THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 639/2010

In the matter between:

THABO MOFUTSANYANA DISTRICT MUNICIPALITY **APPELLANT**

and

STEYN-ENSLIN & VENNOTE **FIRST RESPONDENT**

RUDNAT (PTY) LTD **SECOND RESPONDENT**

AFGRI (PTY) LTD **THIRD RESPONDENT**

Neutral citation: *Thabo Mofutsanyana District Municipality v Steyn-Enslin* (639/2010) [2011] ZASCA 168 (29 September 2011)

Coram: Mthiyane, Heher, Maya, Bosielo and Majiedt JJA

Heard: **12 September 2011**
Delivered: **29 September 2011**

Summary: Regional Services Levy in terms of Act 109 of 1985 ─ Whether municipality entitled to demand a statement of account, debatement or other substantiating documents from a defaulting levy payer ─ if not, whether common law should be developed under s 39(2) of the Constitution to vest it with such right.

ORDER

On appeal from: Free State High Court, (Bloemfontein) (Mocumie J sitting as court of first instance):

The appeal is dismissed with costs, save that the appellant may, if so advised, within 30 days hereof give notice of intention to amend its particulars of claim.

JUDGMENT

MTHIYANE JA (HEHER, MAYA, BOSIELO and MAJIEDT JJA CONCURRING):

[1] This appeal is against the decision of the Free State High Court (Mocumie J) upholding an exception by the first, second and third respondents (the respondents) to the appellant's particulars of claim, in which the appellant sought against the respondents, who were registered regional services 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 exception is a narrow one, namely whether the appellant's demand for the submission of such accounts and the debatement thereof has any basis in law. The attack upon the appellant's cause of action, as pleaded, is that the appellant as a municipal council is not vested with powers to estimate levies or demand

debatement of accounts from levypayers, who are in default. That power resides with the Commissioner of the South African Revenue Service.[1]

[2] In its particulars of claim the appellant claimed the following relief:

'1. That the defendant be ordered to render to the plaintiff within sixty (60) days from the date of the order, a true and proper statement of account together with substantiating documents reflecting the correct;

(a) total amount of all remuneration paid or which became payable by the defendant to any employee;

(b) total amount of all drawings taken by defendant;

(c) total sum of all income or amounts received by or accrued to the defendant in relation to any leviable transaction or consideration as defined[2] including but not limited to the sale and/or letting of goods or fixed property, the rendering of any service and/or the gross amounts received from a financial enterprise during any and every month, effective from 1 March 2000, any remuneration was so paid or so became payable, any drawings was so taken or any income was so received or so accrued as contemplated in paragraph 9(1)(a) and (b) of R340/1987.

2. That the defendant be ordered to debate the said account with the plaintiff within sixty (60) days from the time such account was rendered in terms of prayer 1 above.

3. Payment to the plaintiff of whatever amount appears to be due to the plaintiff upon debatement of the account.

4. Payment of the amount of **R 33 104,46 (Rudnat CC) / R184 081,29 (Steyn Enslin et al) / R184 081,29 (Afgri Pty Ltd)**, in the event of the defendant's non-compliance with prayers 1, 2 and 3 above;

5. Payment of interest on the aforesaid amount in prayer 3 or 4 above at a rate of:

(i) 10.5% per annum from 1 July 2006 till 31 October 2006;

(ii) 11% per annum from 1 November 2006 till 28 February 2007;

(iii) 12% per annum from 1 March 2007 till 29 February 2008;

(iv) 14% per annum from 1 March 2008 till date of payment.'

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[1] See s 12(1A)(dA)(iii) and (iv) of the Regional Services Council Act 109 of 1985.
[2] See paragraph 1 of the regulations promulgated under R340/1957.

[3] The respondents excepted to the particulars of claim on the basis that the facts pleaded did not sustain a valid cause of action. They contend 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.

[4] 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 to vest them with such powers.

[5] The high court accepted the respondents' contention that no cause of action had been disclosed in the appellant's particulars of claim and upheld the exception. The appellant was granted leave to appeal to this court, but confined to the question of whether it was necessary for the common law to be developed in terms of s 39(2) of the Constitution to vest a municipal council with powers enabling it to demand delivery of a statement of account from levy payers and defendants in litigation and the debatement thereof as an extension of the procedural remedy in litigation. This would essentially amount to an extension of the statutory obligation of a levypayer to provide a declaration of its business and to provide monthly returns in respect of the calculation of its liability.

[6] The issue on appeal, as set out in the heads of argument, was whether the appellant's claim that the respondents should account, debate and pay the levies due to the Regional Council Service, had any basis in law. During argument the appellant changed tack and confined itself to the right to press for a return rendered by the respondents who, it argued, were

obliged to submit it in terms of regulation 9(4).[3] Counsel for the appellant further argued as follows: The right to claim levies includes the right to have the return rendered by a levypayer in terms of regulation 9(4). The appellant requires the return in order to determine the amount of levies owing to it by the respondents. The scheme of the regulations is such that if a levypayer failed to submit a return, the council is entitled to make an assessment of what is owed to it. If regulation 13(1), (discussed below), forbids the submission and production of the taxpayer's books, records, accounts or other documents, at the instance of the council, the court should use its common law power to order the payer, to furnish the return. If the common law is deficient, it should be developed in terms of s 39(2) of the Constitution, to vest the court with the power to order a reluctant levypayer to submit such a return.

[7] It was never the appellant's case, on the pleadings, that it required the submission of a return by the respondents. The appellant's claim, as indicated in particulars of claim to which exception was taken, was for a statement of account, debatement of it and other documents reflecting the amounts owing to the appellant. What hindered the appellant in its demand for the production of the required documents was regulation 13(1) which reads as follows:

'**13 Powers of council and Commissioner**

(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.'

[3] Calculation and payment of Regional Services Levy and Regional Establishment Levy GN R340, 17 February 1987.

[8] On the case as pleaded, especially having regard to the fact that the matter came before the high court on exception,[4] the appeal cannot succeed in light of the provision of regulation 13(1).

[9] Upon realising the difficulties posed by regulation 13(1), the appellant resorted to demanding, not a statement of accounts and debatement but a 'return'. In this regard regulation 9 is relevant. It provides:

'(3) Every payment of regional services levy or regional establishment levy shall be accompanied by a return in such form as the council may determine.

(4) Every person who is registered as a levypayer under the provisions of paragraph 10, shall within the period allowed by subparagraph (1) or (2) furnish the council with the return referred to in subparagraph (3) in respect of every month or other period, as the case may be, whether or not any relevant levy is payable in respect of such month or period.'

[10] The respondents do not dispute that the appellant was entitled to the return in terms of regulation 9(4) but submit that this was not the appellant's pleaded case. Their contention is borne out by the pleadings. Had it been otherwise the matter might have ended without the present appeal. There is nothing preventing the appellant from seeking a mandamus in respect of the return. The respondents conceded as much in argument.

[11] However, during argument it also became clear that the appellant is not sure what amount, if any, is owing to it by the respondents. The dilemma in which the appellant found itself was that it no longer has the power to estimate the amount of levy owing to it. The regulation which empowered it to do so, (regulation 11(1)) was struck down by this court in

[4] *Burger v Rand Water Board & another* 2007 (1) SA 30 (SCA) para 4.

City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) as being invalid for inconsistency with the empowering provisions. Regulation 11(1) read as follows:

'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.'

[12] The mere submission of a return would consequently not prove a certain solution to the appellant's difficulties. In the circumstances the statute provides the remedy viz an assessment by the Commissioner in terms of regulation 13.

[13] The argument in favour of the development of the common law in terms of s 39(2) of the Constitution, though not abandoned, was not pressed by counsel for the appellant. I think Mocumie J, in her short pithy judgment, handled the question of whether the common law should be developed in a sound and judicious way. I cannot fault this aspect of her judgment. The law on the subject is perfectly clear. A municipal council is not empowered to assess levies owed to it. If it wishes to have them assessed it has to request the Commissioner to conduct an assessment as required by regulation 13. There is no valid reason for this court to develop the common law when the wording of the legislation on the subject is clear and sufficient. To do so would be to embark on overzealous judicial reform against which the Constitutional Court has warned (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55).

[14] It follows that there is no merit in the appeal and, in my view, the exception was correctly upheld by the high court.

[15] In the result the following order is made:

The appeal is dismissed with costs, save that the appellant may, if so advised, within 30 days hereof give notice of intention to amend its particulars of claim.

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K K MTHIYANE

JUDGE OF APPEAL

APPEARANCES

For Appellant:	KJ Kemp SC (with him C Ploos van Amstel SC) Instructed by: Podbielski Mhlambi Inc, Welkom Honey Attorneys, Bloemfontein
For 1st, 2nd and 3rd Respondents:	FWA Danzfuss SC Lovius Block, Bloemfontein