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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DEBTS WHICHEVER IS NOT APPLICABLE	
1) REPORTABLE YES/NO.	
2) OF INTEREST TO OTHER JUDGES: YES/NO.	
3) REVISED.	
DATE 25/5/09	SIGNATURE <i>(Balk)</i>

26/05/2009
Case number 30463/2008

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY PLAINTIFF

and

SASOL LIMITED

DEFENDANT

JUDGMENT

BOTHA J:

In this case there are two inter-related matters: an exception and an application to amend.

On 25 June 2008 the plaintiff, the City of Johannesburg Metropolitan Municipality, issued a combined summons against the defendant, Sasol Ltd, in which it claimed R48 003 836.92 as unpaid Regional Services Council establishment levies for the years 2000 to 2006.

On 7 August 2008 the respondent filed a notice to remove cause of complaint and exception in terms of Rule 23(1) and (3).

In the notice it is stated that the particulars of claim are vague and embarrassing on six grounds, stated to be causes of complaint. They essentially deal with the calculation of the amount claimed.

The exception proper contains five so-called grounds of complaint.

On 3 November 2008 the plaintiff gave notice of its intention to amend its particulars of claim. It is common cause that the proposed amendment would remove the complaints regarding the calculation of the claim. The defendant opposes the amendment on the basis that it still does not contain the averments necessary to sustain a cause of action.

I do not intend to deal with the five grounds of complaint. I shall focus on what I perceive to be the gist of the exception.

The plaintiff's case very simply put is that over the years concerned the defendant understated its income. That had the effect that there was an underpayment of levies. The plaintiff extracted the figures of what it contends was the defendant's true income from the defendant's annual financial statements. It recalculated the levies on the higher income and claims the difference between the levies calculated on the higher income and the levies actually paid.

The point of the exception, also very simply stated is that the plaintiff cannot claim levies in a summons, but that it should follow the procedure laid down in the Regional Services Councils Act, 1985 (Act 109) of 1985.

In section 1 of Act 109 of 1985 “**regional establishment levy**” is defined as “... **a levy calculated . . . and payable ... in the manner determined by the Minister of Finance under section 12(1)(b) at a rate from time to time determined by the council for that region with the concurrence of the said Minister and which the said Minister shall publish by notice in the Gazette ...**”

The defendant is clearly held liable as a person carrying on an enterprise.

Section 12(1)(i) of Act 109 of 1985 reads as follows:

“ (1)(a) . . . a council shall levy and claim from –

- (i) ...
- (ii) **Every person carrying on or deemed to be carrying on an enterprise within its region, a regional establishment levy.”**

Section 12(1)(b) provides that the Minister of Finance may from time to time by notice in the Gazette determine the manner in which the regional establishment levy shall be “**calculated and paid**”.

Section 12(dA) reads as follows:

“The Minister of Finance may in any notice contemplated in subsection (1)(b) –

(dA) authorize 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 a council with a ruling or directive on the interpretation of any provision of this 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;”.

In Government Notice R340 (R340) published in Government Gazette 10613 of 17 February 1987 the Minister of Finance published a determination specifying how regional council levies are to be calculated and paid.

Paragraph 9(3) of R340 provides that every payment of a regional establishment levy shall be accompanied by a return in such form as the council may determine. This clearly provides for a system of self assessment. Paragraph 9(4) provides that levy payers must submit monthly returns.

Paragraph 1(1) of R340 reads as follows:

"11. (1) Where any registered levypayer has failed to furnish any return referred to in paragraph 9(4) within the relevant period allowed, the council concerned may estimate the amount of any levy which, in its opinion, is probably payable in respect of the relevant month or period, and may make an assessment of the amount of the unpaid levy."

R340 was amended (and amplified) by Government Notice R783 (R783) published in Government Gazette 11838 of 21 April 1989.

Paragraph 11(2)(3) and (4) of R340 was amended by the substitution of the following subparagraphs:

- "(2) Where the Commissioner has under the provisions of paragraph 13(4) directed a council to make an assessment of any unpaid levy, the council shall make such assessment.**
- (3) A council shall give the levypayer concerned written notice of any assessment made under subparagraph (1) or (2).**

- (4) The amount of any unpaid levy shown in any such assessment shall, subject to the levypayer's right of objection and appeal in accordance with the applicable provisions of this Schedule, be deemed to be an amount of levy which is properly payable under the Act, and may be recovered by the council by way of judicial process in a competent court, and it shall not be competent for any levypayer in any such process to question the correctness of any such assessment, notwithstanding that objection and appeal may have been lodged thereto."

Paragraph 13 of R340 was amended by the substitution of the following paragraph:

- "13. (1) A council shall be responsible for the administration of the provisions of this Schedule, but shall not be empowered to require any person to produce any books, records, accounts or other documents in relation to any regional services levy and regional establishment levy or to require any levypayer to substantiate any return submitted by him in connection with any such levy.
- (2) Where a council has reason to believe that any levypayer has not paid in full any levy for which he is liable in terms of the Act, the council may submit the

matter to the Commissioner for such action as he deems fit.

- (3) The Commissioner shall conduct such audits of the affairs of any levypayer as he considers necessary to ensure that the provisions of the Act are complied with, and may require any person to produce for examination any books, records or accounts or any other documents which in the opinion of the Commissioner are or may be necessary for the purpose of determining the liability of such person or any other person for the payment of any such levy.
- (4) (a) Where the Commissioner is of the opinion that any levypayer has not paid in full any such levy for which he is liable, the Commissioner may, whether or not any person has reacted on a requisition referred to in subparagraph (3), direct the council concerned to make an assessment upon the levypayer in terms of the provisions of paragraph 11.
 - (b) The Commissioner may, for the purposes of any assessment contemplated in item (a), estimate the amount upon which levy is payable.
- (5) The Commissioner may as and when he deems it expedient, furnish a council with a ruling or directive on the interpretation of any provision of the Act or

this Schedule, and in such case the council shall be obliged to apply such ruling or directive”.

A paragraph 14 was added to R340. It deals with objections and reads as follows:

- “14. (1) Any person who is dissatisfied with any assessment made in respect of him by a council under the provisions of paragraph 11 or with the council’s refusal to make a refund under the provisions of paragraph 12, may lodge an objection thereto with the council.
- (2) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.
- (3) No objection shall be considered by the council which is not delivered at its office or posted to it in sufficient time to reach it within 30 days after the date of the notice of assessment or notice of the council’s refusal to make a refund against which the objection it lodged, unless the council is satisfied that reasonable grounds exist for the delay in lodging the objection.
- (4) After having considered the objection, the council may –
- (a) alter or reduce the assessment; or
- (b) make a refund of any levy or interest paid; or

- (c) refer the objection to the Commissioner,
and shall in writing notify the person who made the
objection of such alteration, reduction or referral, as
the case may be: Provided that where the relevant
assessment or refusal to make a refund is in
accordance with a ruling or directive issued by the
Commissioner, the council shall not alter or reduce
such assessment or make such refund, but shall
refer the objection to the Commissioner.
- (5) The Commissioner may, after having considered an
objection referred to him by the council under
subparagraph (4) –
 - (a) direct the council to alter or reduce the
assessment; or
 - (b) direct the council to make a refund of any levy
or interest paid; or
 - (c) disallow the objection,
and shall send the person who made the objection
written notice of such direction or disallowance, as
the case may be”.

Lastly paragraph 15 was added to R340. It deals with appeals. It provides for appeals from decisions of a council or the Commissioner to the Special Income Tax Court and from that Court to the High Court and the Supreme Court of Appeal. In short, it introduces the regime of Act 58 of 1962.

Mr Subel SC, who with Mr Kilian appeared for the defendant, referred me to an unreported judgment in the Eastern Cape Division where Jones J declared paragraph 11(1) of R340 *ultra vires*. See **Algoa Regional Services v Neil Buchner case 1150/1994**. The court found that paragraph 11(1), which authorizes a council to estimate the amount of a levy was *extra vires* because section 12(1)(b) authorizes the Minister of Finance to determine the manner in which the regional services levy shall be calculated.

The reasoning was that where a council was precluded from gaining access to the books of a levy payer it would be arbitrary to empower the council to estimate the amount of the levy. In an unreported judgment in **City of Tshwane Metropolitan Municipality v Cable (Pty) Ltd case 34431/2005**, Transvaal Provisional Division, Fabricius AJ agreed with the reasoning of Jones J.

I am not convinced that paragraph 11(1) is *ultra vires*. It only deals with the situation where no return was submitted. It may be possible to interpret it so as to render it valid on the basis that the council may only make an estimate if there is a basis for an estimate such as previous returns.

For the purposes of this exception it does not matter whether paragraph 11(1) of R340 is *intra vires* or not, because it was common cause in argument that it would not, if valid, be applicable because this case concerns a case where returns were in fact submitted.

Mr Roux, who appeared for the plaintiff argued that the procedure laid down in R340 as amended by R783 was optional. He argued that it was not necessary for the plaintiff to follow that route where it was in possession of information with which it could calculate the liability of the defendant with mathematical exactitude. He submitted that the plaintiff's claim was based on delict and that there was nothing in Act 109 of 1985 precluding the plaintiff from recovering the amount of the indebtedness by way of action.

I cannot agree that the procedure laid down in R340 and R783 as derived from section 12(1)(b) is optional. Section 12(1)(b) provides that the Minister may determine the manner in which the regional services levy and the regional establishment levy "shall be calculated and paid".

That shows an intention to prescribe the process of collection.

Mr Roux referred to the word "may" where it occurs in paragraphs 11 and 13 of R340. In my view the word must be understood in the sense of conferring a power and imposing a duty. See **Commissioner for Inland Revenue v IHB King, Commissioner for Inland Revenue v A H King 1947(2) SA 196(AD) at 209 and 210.**

It is also of importance, as Mr Subel pointed out, that nowhere in section 12 or R340 and R783 is the council empowered to approach the court directly.

The submission that the claim is based on delict cannot be accepted.

The fact that the plaintiff may have clothed its claim as one based on fraud or misrepresentation is irrelevant. Fraud and misrepresentation is only relevant to the extent that the plaintiff can only recover unpaid levies that are more than two years old if the levies were not paid due to fraud or misrepresentation. When such a levy is claimed there still has to follow an assessment before there can be liability.

In my view the procedure laid down in R340 as amended by R783 must be followed. It deals with a situation where a council is not satisfied that a full levy had been paid. It provides for the intervention of the Commissioner of Inland Revenue. It provides for objection and appeals. In that whole process the High Court only figures at the level of an appeal.

The assessment of tax liability, very much dependant on the determination of what is income, is a specialist function which the legislator has for good reasons entrusted to a specialist agency with special powers and subject to constraints of confidentiality. Even at the first level of appeal a specialist court is prescribed. That is the regime of Act 58 of 1962 which has been adopted *mutatis mutandis* in R340 as amended by R783.

It would be contrary to the ethos of our tax legislation if a court were, as a court of the first instance, to assume the functions of the Commissioner of Inland Revenue.

My conclusion is that the exception is well founded. For that reason the amendment should be refused, because even though it removes some causes of complaint, it still leaves particulars of claim that do not sustain a cause of action.

The correct order would therefore be that the amendment is refused and the exception upheld.

Even though I cannot visualize how the plaintiff, having done its damnest, can rectify the matter, I shall follow the invariable practice of the courts and grant it an opportunity to amend its particulars of claim.

The following order is made:

1. The application for an amendment of the plaintiff's particulars of claim is dismissed.
2. The defendant's exception against the plaintiff's particulars of claim is upheld, and the particulars of claim are set aside.
3. The plaintiff may file amended particulars of claim within 20 days.
4. The plaintiff must pay the costs of the application for amendment and the exception, which costs shall include the costs of two counsel.