO LTD AND ANOTHER,** 1996(4) SA 1139 (W) 1141F and 1142B, read with 1141E.) It has also been held that, where one is dealing with an expiry period and not prescription, there is no reason why a similar approach should not prevail. (See: **BRANDON v MINISTER OF LAW & ORDER AND ANOTHER**, 1997(3) SA 68 (C) at 75D-F/G.)

[117] *In casu* a claim for the delivery of returns is not discernible in the original summons. It follows, then, that service of that summons in 2008 could not have stayed or interrupted prescription of this debt since in terms of S 15(2) of the Prescription Act, prescription is stayed by service of a pleading on a debtor in which payment of the debt is claimed and on which the claim is prosecuted to finality.

[118] In **ITC 1671**, (1999) 62 SATC 39, for instance, the Commissioner withdrew certain original assessments in terms of s 3(2) of the Income Tax Act. The Court held that such adjustments do not restart the three-year prescription periods for the reopening of assessments contained in s 79(1) so that the date of the original assessment remains the commencement date for the prescriptive period (this view was endorsed by the Supreme Court of Appeal in **C: SARS v BRUMMERIA RENAISSANCE (PTY) LTD and OTHERS**, (2007) SCA 99).

[119] The date of service of the Notice of Intention to Amend, namely 11 November 2011, would therefore be the conclusive

date to determine whether the claim has prescribed because that is the first date on which the proposed new debt was being claimed. More than three years have elapsed since the original summons was issued and since the cut-off date for liability to lapse.

[120] Mr Kemp's argument that it could never have been the intention of the Legislature to leave the applicant in a position in which he is unable to calculate the amount due in my view is clearly addressed by the provisions of both the RSC Act (S 12(1B)) and the 2006-Act and the stated purpose of s 59.

[121] I am sure, furthermore, that the Legislature with the imposing of the said 2-year time limits in the two applicable Acts made it clear that they did not envisage a 30-year term for the determination of liability for payment or for the Courts to allow countless further attempts to determine liability by amending the summons in the hope of sometime striking it lucky and finding a viable claim.

[122] I find that the lack of empowerment of the Commissioner and council to assess or collect the levies due to the passage of

time not only offends the principle of legality, but also deprives applicant of a viable cause of action. To allow the amendment would be to allow an excipiable particulars of claim. It has been found that save in exceptional cases an amendment ought not to be allowed where its introduction into the pleading would render such pleading exceptionable. (See: **ALPHA (PTY) LTD v CARLTONVILLE READY MIX CONCRETE CC**, 2003(6) SA 289 (W) at 293I-J and **KRISCHKE v RAF**, 2004(4) SA 358(W) at 363.)

[123] Especially in view of the purpose of s 59 of Act 2006 to abolish RSC levies, as confirmed in **CITY OF TSHWANE v CABLE CITY** (CC), *supra,* I do not consider this to be an exceptional case which would justify allowing the amendment under such circumstances.

[124] It has been found, furthermore, that an amendment which introduces a new claim will not be allowed if it would rescussitate a prescribed claim or defeat a statutory limitation as to time. (See: **ASSOCIATED PAINT & CHEMICAL INDUSTRIES (PTY) LTD t/a ALBESTRA PAINT & LACQUERS v SMIT** 2000(2) SA 789 (SCA) at 794C-G and

BLAAUBERG MEAT WHOLESALERS CC v ANGLO DUTCH MEATS (EXPORTS) LTD , [2004] 1 ALL SA 129 (SCA) at 133g to 134H.)

[125] It is my considered opinion, therefore, that the Commissioner's and the council's authorisation to determine liability and collect levies in terms of the RSC Act and the regulations as curtailed by subsection (1B) has prescribed and that the respondent's liability for payment of the levies has lapsed. Since the applicant no longer has the power to insist on returns or on determination of liability or payment of the levies, as prayed for in its proposed amended particulars of claim, granting such amendment would merely be an exercise in futility.

[126] It is trite law that an amendment would not normally be decided on a claim of prescription. In reliance on **CORDIER v CORDIER,** 1984(4) SA 524 (C), and **STROUD v STEEL ENGINEERING COMPAY LTD AND ANOTHER,** 1996(4) SA 1139 (W) Mr Kemp argued that in order to refuse leave to amend, this Court would have to find that respondent had such a strong case regarding the issue of prescription and of non-

empowerment that even without a plea the applicant does not have a case and will never have a case on the proposed amendment. In my view such is the effect of subsection (1B) and s 59.

[127] In **STROUD v STEEL,** *supra,* at 1142, the Court cautioned that though the application for an amendment is not *'normally'* the place to decide the issue of prescription, there *'may be special cases'* which merely depend on the legal interpretation of facts which are common cause. In my view the instant case is such a case in which prescription depends on legal interpretation of the relevant statutes and the facts of the case are not in dispute. It has been held, furthermore, that where the proposed amendment raised a point of law which would dispose of the case in whole or in part, the court should determine that point of law. (See: **KRISCHKE v RAF**, *supra,* 2004(4) SA 358 (W) at 363F-G.)

[128] I have to agree with Mr Danzfuss that the circumstances in the instant case warrant a refusal of the amendment based on the defence of prescription at this stage. The applicant has indeed never raised any factor which would either stay or interrupt the

prescription. Throughout its case has simply been that the levy was a tax, alternatively that the debt was for the same or materially the same debt as the one claimed in the original summons, but its argument is not sustained by the facts.

COMMON LAW:

[129] It was submitted on behalf of the respondent that, apart from the merits, three further reasons for dismissing the application are that the applicant failed to address and prove in its founding affidavit the following prerequisites for allowing an amendment:

129.1 that the amendment would not prejudice respondents;

129.2 that it has a good explanation for not instituting much earlier the present amendments and the present claim and

129.3 that it is *bona fide.*

[130] It is trite law that an applicant for an amendment seeks an indulgence. It has been held that the greater the disruption caused by the amendment, the greater the indulgence sought and the greater the burden upon the applicant to convince the court to accommodate him. (See: **CIBA-GEIGY (PTY) LTD v LUSHOF FARMS (PTY) LTD 2002(2) SA 447 (A),** at 463E, 462J – 463B and 464E-H.)

PREJUDICE

[131] It is trite law that that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs, or, where appropriate, a postponement, in other words if a party cannot be put back for the purposes of justice in the same position as it was when the pleading which it is sought to amend was filed. (See: **EUROSHIPPING CORPORATION OF MONROVIA v MINISTER OF AGRICULTURE,** 1979(2) SA 1072 (C) at 1087C).)

[132] Although it has been held that in terms of its inherent powers a court may grant an amendment even of a fatally defective

summons, the prerequisite for doing that is that it will occasion no prejudice and will prevent a waste of costs. (See: **PRUDENTIAL ASSURANCE CO LTD,** 1963(1) SA 66(T), at 69F-H, **BANKKORP LTD v ANDERSON MORSHEAD,** 1997(1) SA 251 (W) and **MEYERS v ABRAMSON** 1951(3) SA 438 (C) at 450F - 451D.) I cannot find that such is the case *in casu.*

[133] In **RAND STAPLE MACHINE,** 1977 (3) SA 199 (W) at 202C it was found that a long delay between the date of institution of the action and the application for amendment might *prima facie* prejudice the defendant and should be explained in the particulars of claim.

[134] I consider the instant case to be one in which this Court's power to allow a material amendment is indeed limited by considerations of material prejudice or injustice to the respondent in view of the applicant's 11-year delay before claiming returns. (See: **ROSNER v LYDIA SWANEPOEL TRUST,** 1998(2) SA 1123 (W) at 127D-G.)

[135] The applicant in its proposed amended particulars relies on

returns not submitted as far back as 2000 and proposes to claim returns as from 2004, in other words returns from 8 year ago. No such returns were claimed when the summons was issued in 2008. Nor were they claimed in the amendment against which the exception was upheld by the Supreme Court of Appeal. (See: **THABO MOFUTSANYANA DISTRICT MUNICIPALITY v STEYN-ENSLIN & PARTNERS AND OTHERS**, (SCA), *supra,* para [5]). No explanation was offered for the applicant's failure to do so on either of the two occasions. Since then, furthermore, four further years have already elapsed and three attempts to amend have already failed.

[136] The question of prejudice was not even addressed in the founding affidavit. As appears from the application to amend itself, for many years the applicant never claimed returns from the respondent. Even if s 75 of the Income Tax Act, had indeed been applicable to levypayers, which it is has not been declared to be, a levypayer would only have been obliged to retain the relevant documentation for five years after it had rendered a return. The RSC Act made no provision for the compulsory retention of documentation.

[137] When an income tax return has not been rendered, the Commissioner in terms of the Income Tax Act makes an estimated assessment of the taxpayer's liability and the taxpayer then has the right to object to or appeal such assessment. The taxpayer then bears the onus of showing that the estimate is incorrect. In the absence of books and records it would be difficult or impossible to do so. (See: **DE KOKER & URQUHART**, Vol 1A, *supra,* at 27-27.) The RSC Act also granted levypayers the right to object to or appeal assessments. But the onus to prove their case would be on them. Without documentation that would be virtually impossible.

[138] The 2006-Act made it clear that the levies were to be abolished. The applicant only issued summons two years later, two weeks before the grace period expired in June 2008, on a claim based on a regulation that had already been declared invalid and amounts that were clearly fictitious in a summons which it has been unable to successfully prosecute to final judgment. For four years nothing further happened except the attempts to amend and one further High Court

judgment, two further Appellate Division judgments and one Constitutional Court judgment against regional councils.

[139] By the time the applicant filed its application for leave to amend to claim the submission of returns in November 2011, more than five years had already elapsed since the due date for submission of the last return it was allowed to claim, namely that of June 2006 which would have been due no later than July 2006. There is no evidence that at that time there was any litigation against the respondent. By then for years the respondent has not been sued for delivery of returns, or, presumably, for payment of levies. In the absence of any obligation to retain documentation in terms of the RSC Act and in the absence of having been sued for failure to render returns or pay levies, the probability that the respondents would have retained the relevant documents even up to June 2008 was negligible.

[140] I therefore find the applicant's *viva voce* argument that the respondents should have been aware of the continuing litigation and would have been advised to retain the relevant documents, and can therefore not be said to be prejudiced if

they did not do so, unpersuasive.

[141] The respondent would in my view be severely prejudiced if, in the absence of such documents, it were to be ordered to render monthly returns, between 6 and 8 years later, for each of the 24 months between June 2004 and June 2006, as proposed.

[142] In order to comply with an order to render returns, up to 11 000 other enterprises and employers, many of which might not even exist or trade any longer, would after between 6 and 8 years later also have to find for each of the months between 2004 and 2006 the details not only of the enterprise's:

142.1 monthly income;

142.2 monthly expenditure and summaries;

142.3 monthly drawings;

142.4 monthly turnover;

142.5 monthly taxable transactions;

142.6 monthly sale of movable assets,

but also the evidence and financial details of salaries paid to each employee every month in order to compute, for every relevant month, between 6 and 8 years ago, the applicable levy, if any, that they were liable for.

[143] Should the respondent, and all the other thousands of respondents, be unable to render such returns, it/they would be prejudiced, furthermore, by an order allowing the Commissioner to estimate an assessment which it/they would be unable to challenge in the absence of the same documentation the lack of which had prevented them from rendering the returns in the first place.

[144] In my view, that is exactly what the Legislature intended to prevent with the introduction of the two 2-year periods introduced by the 2005- and 2006-Acts when it decided to withdraw the power of the councils to collect levies. It is clear that the Legislature's intention with the 2-year periods imposed by the RSC Act as well as the 2006-Act was to finally dispose of the levies and to terminate liability for their payment, not to allow litigation to continue *ad infinitum.*

[145] On the applicant's own version the decision affects thousands of virtually identical summonses issued in the Free State alone. I have to keep in mind that that makes it vital to consider the application with great circumspection, especially if it were to be found that the applicant failed to explain the delay or to provide any facts to prove that its conduct was *bona fide.*

[146] A further important consideration is that, if the proposed amendments were to be allowed, thousands of amended summonses which the recipients would almost certainly want to defend would be unleashed. Even though without the relevant documents, they might be unable to defend themselves effectively, inevitably thousands of trials would suddenly need to be set down to clog the court rolls. On its own, of course, that would not be sufficient grounds to refuse the amendment, but it is certainly an important factor to take into consideration, especially if all the requirements for an amendment to be allowed are not met.

[147] In my view, then, there is no doubt that the amendment would prejudice this and thousands of other respondents .

GOOD EXPLANATION:

[148] In its founding affidavit the applicant offers no explanation of why the submission of returns was never claimed before June 2008, or in any of the subsequent amendments, until November 2011. All that was explained was how the process evolved, not why.

[149] In the founding affidavit the applicant only averred that the parties agreed to make the exception a test case. Mr Danzfuss pointed out, however, that there was never any agreement that the applicant could rely on a certain cause of action or that that certain cause of action would stand over. The parties merely agreed that the arguing of the exception in the other cases would stand over until after the Supreme Court of Appeal had decided the exception in this case. The applicant therefore cannot use that as an excuse for once again trying to revive its claim.

[150] The applicant failed in its first attempt to claim payment from the respondent by simply, on its own version, pulling amounts

out of a hat without any documentary proof or books or financial figures. Why the applicant did not follow the correct procedure when it applied for the first amendment two months after issuing summons, or as soon as the exception against its particulars of claim was upheld in early 2009, is not explained at all in the founding affidavit.

[151] And, as stated in **HARMS: CIVIL PROCEDURE IN THE SUPREME COURT**, Issue 23 at 294, an amendment is not granted for the mere asking, some explanations must be offered therefore. In the instant application the only ‘explanation’ offered was the applicant’s reliance on Mthiyane, AJ’s *obiter* ‘advice’.

BONA FIDES:

[152] In order to establish applicant’s *bona fides* Mr Kemp relied on the said ‘advice’ to amend and to use regulations 9(4) and (13), even though he correctly conceded that that point had not served before the Appellate Division.

[153] The respondent contended that the applicant is not *bona fide*

in attempting to introduce yet another amendment after two Courts had already dismissed its right of action, especially in the absence of a proper explanation for doing it in this way.

[154] I unfortunately have to agree that one gains the distinct impression that the applicant painted itself into a corner by failing to follow the prescribed process in the time allowed, and is now simply using or abusing the legal process to make one attempt at amendment after the other to keep its claim afloat at all costs. Even more so in view thereof that Mr Kemp has already indicated that the applicant might still not let the matter rest if this application for leave to amend were to be refused, but might attempt to approach the Constitutional Court in terms of s 172 regarding the constitutionality of the effect of the declaration of invalidity of reg 11(1). That is, despite the fact that the Constitutional Court has already refused leave to appeal in the **CITY OF TSHWANE**-matter.

[155] In my view the unacceptably long delay caused by applicant's own failure to follow or to timeously apply the procedures prescribed in peremptory terms for the calculation and collection of levies has already *prima facie* caused prejudice

which is *prima facie* no indication of *bona fide* conduct.

[156] I therefore agree that the applicant has failed to discharge the onus of proving that the amendment would cause no prejudice, or that the applicant is *bona fide* in bringing yet another application for amendment, or that it has a good explanation for the inordinate delay in bringing this matter to finality.

[157] In the premises I find that even should I be wrong about the applicant's ability to claim having prescribed and the respondent's liability for levies having lapsed, the amendment should be refused anyway because of the applicant's failure to discharge the onus of proving the common-law requirements for allowing material amendments, especially in the face of the patent prejudice the proposed amendment would entail.

COSTS:

[158] I see no reason why costs should not follow the outcome.

WHEREFORE the following order is made:

1. The application for leave to amend is dismissed with costs.

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H MURRAY, AJ

Mero motu correction in terms of Rule 42(1)(b):

As stated in para [2] of this judgment, the parties agreed that the judgment in this case, no 3332/2008, will also apply to case no 3724/2008, THABO MOFUTSANYANA DISTRICT MUNICIPALITY v AFGRI OPERATIONS LIMITED which was set down simultaneously with case no 3332/2008.

WHEREFORE the following order is made with regard to case no 3724/2008 as well:

1.The application for leave to amend is dismissed with costs.

H MURRAY, AJ

On behalf of applicant:	KJ Kemp, S.C. With him: S Grobler Instructed by: Honey Attorneys Inc BLOEMFONTEIN
On behalf of respondent:	FWA Danzfuss, S.C. Instructed by: Naudes Inc (In case no 3332/2008) BLOEMFONTEIN
	FWA Danzfuss, S.C. Instructed by: Lovius Block Attorneys (In case no 3724/2008) BLOEMFONTEIN