THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 232/08

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Appellant**

and

CABLE CITY (PTY) LTD **Respondent**

Neutral citation:	*City of Tshwane v Cable City* (232/08) [2009] ZASCA 87 (10 September 2009)
Coram:	BRAND, CLOETE, JAFTA and MAYA JJA, HURT AJA
Heard:	18 MAY 2009
Delivered:	10 SEPTEMBER 2009
Summary:	**Administrative action – whether joinder of relevant actor necessary – whether notice promulgated by the Minister validly authorized by s 12(1) of the Regional Services Councils Act 109 of 1985.**

ORDER

On appeal from: High Court, Pretoria (Fabricius AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

MAYA JA (BRAND, CLOETE, JAFTA JJA and HURT AJA concurring):

[1] This appeal turns primarily on the validity of paragraph 11(1) of Government Notice R 340, for the Calculation and Payment of Regional Services Levy and Regional Establishment Levy, dated 17 February 1987 (the Notice)[1] which empowers a council[2] to estimate the amount of any levy prescribed by the Regional Services Councils Act 109 of 1985 (the Act), which, in its opinion, is payable where a registered levypayer has failed to furnish any return.

[2] The purpose of the Act is to provide for the joint exercise and carrying out of certain functions in certain areas by local bodies [including local authorities] within such areas and to that end to provide,

[1] As amended by GN R783 of 21 April 1989.

[2] Defined in s 1 of the Regional Services Councils Act 109 of 1985 as 'a regional services council established under s 3'. These councils and the levies they were allowed to impose by the latter Act and the KwaZulu and Natal Joint Services Act 84 of 1990 have since been abolished by s 59 of the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006 although municipal councils were allowed to collect outstanding levies up to 30 June 2006. The present matter is, however, not affected by this amendment as the summons was issued on 27 October 2005.

inter alia, for the delimitation of regions and the establishment of regional services councils. The financing of such councils is governed by s 12 of the Act which allows them to impose levies; regional services levies from employers deemed to employ employees within their regions and regional establishment levies from persons carrying on or deemed to be carrying on enterprises;[3] within their regions.[4]

[3] Section 12(1)(b) of the Act[5] empowers the Minister of Finance (the Minister) 'after consultation with the Council for the Co-ordination of Local Government Affairs Act established by section 2 of Promotion of Local Government Affairs Act, 1983 (Act 91 of 1983) and by notice in the Gazette, [to] determine the manner in which the regional services levy and the regional establishment levy shall be calculated and paid'.

[4] Section 12(1A) of the Act further vests the Minister with the power to perform a variety of acts towards that end by way of the notice contemplated in subsection (1)(b). Thus, the Minister may, inter alia:

'(a) ...

(b) ...

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

(d) exempt any employer or person from the regional services levy or the regional establishment levy in relation to any enterprise;

(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 [the] Act is paid;

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[3] Defined in s 1 as 'any trade, business, profession, or other activity of a continuing nature, whether or not carried on for the purpose of deriving a profit, but excluding any religious, charitable or educational activity carried on by any religious, charitable or educational institution of a public character'.

[4] Section 12(1)(a).

[5] Substituted by s 8 of Act 78 of 1986.

(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 [the] 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) authorize a council to administer, subject to any ruling or directive furnished by the said Commissioner under the provisions of paragraph (dA) (v), any provision of this Act or of any such notice in so far as it relates to the payment or recovery of any such levy;

(dC) authorize a council, upon written application by an employer or person and subject to such conditions as the council may determine, to permit that employer or person to pay the total amount of the regional services levy and regional establishment levy for which he is liable within a period of 20 days after the end of every period of a year or such shorter period as the council may determine;

(dD) ...

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

[5] Paragraph 11 of the Notice , which was made on the basis of this legislative framework, reads:

'**Assessments**

11.(1) Where any registered levypayer has failed to furnish any return referred to in paragraph 9(4)[6] 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.

(2) A council shall give the levypayer concerned written notice of any assessment made under subparagraph (1).

(3) The amount of any unpaid levy shown in any such assessment shall be paid by the levypayer within the period determined by the council in the notice of assessment.

(4) An assessment made under the provisions of subparagraph (1) shall lapse in the event of the levypayer furnishing the relevant return.'

[6] Acting on the latter provisions, the appellant sought to recover levies from the respondent and brought an action against it in the Transvaal Provincial Division for payment of a sum of R241 660.22 plus interest. This claim was based on what the appellant contended was an estimated assessment of regional services levies and regional establishment levies allegedly owed to it by the respondent in terms of s 12(1) of the Act read with paragraph 11(1), accumulated during 1 May 1999 to March 2005.

[7] The relevant background facts and applicable legal provisions are encapsulated in a statement of facts agreed upon by the parties for trial purposes and I quote them fully as they represent the sole basis on which the court below decided the matter, the parties having opted not to adduce oral evidence:

'1.1 Plaintiff is the City of Tshwane Metropolitan Municipality, a local authority with full legal capacity duly established in terms of the Local Government Municipal

[6] Paragraph 9(4) provides that '[e]very 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.'

Structures Act 117 of 1998 read with Notice R6770 published in the Gauteng Extraordinary Provincial Gazette No 141 of 1 October 2000, and is the successor- in-law of the disestablished Greater Pretoria Metropolitan Council ...

1.2 Plaintiff [the appellant] is entitled to, in terms of section 93(6) of the Municipal Structures Act 17 of 1998 read with section 12(1) of the Regional Services Councils Act 109 of 1985 (hereinafter referred to as the "Act"), levy and claim a regional services levy and a regional establishment levy (levies).

1.3 In terms of s 12(10) of the Act, Plaintiff is further entitled to charge interest at the rate of 10.5% per annum on all arrear amounts owing in respect of levies.

1.4 Defendant [the respondent] is Cable City (Pty) Limited, a duly registered company incorporated in terms of the Company Laws of the Republic of South Africa and trading as such ...

1.5 Defendant is an employer and is carrying on an enterprise within the area of jurisdiction of the Plaintiff and is therefore liable towards Plaintiff for the payment of levies to Plaintiff.

1.6 Defendant submitted a RCS 6 declaration containing its information to Plaintiff on 23 August 2004.

1.7 Plaintiff confirmed Defendant's registration on 12 November 2004 by letter.

1.8 Defendant has at all times carried on an enterprise and been an employer as defined in the Act as from 1 May 1999 to 30 June 2006.

1.9 Defendant is duly registered as a levy-payer under the provisions of paragraph 10 of the Regulations issued in terms of the Act, and is liable to pay the levies by the Plaintiff in terms of the provisions of section 12(1A) of the Act.

1.10 At all times material hereto the Defendant has carried on business within the region for which the Plaintiff was established.

1.11 Defendant has not furnished the Plaintiff with any returns for the period 1 May 199 to date as required in paragraph 9(3) and (4) of Government Notice R309, as amended.

1.12 Defendant has not submitted to Plaintiff any information relating to his enterprise except for the information contained in the RSC 6 form dated 23 August 2005 ...

1.13 Plaintiff has not been authorised by the Defendant to have access to any books, accounts and records, or other documentation relating to Defendant's enterprise.

1.14 Plaintiff has not been instructed by the Commissioner of the South African Revenue Services (SARS) to make any assessment in terms of Government Notice R302, as amended.

1.15 Pursuant to the Defendant's failure to furnish the aforesaid returns, Plaintiff has estimated the amount of the levies, which, in Plaintiff's estimation, the Defendant is liable to pay in respect of the said period as provided for in paragraph 11(1) of Government Notice R340 published in Government Gazette dated 17 February 1987, as amended.

1.16 Plaintiff has on 4 July 2005 faxed ... to Defendant ... a valid assessment in terms of the said estimate as provided for in paragraph 11(1) of the said notice. Defendant denies that the documents constitute a valid assessment.

1.17 Defendant has not paid any amounts to the Plaintiff.

1.18 SARS has not made an estimate or assessment in respect of Defendant's liability in respect of the aforesaid levies.

1.19 Plaintiff has not been instructed by SARS to issue an assessment for any unpaid levies by Defendant as provided for in paragraph 11(2) as read with 13(4) of Government Notice R304 of 17 February 1987, as amended.'

[8] The matter came before Fabricius AJ who, relying on *Algoa Regional Services v Buchner*,[7] dismissed the claim on the basis that the Minister of Finance had acted *ultra vires* the empowering provisions contained in s 12 of the Act when he made the regulation contained in paragraph 11(1), with the consequence that the levies claimed on the basis of estimates made under its provisions were unenforceable. The learned judge held further that, in any event, the assessment of the amount of the levies was unreasonable and arbitrary as it was based on information totally unrelated to the respondent's enterprise and that the action could have been dismissed on that ground alone. The appellant appeals against this decision with the leave of the court below.

[7] An unreported judgment of the Eastern Cape Division in Case No. 1150/94 delivered on 5 June 1995 by Jones J.

[9] In the appeal before us a challenge raised in the appellant's heads of argument that the respondent had failed to establish a defence to the appellant's claim because the legality of Paragraph 11(1) was not properly raised in the pleadings was abandoned, wisely so in my view. However, the appellant, relying on the provisions of rule of court 10A, argued – for the first time in these proceedings – that the matter should have been dismissed on the basis of the Minister's non-joinder in the proceedings as the validity of the impugned Notice is a constitutional issue which could not be determined in the absence of the Notice's maker. The appellant also persisted with its argument that paragraph 11(1) is valid and that its estimate of the levies was not arbirtary.

[10] I deal first with the issue of non-joinder as it is potentially crucial to the fate of this appeal. I agree with the appellant's contention that the making of regulations by a Minister constitutes administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000,[8] which must comply with the requirements of this Act in accordance with the doctrine of legality.[9] A determination of whether public power such as this has been exercised lawfully is indeed a constitutional matter[10] and a finding that a 'minister acted *ultra vires* is in effect a finding that [he or she] acted in a manner that is inconsistent with the Constitution and that his or her conduct is invalid'.[11]

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[8] *Minister of Health NO v New Clicks SA (Pty) Ltd* (TAC as *Amici Curiae)* 2006 (2) SA 311 (CC) paras 128, 135.
[9] *Pharmaceuticals Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) para 50.
[10] *Id* at para 51; *MEC for Local Government and Development Planning, Western Cape v Paarl Poultry Enterprises CC* 2002 (3) SA 1 (CC) para 6.
[11] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 50; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

[11] According to rule of court 10A, 'if in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings'. As pointed out by the appellant, a court may, on this basis, not make an order of constitutional invalidity in relation to legislation unless the relevant organ of State which is not a party to the proceedings has had the opportunity to intervene in those proceedings.[12]

[12] That being said, it seems to me that the appellant misconceived the nature and implications of the respondent's defence and that its reliance on rule of court 10A is misplaced. Of first importance is the fact that the respondent does not seek a declaration of constitutional invalidity and has not asked that paragraph 11(1) be set aside, which, I think, is the remedy contemplated in uniform rule of court 10A. The notice in issue was found unlawful, long before these proceedings, in *Algoa Regional Services*, a decision which, significantly, was never challenged. The respondent merely relies on that settled legal precedent as a defence against its refusal to pay the levies, a defence which the appellant was well aware of before the trial. In any event, the appellant itself administers the provisions in issue by delegation in terms of s 12(1A)(dB) and this precludes any possible prejudice. In my opinion, the issue is rather whether it is permissible for the respondent to advance the defence.

[13] The validity of an administrative act is generally challenged by way of judicial review. It is, however, not uncommon for a challenge to arise, not by the initiation of such proceedings but by way of defence, as

[12] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 7; *Van der Merwe v Road Accident Fund* (Women's Legal Centre Trust as *Amicus Curiae*) 2006 (4) SA 230 (CC) para 7.

a collateral issue in a claim for the enforcement or infringement of a private law right, as the case may be. A citizen is not required to comply with an administrative act which is bad on its face as it is unlawful and of no effect. He or she is entitled to ignore it if so satisfied and justify that conduct by raising a 'defensive' or 'collateral' challenge to its validity.[13]

[14] In *Boddington v British Transport Police*[14] the court reaffirmed a party's right to raise a collateral challenge to the validity of a decision to post a prohibitory notice issued pursuant to a byelaw by way of defence against a criminal charge of a contravention of the byelaw. The court took the view that there was no reason to distinguish between civil and criminal proceedings as settings in which the defence could be raised and held:[15]

'It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court of law as unlawful. Suppose an individual is charged before one court with breach of a byelaw and the next day another court quashes that byelaw – for example, because it was promulgated by a public body which did not take take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.

...

However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

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[13] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 244C.
[14] [1999] 2 AC 143 (HL).
[15] At 153H-154A; 160C; 161D.

...

However ... it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.'

[15] Thus, depending on the construction of the relevant statutory instrument through the lens of the principles of the rule of law, a party has a right to raise a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action because the legal force of such action will most often depend upon the legal validity of the administrative act in question.[16] Importantly, the court has no discretion to allow or disallow a party from raising a collateral challenge once the right to do so has been established.[17] The basis for this view was eloquently articulated in the *Oudekraal Estates* decision as follows:[18]

'The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy ... Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.'

[16] I mentioned at the outset that the respondent did not ask to have paragraph 11(1) set aside. It merely contends that its provisions are unlawful for exceeding the powers of the enabling legislation and cannot

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[16] *Oudekraal Estates Pty Ltd* (supra) at 245G-H.
[17] *Ibid* at 246B.
[18] At 246C-D.

found a basis for the collection of the levies sought to be recovered from it. In other words, the respondent seeks to repel the council's coercive action ie the collection of the levies, whose legal force lies in the legal validity of the provisions made by the Minister empowering the council to collect the levies. The appellant's case, therefore, bearing in mind again that these proceedings were not designed to impeach the legal provisions in issue, rests squarely on the validity of these provisions. If they are unlawful, that is the end of the matter. That being the case, this court has no discretion regarding whether or not the respondent may raise it and must perforce adjudicate the case presented to it.

[17] As to the merits of the matter, the crisp question to be asked is whether s 12 authorises the Minister to issue a notice which permits a regional services council to determine the amount of a levy simply by estimating it. If not, paragraph 11(1) is invalid for inconsistency with the empowering provisions thus rendering the appellant's assessment of the respondent's levies invalid.[19]

[18] It was contended on behalf of the appellant that the Act does vest the Minister with the power to authorize the council to estimate the amount of a levy especially if regard is had to the wide provisions of s 12(1A)(e) entitling him or her to 'make such other provision as he [or she] deems necessary to enable a council to impose and claim [a] levy'. It was contended further that the words 'shall be calculated' in subsections (1)(b) and (1A)(c) must be interpreted against the background of the definitions of 'regional establishment levies' and 'regional services levies' in the Act which embody detailed provisions for the mathematical

[19] *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A) at 469A-B.

calculation of such levies and that they do not mean 'a mere arithmetical calculation'.

[19] Admittedly, the provisions of subsection (1A)(e) are wide. But are they so wide as to allow the meaning contended for by the appellant? What is certain is that they cannot be interpreted in isolation and must be read in conjuction with the rest of the provisions of s 12.[20] To my mind, the starting point is to determine the meaning of the words 'shall be calculated' used in s 12 (1)(b) and subsection (1A)(c). 'Calculate' in the *Shorter Oxford English Dictionary* means 'to compute mathematically; to perform calculations; to ascertain by mathematics'. In their ordinary, grammatical context, the words connote a certain degree of precision which can be achieved only by way of a mathematical exercise. This interpretation creates neither ambiguity nor absurdity and I see no reason to depart from the words' plain meaning.

[20] Moreover, the reading of the provisions of subsection (1A)(e) contended for by the appellant renders subsection (1A)(c) superflous. That, undoubtedly, cannot have been the Legislature's intention. And if proper effect is given to the wording of subsection (1A)(c) in the manner shown above, it becomes clear that subsection (1A)(e) does not include the authority to merely estimate levies without the benefit of relevant and objectively identified figures.

[21] I am fortified in this view by the provisions of subsection (1A)(dA) which introduced the Commissioner for Inland Revenue, vested with significant powers, into the picture. I refer to these provisions fully mindful of the fact that they did not exist when the Notice was

[20] *Algoa Regional Services v Buchner* (supra) above n 7.

issued. But I see no reason why we should not have recourse to them for purposes of determining the Legislature's intention. They do not seek to invalidate the old provisions of the Act and were meant to 'further define certain expressions ... [and] to further regulate the financing of a council and the furnishing of information to a council'.[21] By distinguishing between the powers vesting in the Commissioner and the council as they do, they explain what was in the Legislature's mind when it enacted s 12.

[22] The subsection expressly authorizes only the Commissioner, among other things, to examine a levypayer's supporting documentation from which a determination of liability can be quantified. Interestingly, the Notice itself precludes a council from accessing a levypayer's documentation.[22] The Commissioner, significantly, is an expert with vast auditing skills and machinery to conduct the necessary verification. He or she has access to all taxpayers' financial information, in circumstances of confidentiality, upon which to make assessments which a council does not possess as shown by the provisions of s 15 of the Act which authorize the Comissioner 'to furnish to a council such information as in [his] opinion is necessary for the determination and collection of ... [levies]'.

[23] The subsection further authorizes only the Commissioner to 'determine or estimate' a levypayer's liability, where unable to make a calculation despite the exercise of his or her powers, and then to 'direct a council to make an assessment of such levy'. Quite apart from the use of the disjunctive 'or' between 'determine' and 'estimate', which draws its

[21] Preamble of Act 78 of 1986.
[22] Paragraph 13 of the Notice provides that '[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.'

own distinction between the meaning of the words, these provisions clearly show that it is only in these circumscribed circumstances in which the Commissioner is involved that a council may make an estimate.

[24] Considering the Act as a whole and the wording of s 12, the implication appears ineluctable that the Legislature never intended councils to have power to summarily estimate levies and did not grant the Minister authority to permit such exercise. I agree with the court below and the reasoning followed in the *Algoa Regional Services* decision therefore that the provisions of paragraph 11(1) are *ultra vires* the empowering provisions set out in s 12 of the Act and are unlawful. This finding, in my view, dispenses with the need to consider the other issues raised in the appeal.

[25] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel.

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MML MAYA
JUDGE OF APPEAL

APPEARANCES:

For appellant:	JP Vorster SC M Snyman Instructed by: Hugo & Ngwenya Inc, Centurion c/o Meintjes & Petzer Claude Reid, Bloemfontein
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