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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

VINCENT THABO SEHUME ..... Appellant

and

CITY COUNCIL OF ATTERIDGEVILLE ... 1st Respondent

ADMINISTRATOR OF TRANSVAAL ..... 2nd Respondent

CORAM : VAN HEERDEN, HEFER, SMALBERGER, NIENABER JJA et KRIEGLER AJA

HEARD : 10 SEPTEMBER 1991

DELIVERED : 27 SEPTEMBER 1991

J U D G M E N T

KRIEGLER AJA/...

KRIEGLER AJA:

This appeal concerns the validity of a special levy imposed by municipal by-laws. The appellant is the registered occupier of residential premises falling within the area of jurisdiction of the first respondent ("the council"), a city council established in terms of sec 2 of the Black Local Authorities Act No 102 of 1982 ("the Act"). The second respondent, the Administrator of Transvaal ("the Administrator"), approved and promulgated the relevant by-laws under the powers vested in him by the Act. He took no part in the proceedings in either court. The appellant, who was struck by the provisions of the special levy, unsuccessfully challenged its validity in the Transvaal Provincial Division and, with the leave of that court, now renews the challenge.

The special levy was adopted in the following circumstances. In March 1985

and again in March 1987 by-laws increasing the council's tariffs for municipal services were put into operation. The validity of both such sets of by-laws was, however, successfully assailed by the appellant in motion proceedings in the Transvaal Provincial Division; on 17 June 1988 the court set them aside and declared earlier by-laws, which had come into operation in March 1982, to be of full force and effect. The court further declared the appellant "entitled to a refund of such monies as have been invalidly collected in terms of the" March 1985 and March 1987 tariffs. (Full details of the order appear from the reported judgment, Sehume v Atteridgeville Town Council 1989(1) SA 721(T) at 729F - I.) The order of court put the council in a quandary. Not only had the tariff structures on which it had budgeted and operated for several years been swept away but, what is worse, it faced a substantial loss. Over the years it

had purchased its requirements of electricity and water from the City Council of Pretoria and had in turn supplied its consumers at charges sufficient to ensure that it recovered the purchase costs. Consequently reversion to the 1982 tariffs would mean that such consumers had been supplied at below cost. Furthermore the order declaring the appellant entitled to a refund presaged similar claims by other consumers.

The special levy was the means devised to extricate the council from its predicament. Two days prior to delivery of the judgment the council had approved the revenue estimates for the ensuing financial year and had resolved to increase its tariffs by means of new by-laws which were to have come into operation on 1 November 1988. Having become aware of the judgment the council held a special meeting on

12 July 1988 at which it resolved to engraft the special levy onto such proposed by-laws. The resultant amended by-laws were promulgated by the Administrator on 30 November 1988 under Administrator's Notice 1398 entitled "By-laws relating to the making of charges for services and the use of facilities." The special levy was structured in the following manner. First a number of interrelated terms were defined in Regulation 1 of the by-laws, namely "consumer", "holder", "special levy" and "special credit". The relevant definitions read as follows:

> "(vi) 'consumer' means a person to whom or for whose benefit services are supplied, made available, or provided whether or not such services are utilised and, if there is no such person, the holder;
>
> (vii) 'holder' means the owner or a person to whom a site has been allocated, the holder of a right of leasehold or a person who has entered into an agreement or transaction for the acquisition of land or a site or of a right to or an interest in land or a

site;

(xiv) 'special levy' means the one-time levy determined in terms of regulation 13; and

(xv) 'special credit' means the credit on a consumer's account with the City Council to which he has become entitled in an amount equal to -

(a) the additional amount which was charged by the City Council to the account of a consumer in respect of services;

(b) the additional amount which was charged by the City Council to the account of a holder of a business site in respect of site rent;

(c) the additional amount which was charged by the City Council to the account of a hostel resident in respect of his accommodation in a hostel;

(d) the additional amount which was charged by the City Council to the account of a lodger in respect of his lodging;

(e) the additional amount which was charged by the City Council to the account of a holder of a church site in respect of site rent;

(f) the additional amount which was

charged by the City Council to the account of a holder of a residential site in respect of site rent;

over and above the amounts prescribed in terms of the regulations promulgated by Government Notice 557 of 28 March 1980 (as amended, by Government Notice 573 of 26 March 1982), and which was charged by reason of the implementation by the City Council of the regulations promulgated by Government Notice 71 of 11 January 1985 (as amended, by Administrator's Notice 87 of 31 December 1986), and which latter regulations were declared null and void by the Supreme Court of South Africa (Transvaal Provincial Division) on 17 June 1988.

The additional amounts charged monthly in respect of each of the categories referred to in sub-paragraphs (a) to (f) above, are calculated as set out in the Annexure hereto."

Then regulation 13 was formulated in the following terms:

"Special Levy

13.(1) Every person subject to these by-laws and who has become entitled to a special credit on his account with the City Council shall

be liable for payment to the City Council of a one time levy in an amount equal to such special credit.

(2) The City Council shall be entitled to appropriate any credit standing to the account of any person subject to these by-laws as a payment in respect of the aforementioned levy."

Lastly the annexure referred to in the concluding paragraph of the definition of "special credit" tabulated the council's monthly charges for municipal services under its March 1982, March 1985 and March 1987 tariffs respectively, and calculated the monthly and total disparities under separate headings relating to the categories of consumers mentioned in paragraphs (a) to (f) of the definition of "special levy" in regulation 1(xv). Thus, for instance, the monthly charges in respect of residential sites were formulated as follows:

"1. Residential sites

Services	March 1982	March 1985	March 1987
Miscellaneous	R 8,35	R16,35	R16,35
Electricity	14,43	16,43	23,54
Water	8,20	11,80	13,60
Sewerage	2,75	4,00	6,00
Refuse removal	2,45	5,00	6,50
	R36,18	R53,58	R65,99

March 1982-Feb 1985 36 months @ R17,40 = R 626,40
March 1985-Feb 1987 24 months @ R29,81 = R 715,44
March 1985-Sep 1988 18 months @ R29,81 = R 536,58
R1878,42"

As can be seen the charges per month totalled R36,18 under the March 1982 tariff while under the March 1985 and March 1987 tariffs they added up to R53,58 and R65,99 respectively. That meant, as the annexure indicates, that under the March 1985 tariff the "additional amount" was R17,40 per month (R53,58 - R36,18) and under the March 1987 tariff R29,81 per month (R65,99 - R36,18). Thereafter, however, the calculation reflected in the annexure went awry.

Instead of calculating the disparity of R17,40 per month from March 1985, when the first set of invalidated by-laws came into operation, the annexure reflects a calculation for the 36 months from March 1982 to 1985 at R17,50 per month and totalling R626,40. That is clearly wrong. The March 1982 tariff remained extant until March 1985 and until the latter date no "additional amount ... over and above the amounts prescribed in terms" thereof was charged by the council. There are two further errors in the annexure, the one of substance and the other merely clerical. The second line of the calculation reads: "March 1985 - February 1987 24 months @ R29,81 = R715,44"; the monthly disparity during that period, was not R29,81 but only R17,40. In the third line of the calculation the period from March 1985 to September 1988 is reflected as 18 months; clearly the commencing date is wrong and should read March 1987. Commencing the

calculation at March 1985 and taking the correct disparities thereafter, the total of the "additional amounts" under the heading for residential sites adds up to R954,18 and not the figure of R1 878,42 reflected in the annexure. Corresponding over-calculations appear under the succeeding four headings in the annexure relating to the other types of charges levied by the council. The question whether or not the miscalculation invalidates the "special levy" can be left for consideration later.

At this juncture the meaning and effect of the levy fall to be considered. Reg 13 is to be read in conjunction with the relevant definitions in reg 1, which provide the requisite lexicon. A levy is imposed on every person "who has become entitled to" a credit on his account with the council in respect of municipal service or site charges made by the council under the invalidated by-laws over and above the charges

authorised by the 1982 by-laws. The amount of the levy equals the amount of such overcharges and the annexure shows how the latter amount is to be calculated. The "special credit" is not a true credit for payments made, but an artificial concept, namely, the disparity in charges under the valid and the invalid by-laws respectively (the "additional amount"). On one reading of the by-laws every ratepayer is "credited" only to the extent of his entitlement while the "special levy" applies in full. Therefore, if he had paid nothing under the invalid by-laws he would be entitled to no credit and would be liable for the "special levy" to the full extent of the "additional amount". If, again, he had paid in full he would be entitled to the "special credit" in full, ie for the whole of the "additional amount", and the "special levy" would merely wipe out the "special credit". Persons who had paid partially would be "credited" only to the extent of their entitlement but would be levied for the whole

of the "additional amount". Upon scrutiny, therefore, the "special credit" is not only artificial, but illusory. Indeed it merely serves to fix the amount of the "special levy" in the case of every ratepayer at a level sufficient to off-set any overcharges made under the invalidated by-laws. In the result the council would be entitled to retain what had been overpaid under the illegal tariffs and to demand payment of any balance outstanding thereunder.

On a different reading of the by-laws they do not create a credit - reg 13 assumes its existence and reg 1(xv) defines it in terms which imply prior payment under the invalid by-laws, namely, by referring to a credit to which a person "has become entitled". There is force in the argument that such entitlement necessarily presupposes prior payment - a person could only have become entitled to a credit by having made payment(s). If that is correct the definition of "special credit" would refer only to persons who had

paid under the invalid by-laws and the "special levy" created in reg 13(1) would apply only to them.

Whichever one of the two possible meanings may be correct, this much is clear: the effect is that possible claims for refunds for overpayments under the invalidated by-laws are sought to be extinguished by the "special levy". That is hardly surprising. After all, the very purpose of the exercise had been to obviate the problems created by the earlier judgment. The crucial question is whether the means devised were lawful.

Mr Chaskalson submitted on behalf of the appellant that the "special levy" was a levy in name alone; in truth it was a retroactive charge for municipal services which, to boot, bore partially and unequally on those falling within its purview. Three grounds of invalidity are thus advanced. The first draws a distinction between the council's power to raise a levy and its power to fix and recover charges

for municipal services. Counsel drew attention to sec 23 of the Act, which enumerates the rights, powers, functions, duties and obligations of local authorities established under sec 2. Sub-paragraph 23(1)(l)(ii) invests a city council like first respondent with authority in its area of jurisdiction with regard to matters set forth in a schedule to the Act. (The matters listed in the schedule include the administration of the letting of buildings (par 8), the reticulation of water and effluent removal services (par 17) and the supply of power to the residents of its area (para 18).)

The relevant portions of paragraphs (p) and (q) of sub-section 23(1) then provide that first respondent -

> "(p) may, with the approval of the administrator, impose levies for purposes determined by the local authority;
>
> (q) may from time to time by by-law determine the

tariffs for services rendered with regard to matters set forth in the Schedule or for the supply or use of any of the facilities referred to in the Schedule:"

(Then follow two provisos not relevant to this appeal.)

In terms of sec 27(1) of the Act the legislative power conferred on first respondent by sec 23(1)(q) is further subject to the second respondent's approval while sec 27(4) requires second respondent to publish by-laws duly made by first respondent in the Official Gazette. In addition sec 56(1)(i) of the Act empowers second respondent to make regulations as to the procedure to be followed by local authorities when making by-laws under sec 27. Regulations 2 and 3 of such regulations (Regulation 1993 of 16 September 1983, as amended, published in Government Gazette No 8886 of that date) read as follows:

"'Authority for the making of a by-law

2. No by-law shall be made by a local authority save on a resolution adopted at a duly constituted meeting of such local authority authorising the making of such by-law.

By-law to be published

3. When a resolution has been adopted as provided in regulation 2, the chief executive officer shall cause -

(a) a copy of such resolution, and of the draft by-law referred to therein, to be forwarded to the director for submission to the Administrator for consideration by him;

(b) a notice to be published in two issues of a newspaper as provided in s 110 of the Republic of South Africa Constitution Act, 1961 (Act 32 of 1961), and circulating in the area of jurisdiction of the local authority concerned, in which -

(i) the general purport of the draft by-law is set out;

(ii) it is stated that a copy of such draft by-law is lying for inspection during normal office hours at the office of the local authority for a period of 14

days as from the date of the second publication of such notice;

(iii) it is stated that any resident of such area of jurisdiction who desires to record any objection to such draft by-law or who wishes to comment thereon shall do so in writing to the chief executive officer within 21 days of the date of the second publication of such notice."

Mr Chaskalson argued that the lawgiver clearly distinguished between a local authority's power to impose levies on the one hand and its power to determine tariffs for services on the other. In the case of a levy the only requirement is the approval of the Administrator whereas the fixing of tariffs for services requires the whole elaborate procedure for the adoption, publication and promulgation of by-laws. Consequently, so the argument ran, a local authority cannot determine tariffs for services by means of a levy. The "special levy" is indeed a charge for

municipal services by another name and the council has accordingly exceeded the powers vested in it by the Act. It was further submitted that the council purported to fix charges in 1988 for municipal services rendered from 1985 onwards. Inasmuch as there is no express or necessarily implied power in the Act to legislate retrospectively the adoption of the "special levy" was ultra vires the council. In the third instance and in any event, so Mr Chaskalson argued, the levy is so partial and unequal in its application as to render it grossly unreasonable and hence invalid.

Mr Maritz, who argued the appeal on behalf of the council, conceded that a finding that the "special levy" constituted a retrospective exercise of the council's powers (whether as a levy or as a determination of charges for services) or a finding that it was grossly unreasonable due to its partial and unequal application, must result in its being struck

down. The concession was rightly made. Sec 23(1)(q) is unequivocally couched in prospective terms while there is no indication in par (p) that the legislature intended departing from the well-known presumption against retrospectivity (see Steyn: Die Uitleg van Wette, 5th ed p 236). The section as a whole was intended to circumscribe the powers of local authorities and in the context under consideration it is neither necessary nor permissible to interpret it as affording powers not expressly bestowed or necessarily implied. Likewise there is no indication in the Act that its creatures were empowered to discriminate unfairly between categories of persons under their domain. From that it follows that partial, unequal and consequently grossly unreasonable by-laws or levies would not fall within the council's powers (Rex v Abdurahman 1950(3) SA 136(A) at 143C - H).

Mr Maritz submitted though that the "special levy" is truly what it purports to be; although it had

admittedly been adopted in order to supplement the loss sustained as a result of the invalidation of the March 1985 and March 1987 by-laws, that was merely an historical fact and of no legal consequence. Counsel likened it to a loss occasioned by a natural disaster befalling the council's property. It was therefore neither a disguised charge for services nor retrospective. Moreover, so Mr Maritz submitted, the perceived partiality and inequality were illusory: the "special credit" and the "special levy" were merely balancing book entries which left each consumer with a nil balance on his account.

In any event, so he submitted, it was not open to the appellant to argue the point of partiality and inequality as it had not been raised on the papers. I do not agree. It is true that the appellant did not specifically raise the point in his founding affidavit but instead sought to invalidate the November 1988 by-

laws as a whole on a number of other grounds. Nevertheless the point was pertinently raised in the court a quo; the argument on appellant's behalf was confined to an attack on the validity of the disputed levy and one of the grounds advanced in support was the impartial and unequal incidence thereof. The learned judge a quo entertained argument on the point and determined it in favour of the council. In this court the issue was fully debated, both in the heads of argument and at the hearing. To the extent therefore that questions of law are involved, there could be no prejudice to the council if this court were to consider the issue. To the extent that it involves questions of fact, they are largely to be inferred from the circumstances. The manner in which the practical application of the disputed levy will bear upon different categories of persons, does not really lie within the knowledge of either party but arises from a

legal interpretation of the enactment in the knowledge that is to be applied by a local authority in its area of jurisdiction. It follows that any averments on the point which the appellant could have made in his founding affidavit would have been essentially argumentative. And though the council's acting town clerk, who deposed to the answering affidavit, probably knows a great deal more about the day to day effect of the levy, he would have been constrained to respond in similar argumentative vein. In any event it is highly undesirable that the possible invalidity of the levy in question be left hanging in the air. Prolonged uncertainty will inevitably redound to the detriment, not only of the council, but of untold numbers of others. But even if that had not been the case, sufficient facts can be gleaned or inferred from the papers to deal with the question of law - which has been squarely raised. Indeed the circumstances call

for adjudication more compellingly than had been the case in Van Rensburg v Van Rensburg en Andere 1963(1) SA 505(A), to which Mr Chaskalson referred.

There is much to be said for Mr Chaskalson's argument regarding the distinction between the council's power to impose a levy and the power to fix charges for municipal services. Paragraphs (p) and (q) of sec 23(1) of the Act were ostensibly intended to clothe a Black local authority with two distinct and different powers, namely to impose levies and to determine the tariffs for its services. Generally a levy is a kind of tax or impost (see The Oxford English Dictionary, 2nd Ed, Vol VIII, page 871) not denoting a quid pro quo; a charge for municipal services, again, implies payment for services rendered or made available. Moreover "(t)he usual mode of interpretation is to read the sub-sections of a section as interrelated parts of the whole" (per Hoexter JA in

Aziz v Divisional Council, Cape and Another 1962(4) SA 719(A) at 726E). In the present context there can be little doubt that a Black local authority cannot lawfully establish or amend service charges by means of a levy imposed under sec 23(1)(p) of the Act. It follows a fortiori that the council could not lawfully do so retrospectively. The whole procedure set out in the regulations formulated under sec 56(1) of the Act was designed to forewarn residents of impending amendments to tariff charges and to afford them an opportunity to make appropriate representations. Such opportunity would be rendered nugatory by an interpretation of sec 23(1)(p) which permits tariffs to be amended by means of a levy. It would also be contrary to the scheme of sec 23(1)(q) to permit retroactive increases in charges for municipal services. Urgent adjustments by way of resolution are permitted but, as the paragraph makes plain, in such a

case the ordinary by-law route has to be followed within six months. The "special levy", notwithstanding the ingenuity of its conception and the complexity of its structure, appears to be no more and no less than a device retroactively to increase the council's charges for municipal services.

It is not correct that the belated invalidation of the council's by-laws was merely the cause of a loss which it sought legitimately to recoup - or partially to avoid - by means of the "special levy". Although it was couched as a levy imposed on all persons generally, it was intended to strike - and indeed strikes - at persons who were consumers or holders at any time during March 1985 to September 1988 and who remained such when the 1988 by-laws came into operation. Admittedly all such consumers or holders with municipal service accounts with the council were affected, and only to the extent

that there had been overcharges on their accounts for municipal services. But both in its intent and its effect the "special levy" served to reverse the invalidation of the 1985 and 1987 by-laws. On the first interpretation discussed above the "special credit" is to be afforded to every ratepayer. The by-laws then create a fictional credit relating to service charges but raise the "special levy" in full. The council would then be in precisely the position it would have been had its by-laws relating to charges for municipal services not been struck down: no-one could claim a refund for overpayments made thereunder and any debit balance on a consumer or holder's account would be recoverable by the council at the (illegally) increased rates. Thus the device of a levy imposed in 1988 under sec 23(1)(p) of the Act would have been used to render ratepayers liable for service charges made from March 1985 onwards. That the council cannot

lawfully do under the enabling enactment. The limits of its powers thereunder need not be determined, for it is clear that an increase in charges for municipal services is to be introduced by way of by-laws under sec 23(1)(q). The purported exercise of the council's powers under par (p) of sec 23(1) of the Act in order to achieve that which can only be done under par (q), was invalid. Moreover, even if the council had not labelled the disputed measure a levy but had adopted nomenclature appropriate to determination of service charges, it would still have been acting ultra vires. Indeed, then the purported exercise of retrospective rating powers which it manifestly does not possess, would have been all the more plain.

On the alternative interpretation of the by-laws the conclusion of invalidity is equally ineluctable. If the definition of "special credit" postulates payment under the invalidated by-laws - and

accordingly renders the "special levy" only applicable to those ratepayers who had paid, whether partially or fully - it results in overpayments in respect of service charges being nullified. What the by-laws then achieve, is cancellation of claims for refunds of overpayments. They still constitute an attempt to legitimate retrospectively service charges which were illegal at the time they were made and paid, to which the strictures discussed in the preceding paragraph apply with equal force. But the criticism goes further. The creation of the artificial "special credit" and the contemporaneous imposition of the "special levy" in themselves serve no purpose - the council merely gives with the one hand and takes with the other. But the draughtsman did not have such a pointless exercise in mind. The real - and thinly veiled - objective is attained by the right of appropriation built into reg 13(2). It strikes only at

those who had overpaid as a result of the invalidated by-laws; in their case there would be a third hand involved in the giving and taking exercise, a hand which took yet a second time. And what would be taken is the overpayments made under the invalidated by-laws - overpayments made in respect of service charges. The fiscal sleight of hand would in substance and in reality mean that the conscientious ratepayer would be charged, nunc pro tunc, for the services he had enjoyed since March 1985. What he had overpaid under the invalidated by-laws would not be recoverable from the council by virtue of the latter's right of appropriation contained in reg 13(2). The recalcitrant consumer, however, would be left untouched. Not having been afforded the spurious benefit of the "special credit", he would not have the "special levy" visited upon him. In the result he who had paid nothing, would lose nothing; he who had paid what had not been due,

would be deprived of any right to recover the indebitum. It goes without saying that the latter class would be singled out for such prejudicial treatment. And even more self-evidently discrimination against the conscientious - for the very reason that they had been conscientious - is unconscionable. To penalise virtue is unreasonable. The enabling statute contains no indication that a Black local authority can lawfully treat those under its jurisdiction in such an unreasonably unequal manner.

It follows that the "special levy" provisions in the 1988 by-laws must be held to have been a purported exercise by the council of powers not vested in it by the Act. In view of the preceding conclusions, detailed consideration of the effect of the miscalculation of the "additional amounts" in the annexure to the by-laws is unnecessary. But it should be pointed out that the excessive amounts arrived at

erroneously in the schedule to the by-laws, expose consumers and holders to "special levies" substantially greater than the actual overcharges. A conscientious holder of a residential site, for instance, would have been overcharged in a total amount of R954,18 but his levy would be R1 878,42. Clearly the council is not empowered to impose such a burden on its ratepayers.

To sum up, the council has purported to exercise the power to impose levies, conferred upon it by sec 23(1)(p) of the Act, for a purpose not contemplated by such paragraph, namely, to introduce increases in its tariff of charges for municipal services. That it cannot do - see Sinovich v Hercules Municipal Council 1946 AD 783 at 792; Van Eck N.O and Van Rensburg N.O v Etna Stores 1947(2) SA 984(A) at 996-7, and Mathebe v Regering van die Republiek van Suid-Afrika en Andere 1988(3) SA 667(A) at 700 B - C. It has also attempted to effect such increases

retrospectively whereas sec 23(1)(q) of the Act envisages prospective increases only. On the second, though less likely, interpretation of the 1988 by-laws, the council has moreover discriminated unreasonably against consumers and holders who had made payments in respect of charges for municipal services under the invalidated by-laws. In so doing it breached the principle enunciated by this Court, e.g. in Rex v Abdurahman supra, Sinovich's case supra and Minister of Posts and Telegraphs v Rasool 1934 AD 167 at 173 and 180.

The appeal is upheld with costs, including the costs consequent upon the employment of two counsel. The order in the court a quo is set aside and substituted by the following order:

1. By-law 13 of the by-laws of the City Council of Atteridgeville promulgated under Admini-

strator's Notice 1398 dated 30 November 1988 is declared to be null and void.

2. The first respondent is to pay the costs of the application.

J C KRIEGLER
ACTING JUDGE OF APPEAL

VAN HEERDEN JA)
HEFER JA)
SMALBERGER JA) - Agree
NIENABER JA)