THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

29 September 2011

STATUS: Immediate

THABO MOFUTSANYANA DISTRICT MUNICIPALITY V STEYN-ENSLIN (639/2010) [2011] ZASCA 168 (29 SEPTEMBER 2011)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today dismissed the appeal with costs, save that the appellant may, if so advised, within 30 days hereof give notice of intention to amend its particulars of claim.

The appeal was against the decision of the Free State High Court, Bloemfontein (Mocumie J) upholding an exception by the respondents to the appellant's particulars of claim, in which the appellant sought against the respondents, who were registered regional service levypayers, an order requiring them to submit to it a true and proper statement of account; the debatement thereof and other substantiating documents.

The issue raised on appeal was a narrow one, namely whether the appellant's demand for the submission of such accounts and the debatement thereof had any basis in law. The respondents excepted to the particulars of claim on the basis that the facts pleaded did not sustain a valid cause of action. They contended that the legislature has not vested the appellant with powers to estimate levies or demand an account or debatement of it from levypayers who are in default. The appellant's response was that if the appellant as a municipal council had no such powers, the common law ought to be developed in terms of s 39(2) of the Constitution of the Republic of South Africa, 1996, to vest them with such powers.

The SCA reiterated that the issue on appeal, on the pleadings, was whether the appellant's claim had any basis in law but that during argument the appellant changed tack and confined itself to the right to press for a return rendered by the

respondents. The SCA stated that it was never the appellant's case, on the pleadings, that it required the submission of a return by the respondents. The SCA averred that what hindered the appellant in its demand for the production of the required documents was regulation 13 which forbids the submission and production of the taxpayer's books, records, accounts or other documents, at the instance of the council. The SCA held that the appeal cannot succeed in the light of the provision of the latter regulation. The respondents did not dispute that the appellant was entitled to the return but submitted that this was not the appellant's pleaded case. Their contention was borne out by the pleadings. The SCA stated that there was nothing preventing the appellant from seeking a mandamus in respect of the return, which the respondents conceded in argument. However, during argument it also became apparent that the appellant was not sure of the amount, if any owing to it by the respondents. The dilemma in which the appellant found itself was that it no longer had the power to estimate the amount of the levy owing to it. As the regulation which empowered it to do so was struck down by the SCA in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) as being invalid for inconsistency with the empowering provisions. The SCA stated that the mere submission of a return would consequently not prove a certain solution to the appellant's difficulties. The SCA held that in the circumstances the statute provides the remedy viz an assessment by the Commissioner in terms of regulation 13. As to the development of the common law in terms of s 39(2) of the Constitution the SCA held that there was no valid reason for it to develop the common law when the wording of the legislation on the subject is clear and sufficient. To do so, it held, would be to embark on overzealous judicial reform against which the Constitutional Court has warned. Accordingly the SCA held that there was no merit in the appeal and the exception was correctly upheld by the high court.