

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 8758/06

In the matter between:-

ETHEKWINI MUNICIPALITY

Plaintiff

and

ATLAS PLASTICS (PROPRIETARY) LIMITED

Defendant

JUDGMENT

VAN ZYL, J.:-

1. The Plaintiff municipality instituted action claiming alleged arrear regional services levies and regional establishment levies from the defendant, claims which the defendant has resisted.
2. It is common cause that, with effect from 1 March 1991, the Port Natal-Ebhodwe Joint Services Board was created with powers to impose and recover regional services levies, as well as regional establishment levies

within the Port Natal area in terms of the KwaZulu and Natal Joint Services Act, No. 84 of 1990 and for convenience herein after referred to as “the Act”.

3. Subsequently the Port Natal-Ebhodwe Joint Services Board was succeeded by the Durban Transitional Metropolitan Council and it was in turn succeeded by the Durban Metropolitan Unicity Municipality. The latter municipality later changed its name to that of the eThekweni Municipality, being the plaintiff in these proceedings.
4. It was further common cause that a joint services board, and thus the plaintiff, was entitled to impose upon an employer which employs, or is deemed to employ employees within its region a regional services levy, as well as upon every person carrying on or deemed to be carrying on an enterprise within its region, a regional establishment levy and that where interest on arrears could be levied, the applicable interest rates, as set out in the schedule contained as annexure “A” to the particulars of the plaintiff’s claim, conformed to the definition of the “prescribed rate” as contained in Section 1 of the Income Tax Act, No. 58 of 1982.
5. The plaintiff alleged, but the defendant denied that, with effect from July 1991 the latter had been an employer and had carried on an enterprise within the plaintiff’s (formerly known as the Port Natal) region, was thus liable as a levy payer to render returns and pay the applicable regional services and establishment levies on a monthly basis and that it had

failed to do so.

6. The plaintiff alleged, by way of amplification in paragraph 11 of its particulars of claim, that the defendant had failed to register as such with effect from July 1991, or to render returns. It was further alleged that the defendant had only registered as a levy payer on or about 14 January 2002, but that it had nevertheless commenced rendering returns from June 2001 and had failed to pay the applicable levies, as it was obliged to do.

7. In its plea the defendant admitted that it did not register as a levy payer prior to 14 January 2002, but it did not allege that it did so thereafter and with the exception of specific admissions made in relation to paragraph 11 of the particulars of the plaintiff's claim, purported to deny the contents thereof. The defendant, however, admitted not rendering returns for the period between July 1991 and May 2001, as well as to rendering returns from June 2001 to January 2006, but denied any legal obligation to do so, or to have made any levy payments to the plaintiff.

8. The plaintiff further alleged that in view of the alleged breach by the defendant of its obligations to render returns and make payments, it then estimated the defendant's liability for the payment of the arrear levies and interest calculated thereon and addressed a notification to this effect (in the form of a duly completed form ML5 dated 8 February 2002) to the defendant. The defendant admitted that such notice was addressed to it

and received at its postal address in Klerksdorp, North West Province and outside the plaintiff's area of jurisdiction, whilst denying the remaining allegations and in particular any indebtedness to the plaintiff.

9. These pleadings left the areas of dispute as between the parties somewhat unclear. By and large and with the exception of the admissions made in the plea, the defendant sought simply to deny the allegations made and to put the plaintiff to the proof thereof. Whilst, in its affidavit opposing summary judgment, the defendant had raised certain defences, such as alleged lack of jurisdiction, inadequate notice to the defendant of the assessment. Subsequently and presumably informally it raised the issue of prescription. The former defences were not pursued in the plea and the latter, relating to prescription, was abandoned in paragraph 4 of the pre-trial minutes.

10. On the merits and in the affidavit opposing summary judgment, the defendant purported to admit opening "a branch office" within the plaintiff's area during 1993 but by reason of its alleged administrative structuring denied that it constituted an enterprise within the meaning of the legislation, which could attract liability for the payment of levies. It is against this background that the minutes of the pre-trial conference attended by the representatives of the parties assume greater significance and to which I will revert in due course.

11. The plaintiff called two witnesses to the stand, the first of which was its

main witness Ms Yvonne Naicker. She had commenced employment with the plaintiff with effect from 19 December 1982, but subsequently left apparently of her own accord at the end of February 2009. At the time of giving evidence she was an employee of the New Shifa Hospital. Whilst in the plaintiff's service and from 1991 she was employed in its business levy section. Her main functions concerned collecting levies from all income generating enterprises within the plaintiff's jurisdictional area and during 2002 she served as its administrative officer in charge of collections in the levy section.

12. Relevant to the defendant Ms Naicker conceded that she had no direct knowledge of its affairs and had not had any direct dealings with it. Her involvement at the time, was purely a management function on behalf of the plaintiff municipality. She explained in some detail how the plaintiff's levy collections at the time operated and the administrative procedures followed in the course of registering, collecting from and dealing with enterprises liable to pay levies to the plaintiff. According to her evidence the plaintiff was primarily reliant upon the information provided by the enterprises concerned in order to calculate, verify and/or control the levies recoverable.

13. Where no or incorrect returns were made, the plaintiff would resort to estimating the liability of the offending enterprise and issuing an assessment in this regard. Ms Naicker was referred to and identified certain of the documentation comprising the plaintiff's bundle of

documents. However, she made no claim to any legal qualifications and declined in cross examination to express any authoritative views on the applicable legal principles.

14. In particular Ms Naicker was cross examined in regard to a copy of a letter dated 15 January 2003 (received in evidence as exhibit “B”) and addressed by plaintiff’s attorneys of record to the defendant’s attorneys of record. This was some years prior to the institution of the present action during August 2006 and appears to have been a letter in the course of correspondence conducted between the attorneys at the time in an effort to resolve the dispute between the parties amicably. Although the letter was not marked as being “*without prejudice*”, such marking is not essential to rendering the document privileged from disclosure. In this regard Tshabalala JP remarked in *Lynn & Main Inc v Naidoo and Ano* 2006 (1) SA 59 (N) in paragraph 22 at page 65 A-B, as follows:-

“Now, as a general rule negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences, are privileged from disclosure. This is so whether there are express stipulations that they shall be without prejudice or not. (See Millward v Glaser 1950 (3) SA 547 (W).)”

However, since Mr Harcourt who appeared as counsel for the plaintiff did not seek to invoke privilege or object to the letter (exhibit “B”) being put to the witness in cross examination by Mr Crampton, who appeared for

the defendant, it becomes necessary to consider the evidence elicited in regard thereto.

15. The relevant portion of exhibit “B” purports to record that the plaintiff’s attorneys had at the time consulted with the witness Ms Naicker before formulating the reply contained in the letter under consideration. In the course of the letter it was stated that “*Ms Naicker concedes that in the light of the manner of operations and in the light of the fact that all delivery notes and invoices emanate from the head office that the Durban operation will not be responsible for the payment of Regional Service (sic) Levies on the turnover.*”. This appears to be in error and the reference, in context, should rather be to a regional establishment levy which related to business turnover and not to the regional services levy which related to the remuneration paid to employees of the enterprise.

16. When the contents of this letter were put to the witness in cross examination and she was asked whether she recalled “*the problem*”, she denied any recollection thereof. Given the passage of almost eight years between the date of the letter and when the witness gave evidence, this denial can hardly be discredited, especially since the letter preceded the institution of the present action by some three and a half years. Counsel for the defendant then put to the witness that the defendant would contend that its operation was located in a different jurisdiction (Klerksdorp) and that its liability to pay levies was limited to that area only. The witness disagreed and responded that according to the

plaintiff's information at the time the defendant maintained a manager and staff within the plaintiff's area and that this rendered it liable to pay the regional services levy.

17. Counsel for the defendant further put it to the witness that the letter stated that the defendant was liable to the plaintiff for the regional services levy, but not for the regional establishment levy. The witness agreed that such was the meaning of the letter, but stressed that she disagreed, based upon the information available at the time, with its conclusion. She further stated that she did not know how the letter came about, but stressed that the provisions of the Act were decisive of the dispute and not the contents of the letter.

18. It needs to be noted that the letter, having purportedly expressed the views attributed to the witness and set out above, then suggested that the matter be resolved on the basis that the defendant completed fresh declarations setting out the "*actual*" salaries and wages paid at its "*Durban operation*" and that the "*Council*" (no doubt a reference to the plaintiff) then be requested to issue a revised (levies) assessment in respect of the defendant. Presumably no agreement could be reached in regard to the proposal and no compromise resulted.

19. In my view it is not possible to draw any clear inferences adverse to the plaintiff from the letter (exhibit "B"). Firstly, when it was produced by counsel for the defendant and tendered in evidence, this was stated to be

on the basis that the defendant contended that whilst the letter was what it purported to be and was sent and received, the correctness of its contents were not admitted. Ms Naicker, to whom the letter was put, professed not to have any knowledge of the circumstances under which it was written, but disagreed with its contents and conclusions.

20. The letter was apparently in reply to specific allegations made in a preceding letter dated 31 October 2002 by the defendant's attorneys to the plaintiff's attorneys, but which was not produced in evidence, nor did the defendant lead any evidence to the effect that the letter (exhibit "B") formed part of a series of communications between the representatives of the parties and/or was received as such by its attorneys. Unsupported by any evidentiary base, I consider that exhibit "B" has little, if any, evidentiary value.

21. Ms Naicker presented as a good, confident and impartial witness. I have no reason to doubt her honesty and integrity. Allowance needs to be made, as already indicated above, for the long period of time which had elapsed between the occurrence of the events about which she gave evidence and the time when she found herself in the witness box.

22. The second and final witness for the plaintiff was Mr Suren Manilall, an employee of the plaintiff in its business levies department. He held the post of Debtor's Clerk and his duties included dealing with the attorneys retained by the plaintiff relevant to outstanding levy matters. The

relevance of his evidence was merely to explain the disappearance of the plaintiff's original file relevant to its claims against the defendant in the present matter. He said that he was asked to look for the file but could not locate its whereabouts. He explained that his section had moved premises during the year 2007 to Shell House and again during 2008 to its present location in Martin West Building. The suggestion arising from his evidence was that the relevant file had been lost or mislaid in the course of one of these moves. He was not cross examined, the plaintiff closed its case and the matter was postponed for the presentation of the case for the defendant. However, upon resumption the defendant closed its case without calling any witnesses.

23. Counsel for the plaintiff submitted that the matter was deceptively simple. This was because the plaintiff had established that the defendant was a registered as a levy payer and was required in terms of the regulations issued in terms of section 16(1)(d) of the Act by the Minister of Finance for the Republic under Government Notice 729 of 4 April 1991 (herein called "the Payment Regulations") to render returns and to pay the levies calculated as prescribed. For the fact of such registration counsel for the plaintiff relied upon the evidence of Ms Naicker and her identification of the copy of the registration form apparently completed on behalf of the defendant on 14 January 2002 and comprising pages 1 and 2 of the plaintiff's bundle of documents received as exhibit "A".

24. Counsel for the defendant, however, submitted that Ms Naicker was not

competent to give evidence in regard to the authenticity of this registration form, completed in manuscript, because she was not party to its creation, nor to the receipt thereof on behalf of the plaintiff. There was, so the argument ran, therefore no evidence that this form originated from the defendant.

25. Counsel for the plaintiff, on the other hand, contended that the evidence of Ms Naicker was not only admissible, but relevant and acceptable. In developing his argument counsel submitted that Ms Naicker was, at all relevant times, in control of the plaintiff's records and that the assessment of 8 February 2002 was issued under her supervision as the plaintiff's administrative officer in charge of collections in its levy section. As such she was, so counsel submitted, in a position where she was able to and did acquire the necessary personal knowledge from the records at her disposal and under her control. In this respect counsel relied upon the analogous authority of *Kurz v Ainhirn* 1995 (2) SA 408 (D) where Howard JP held that a liquidator could, from the records at his disposal, gain sufficient personal knowledge of the affairs of a company prior to its liquidation in order to depose to an affidavit in support of an application for summary judgment.

26. Counsel for the defendant further submitted that, whilst the accuracy of the plaintiff's computerised records relating to levies imposed upon the defendant had been admitted in the minutes of the pre-trial conference held between the representatives of the parties (see: paragraph 5), the

manuscript portion of the registration form did not form part of such records and was therefore not admitted by the defendant.

27. With reference to the pleadings counsel for the defendant drew attention to the fact that the plaintiff alleged in paragraph 11(b) of its particulars of claim that the defendant registered as a levy payer, to which the defendant pleaded in paragraph 5.1 of its plea that “*Defendant admits that it did not register as a levy payer prior to 14 January 2002.*”, but in paragraph 5(5) it denied the remaining averments made by the plaintiff. Consequently counsel submitted that the defendant made no express admission that it registered as a levy payer with the plaintiff.

28. At the outset it therefore becomes necessary to consider whether the plaintiff has established that the defendant was registered with it as an enterprise for purposes of the Act. During the course of argument it was not suggested that the plaintiff did not bear the duty to establish such registration on a preponderance of probabilities. It therefore needs to be decided whether the plaintiff has discharged the onus resting upon it.

29. It was not put in cross examination to Ms Naicker that the purported registration document was a forgery, or was created and/or introduced by or on behalf of the plaintiff in order to falsely implicate the defendant as a registered enterprise liable to the duties of a levy payer. At most it was suggested to her that she could not, by reason of any personal involvement or contact with the defendant, verify such registration.

30.If regard is had to paragraph 5 of the defendant's plea then it becomes necessary also to note that in paragraph 5.2 the defendant admitted to "*..not furnishing any returns or paying any levies to the plaintiff between July 1991 and May 2001.*" and in paragraph 5.3 of its plea that it rendered returns for the months June 2001 to January 2006, but in paragraph 5.4.2 denies that it was obliged to render returns or make payments prior to the latter period. In paragraph 3 of the pre-trial minutes the parties recorded that the plaintiff admitted that the defendant had submitted returns and made levy payments to the plaintiff since June 2003.

31.If regard is had to the defendant's affidavit opposing summary judgment, then it appears that the affidavit was deposed to by one Lategan who claimed to be the defendant's "*sales and marketing director*" and who was, at the time, residing in Durban North. However, according to this affidavit the defendant established a branch office at Durban during 1993 but until May 2003 paid all levies to the appropriate authority at the seat of its head office in Klerksdorp. But, as a result of pressure brought about by the plaintiff, from June 2003 onwards it paid levies to the plaintiff, an allegation which also finds support in paragraph 3 of the pre-trial minutes.

32.The question arising from the foregoing is how it came about that the defendant admittedly rendered returns and made levy payments to the

plaintiff if it had not registered with the latter as an enterprise liable to do so in terms of the Act. The fact that levy payments were made to the plaintiff from June 2003 onwards, strongly suggests that the defendant must have registered as a levy payer with the plaintiff, in order to do so.

33. It is also significant that the defendant admitted in paragraph 5 of the pre-trial minutes that the plaintiff's computerised records relating to levies imposed upon the defendant were admissible in evidence. In paragraph 6 of the same minutes it was admitted that such records included an assessment form (form ML5) and comprised records of monthly declarations by levy payers, retrospective historical accounts and levy assessments.

34. Ms Naicker gave evidence to the effect that the defendant had been registered as a levy payer in the records of the plaintiff and is recorded as such in the computerised records of the latter as is evident, *inter alia*, with reference to the assessment at page 11 of exhibit "A" to which she referred. This computerised document, dated 8 February 2002 is stated to be a form ML5 assessment of arrear levies allegedly payable by the defendant to the plaintiff for the period 1 July 1991 to 31 December 2001 and corresponds with the plaintiff's allegations as contained in paragraph 11 of its particulars of claim. It was sent to and received by the defendant at its Klerksdorp postal address, as admitted in paragraph 6 of the defendant's plea.

35. In the absence of any evidence to the contrary on behalf of the defendant it appears manifestly clear that the plaintiff has established that the defendant was in fact registered with it as an enterprise liable to render returns and pay levies, certainly as at 8 February 2002. The defendant's purported denials in this regard are at best disingenuous. When the calculations contained in the assessment of 8 February 2002 (at page 11 of exhibit "A") are considered, then it becomes apparent that they correspond with the information contained in the disputed registration document comprising pages 1 and 2 of annexure "A".

36. In all the circumstances there is, in my judgment, sufficient support and corroboration for the evidence of Ms Naicker that this document represents the registration document submitted to the plaintiff on behalf of the defendant and on the strength of which the plaintiff registered the defendant as a levy payer and subsequently on 8 February 2002 issued the assessment referred to above.

37. At the conclusion of the trial counsel for the plaintiff limited its claims to those arising from the assessment of 8 February 2002 issued against the defendant. Counsel submitted, with reference *inter alia* to section 16(2)(h) of the Act and paragraph 12(4) of the Payment Regulations, that once an assessment is issued, then the levy payer became obliged to effect payment of the assessed amount(s) irrespective of any objection and appeal which may have been lodged in regard thereto to the special Court referred to in section 83 of the Income Tax Act, No. 58 of 1962.

38. In the present instance there is no suggestion that the defendant sought to appeal against the assessment of 8 February 2002, so that counsel for the defendant is probably correct in submitting that the provisions of paragraph 16 of the Payment Regulations have no application to the present matter.

39. However, as pointed out above, paragraph 12(4) of the Payment Regulations decrees that the amount(s) stated as owing according to an assessment shall be deemed, irrespective of any pending appeal, to be properly payable under the Act and the relevant authority, here the plaintiff, becomes entitled to proceed thereon against the levy payer by way of legal proceedings in order to enforce payment. In such proceedings the levy payer is precluded from challenging the correctness of the assessment. Effectively the levy payer becomes required to effect payment of the deemed levies as per the assessment and to pursue its remedy against liability thereon separately in the appeal process.

40. It follows that the defendant is then liable to the plaintiff for the levies determined in the assessment of 8 February 2002 which was deemed to be correct at the time of the issue thereof and in the absence of any appeal became conclusive, once the time allowed for an appeal had expired. By reason of the provisions of paragraph 12(4) of the Payment Regulations it is not open to the defendant in the present proceedings to question the correctness of the assessment. In any event, Ms Naicker on

behalf of the plaintiff had asserted its correctness and no countervailing evidence was forthcoming from the defendant.

41. In the event of it being held that the defendant was indebted to the plaintiff, the parties were *ad idem* regarding the applicable interest rates prescribed in section 1 of the Income Tax Act, No. 58 of 1962. These were set out by the plaintiff in paragraph 14 of the particulars of claim read with annexure "A" thereto and duly admitted by the defendant in its plea. In terms of paragraph 10(1) of the Payment Regulations levies are payable within twenty days from the end of the applicable month.

42. Where a levy payer is deemed to have been liable to pay levies for a particular month, but failed to furnish a return so that, at a later stage, an assessment based on an estimate is issued, then it appears to me that the levy payer would nevertheless be liable for interest on the outstanding amount(s) commencing 21 days after the end of the applicable month. Were it to be held otherwise, it would open the door to malpractice where a levy payer could escape liability for interest charges by neglecting to render returns.

43. However, in the present matter counsel for the plaintiff, during the course of argument, handed up and sought judgment in terms of a draft order which not only limited the capital claimed by the plaintiff to the amounts reflected in the assessment of 8 February 2002, but also sought interest thereon only with effect from 31 December 2001, being the end

of the deemed assessment period.

44. There was also, during the course of argument, some debate as to the plaintiff's entitlement to costs and if so, whether those costs should be on the High Court scale or on the applicable scale in the Magistrates' Courts. On reflection I am satisfied that the matter was of sufficient complexity and that the plaintiff, although ultimately obtaining judgment for less than originally sought, was still substantially successful, so that the plaintiff should not be deprived of its costs on the High Court scale.

45. In the result I make the following order conforming to the limitations contained in the draft order handed up by counsel for the plaintiff, namely:-

- a. Judgement is granted in favour of the plaintiff against the defendant for the payment of;
 - i. assessed regional services levies in the sum of R21 802-50; and
 - ii. assessed regional establishment levies in the sum of R51 300-00.
- b. Interest thereon from 31 December 2001 to date of payment at the rate determined from time to time

for the purposes of paragraph (b) of the definition of
“*prescribed rate*” in section 1 of the Income Tax Act,
No. 58 of 1962.

c. Costs of suit.

VAN ZYL , J.

APPEARANCES:

For Plaintiff	:	Adv A W M Harcourt SC Instructed by Sanan & Watts Inc of Durban (Ref : Mr Watts/sr/035401).
For First and Second Defendants	:	Adv D P Crampton Instructed by Venn Nemeth & Hart Inc of Pietermaritzburg (Ref: L Cawcutt/ms/21A092102).
Date argued	:	22 October 2010
Delivered	:	8 March 2012