CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/09
[2009] ZACC 34

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

CABLE CITY (PTY) LTD Respondent

Decided on : 3 December 2009

JUDGMENT

THE COURT:

[1] This application for leave to appeal is about whether the applicant municipality (the City) had power to exact an estimated regional service levy from the respondent levy-payer (the respondent). The main question is whether Government Notice R340, entitled "Calculation and Payment of Regional Services Levy and Regional Establishment Levy", dated 17 February 1987 (the Notice),[1] gave the City the power to estimate the levies due. The Minister of Finance (the Minister) purported in the Notice to confer on the City the power to "estimate the amount of any levy which, in its opinion, is probably payable" in respect of a relevant month or period.[2] The

[1] Published in *Government Gazette*, GG 4049 GN 10613, 17 February 1987.

[2] Paragraph 11(1) of the Notice.

Minister purported to do so in terms of section 12 of the Regional Services Councils Act 109 of 1985 (the Act). Section 12 vests power in the Minister, 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".[3] Section 12(1A) further gives the Minister the power to "determine how an amount upon which the regional establishment levy is payable shall be calculated"[4] and to "make such other provision as he deems necessary to enable a council to impose and claim any such levy".[5]

[2] Relying on paragraph 11(1) of the Notice, the City estimated the amount of the levy that in its opinion was "probably payable" by the respondent. It then issued summons claiming payment of the amount. The matter went to trial before Fabricius AJ in the North Gauteng High Court, Pretoria (the High Court) on an agreed statement of facts. The High Court dismissed the City's claim. Relying on the judgment of Jones J in the Eastern Cape Division in *Algoa Regional Services v*

[3] Section 12(1)(b).

[4] Section 12(1A)(c).

[5] Section 12(1A)(e).

Buchner,[6] the High Court held that section 12 of the Act did not empower the Minister to authorise the City, by way of the Notice, to estimate the amount of any levy.

[3] The Supreme Court of Appeal affirmed the conclusion of the High Court.[7] Maya JA, writing for a unanimous court, held that "[c]onsidering the Act as a whole, and the wording of section 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".[8] The Supreme Court of Appeal therefore endorsed the finding of Fabricius AJ as well as the reasoning in *Algoa Regional Services v Buchner* that the provisions of paragraph 11(1) of the Notice were beyond the powers conferred on the Minister by section 12 of the Act.

[4] Regional services councils and the levies that the Act allowed them to impose have been abolished,[9] but municipal councils were allowed to collect outstanding

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[6] Case No 1150/94, 5 June 1995, unreported. Jones J held at pp 9-12:

> "[T]he wording of subparagraph 12(1A)(e) specifically empowers the Minister to authorize things which are *necessary* to enable the council *to impose and claim* a levy. Wide though the wording is, it relates solely to authority, firstly, for things which are essential to enable a council to assess what the levy is so that it can be imposed and, secondly, for things which are essential to enable it to be claimed. . . . [S]ubsection 12(1A) explicitly envisages that the *Commissioner* may have to resort to an estimate if he is not able to make a calculation despite the use of his powers. Significantly, the Act contains no similar reference to an estimate by a council. It is the Commissioner and not a council who has the expertise to make an informed estimate where the circumstances justify it. . . . The legislator could not have intended a purely arbitrary assessment of liability. . . . My conclusion, therefore, is that provision in section 12 for the intervention of the Commissioner and the use of his powers is totally inconsistent with an intention to allow the amount upon which the levy is imposed, and hence the amount of the levy itself, to be estimated by a council. It follows that in my view the Minister of Finance acted *ultra vires* the empowering statute when he included paragraph 11(1) in the R340 notice. It also follows that a levy imposed in terms of that provision in the notice is unenforceable." (Emphasis in original.)

[7] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; Case No 232/08, 10 September 2009, unreported.

[8] Id at para 24.

[9] See section 59 of the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006.

levies up to 30 June 2006 and the summons in the present matter was issued before that date. Hence the currency of the parties' dispute.

[5] The City now seeks leave to appeal against the judgment of the Supreme Court of Appeal. It contends that the impugned provisions did authorise the Minister to issue the Notice. But to that argument it adds a further point, one it advanced for the first time before the Supreme Court of Appeal. This is that the Minister of Finance, who issued the Notice, should have been joined in the proceedings and that in his absence it was inappropriate for the Supreme Court of Appeal to determine the issue of the validity of the Notice.

[6] The Supreme Court of Appeal rejected the City's plea of non-joinder. It held that the City had "misconceived the nature and implications of the respondent's defence" since the respondent did "not seek a declaration of constitutional invalidity and has not asked that paragraph 11(1) be set aside,"[10] but merely relied on the invalidity of the Notice to resist the claim against it. Referring to the concept of "collateral challenge" as set out in *Oudekraal*,[11] Maya JA held that the respondent was entitled when summonsed to pay tax to resist the claim by raising a "defensive" or "collateral" challenge to the validity of the Notice on which the tax was based.[12] This meant that the respondent was able to resist paying the tax without having to join the Minister.

[10] Above n 7 at para 12.

[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 32-6.

[12] Above n 7 at paras 13-6.

[7] Before this Court the City challenges this conclusion, urging that judgment on the validity of the Notice was incompetent in the absence of the Minister.

[8] In our view it is not necessary to consider the doctrine of collateral challenge or to decide whether it permits invoking invalidity in the absence of the legal authority who issued the Notice from legal proceedings. This is because, on the question of the power conferred by section 12 of the Act, the City's prospects of reversing the judgment of the Supreme Court of Appeal are poor. Even if the Minister were joined, it is unlikely that this Court would reverse the finding of the Supreme Court of Appeal that section 12 conferred no power on the Minister to authorise a council to estimate the liability of levy payers.

[9] As the Supreme Court of Appeal pointed out, the Minister's statutory power to "determine how an amount . . . shall be calculated"[13] clearly does not confer power to authorise a council to make an estimate. Calculation, which is precise, differs from estimation, which is approximate. Still less does the hold-all statutory authority the Act gives the Minister (to "make such other provision as he deems necessary to enable a council to impose and claim any such levy")[14] empower him to authorise a council to enforce estimates.

[10] The City had but meagre answer to these findings, and it appears unlikely that there will be more to be said should the matter be set down for oral argument.

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[13] Section 12(1A)(c).

[14] Section 12(1A)(e).

[11] It is true that this leaves the Notice lingering in a legal limbo. The Supreme Court of Appeal has declared it invalid and unenforceable as a means of exacting levies: but formally it has not yet been set aside. Legally it has therefore not been conclusively extinguished. However, this is not sufficient reason for this Court to grant leave to appeal. As already pointed out, the empowering legislation (and with it the system of regional levies) has been abolished. In the wake of the Supreme Court of Appeal judgment it is highly improbable that any council will in future seek to invoke the Notice to levy payments. The non-joinder of the Minister and the somewhat ambiguous legal status of the Notice are therefore not sufficient reasons for this Court to hear the matter.

[12] Given these features of the case and the paltry prospects that this Court will reverse the conclusion of the Supreme Court of Appeal on the meaning of the provisions in question, it is not necessary for this Court to enter into the question of the existence and impact of the doctrine of collateral challenge. It is in general imperative that a party affected by a ruling should be joined in those proceedings. This is particularly so when the constitutional validity of a ministerial act is at issue.[15] In the unusual circumstances of this case, however, where the statute's empowering provisions clearly fail to confer the authority the City seeks to extract from them, it would be inappropriate for this Court to grant leave to appeal merely on the basis of the Minister's non-joinder.

[15] See *Mabaso v Law Society, Northern Provinces, and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at paras 13-4; *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at paras 7-9.

[13] For these reasons, the application for leave to appeal is dismissed with costs.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J.