

# Suing for charges

## Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd

Council invoiced Peter Klein Investments (PKI) for sewer charges it had previously neglected to charge over a period of three years. Subsequently, PKI was issued a summons. In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) BCLR 344 9 (W) the Witwatersrand High Court had to decide on three issues that were raised in defence of PKI. The following points were raised *in limine*.

### Fair hearing

PKI argued that in terms of the common law principle of natural justice and the constitutional right to fair administrative action, the municipality was compelled to afford it an opportunity for a fair hearing before deciding to recover the amounts it neglected to charge and issue summons in respect thereof. PKI felt prejudiced by the municipality's initial failure to charge, followed by the sudden decision to charge. This had compromised its statutory recourse as owner to recover the charges from the occupiers of the said premises.

PKI argued that the prejudice arose from the decision to charge. However, the Court found that the prejudice would have arisen if and when the charges were paid, because this is when PKI's recourse against the occupiers would take effect. PKI had not paid the charges as yet. Thus, the Court found that the decision to demand payment did not trigger the right to a fair administrative hearing.

The actual issuing of a summons did not constitute an administrative action either. The institution of legal proceedings is a procedural rather than an administrative action. The Court's view was that a defendant in these circumstances would in any event be afforded a fair hearing during the trial itself.

The actual decision to recover

payment (prior to the issuing of a summons) was not an administrative act in terms of the constitutional right to just administrative action. It was a preliminary step with no immediate impact on the parties. Furthermore, to expect a municipality to afford a hearing before employing the ordinary civil process would create administrative inefficiency.

### Prescription

PKI submitted that the claim for certain of the amounts claimed by the municipality ceased to exist (prescribed) because summons was issued more than three years after liability for payment allegedly arose. This issue turned on the question whether the charges constituted a 'tax' or a charge for 'services'.

The municipality argued that these charges constituted a tax and therefore the period after which the charges ceased to exist was 30 years. In defence of its case, the municipality highlighted the compulsory nature of the charge and its general rate. PKI claimed that the sewerage charges were charges for a service.

The Court said that the nature of the amounts that were alleged to have prescribed could not be determined with sufficient certainty from the pleadings. It could not be determined what portion of the charges related to refuse removal and sanitation under the plaintiff's sanitation and refuse by-laws, and what portion to sanitation under the municipality's pollution by-laws. Evidence was therefore required to establish the precise nature (if the charges as a prerequisite to determine the impact of prescription on such amounts. Under these circumstances the prescription defence did not succeed.

This indicates why it is necessary in all instances to determine with precision

the nature of the amounts claimed for in the particulars of claim of the municipality. This will contribute to the necessary clarity on the question whether the charge is a 'tax' or charge for 'services' rendered.

### Estoppel

PKI argued that the municipality should be prohibited from claiming the charges, because it had failed to do so earlier on. By implication this indicated that these amounts were not owing (estoppel). The Court found that there was no obligation on a local authority to sue every debtor. However, there was a positive duty under section 49(1) of the Local Government Ordinance 17 of 1939 (Transvaal) to recover sanitary and other charges from the owners and occupiers of premises in respect of which services were rendered. The raising of

estoppel interferes with or hinders the municipality in the performance of that statutory obligation. Consequently, there was a statutory barrier to the raising of an estoppel defence.

However, the Court concluded that the common law principle of the statutory barrier to estoppel must be developed in the spirit of the fundamental rights in the Constitution, PKI had always paid its charges and was suddenly, without explanation, presented with additional charges, which it could no longer claim from the occupiers. A rule that

allows the municipality, through its own neglect, to deprive PKI of right of recourse against the occupiers and then renders the municipality immune from that argument in defence is inconsistent with the right to just administrative action. The Court concluded that PKI was not prevented from raising estoppel by the statutory barrier rule.

To determine the nature of the amounts claimed for will contribute to clarity on whether the charge is a 'tax' or charge for 'services'.

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