

**ESTOPPEL AND SUBSTANTIVE LEGITIMATE
EXPECTATION IN SOUTH AFRICAN TAX LAW**

The mistaken king as minor

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‘if...the king was deceived in the law in the purpose and intent of his grant, his grant is void...the state is entitled to the same measure of relief as minors who have suffered lesion...In the Netherlands this rule of the civil law was fully adopted and...was extended to the fiscus as the custodian of the public treasury’¹

RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN FULFILLMENT OF PART OF THE REQUIREMENTS FOR THE **INCOME TAX LAW (CML636W)** IN APPROVED COURSES AND A MINOR DISSERTATION. THE OTHER PART OF THE REQUIREMENT FOR THIS QUALIFICATION WAS THE COMPLETION OF A PROGRAMME OF COURSES.

I HEREBY DECLARE THAT I HAVE READ AND UNDERSTOOD THE REGULATIONS GOVERNING THE SUBMISSION OF INCOME TAX LAW (CML636W) DISSERTATIONS, INCLUDING THOSE RELATING TO LENGTH AND PLAGIARISM, AS CONTAINED IN THE RULES OF THIS UNIVERSITY, AND THAT THIS DISSERTATION CONFORMS TO THOSE REGULATIONS.

¹ *Collector of Customs v Cape Central Railways Ltd* (1888) 6 SC 402 at 406-407

OUTLINE

The purpose of this dissertation is to explore the legal avenues that may be open to taxpayers for holding the South African Revenue Services ('SARS') to the representations which it makes to the public in the form of general statements and specific rulings or directives. These avenues lie in two areas of law, namely the doctrine of estoppel as it has been developed in a public law context, and (potentially) the realm of so-called substantive legitimate expectation.

The discussion begins with an analysis of the doctrine of estoppel, as it is in the context of this doctrine that the Courts have most clearly delineated the public law principles which impose limitations upon holding public authorities to their representations.

This is followed by a detailed analysis of the long-standing principle of our law that the executive authority cannot renounce a peremptory statutory obligation imposed upon it by the legislature for the conservation of public monies, an extension of the principle that a public authority may not be held to a representation which is *ultra vires*.

A second aspect of public law which circumscribes the instances in which taxpayers may be entitled to rely on the representations made by SARS is then explored. This issue relates to the question of when guidelines, which are *intra vires*, will nevertheless be held to be unlawful because they eliminate a statutory discretion.

The question of whether the doctrine of so-called substantive legitimate expectation in fact forms a part of our law is then addressed in detail. The future development of this doctrine is discussed with reference to the traditional limitations imposed upon the law of estoppel.

Finally, certain aspects of the South African Revenue Services Discussion Paper on a Proposed System for Advance Tax Rulings 2003, in terms of which it is proposed that a regime for binding advance rulings be legislated, are briefly touched upon in light of the preceding discussion.

INTRODUCTION

No formal advance tax ruling system currently exists in South Africa. However in practice and in the interests of certainty and efficient administration, SARS indicates from time to time what its interpretation of the legislation which it administers is and how that legislation might be applied.

SARS's communication with taxpayers takes broadly one of two forms. It expresses general views in the form of Practice Notes, Interpretation Notes², guides and brochures; and it expresses specific views in the form of rulings or communications with individual taxpayers often based on a specific set of circumstances. There is at present no statutory basis for either of these forms of communication and they are not statutorily binding.

It is for this reason that the questions of whether, and in what circumstances SARS can in terms of public law principles be held to these representations become crucial.

The practice of SARS in communicating with taxpayers serves a useful purpose. It contributes to the understanding by members of the public of the various legislative provisions and therefore facilitates compliance. It also provides for certainty and allows taxpayers to organize their affairs in a way which is tax efficient, thereby providing a favourable environment for business. If there were no means of holding SARS to its representations, these benefits would be undermined and more

² These will ultimately replace all existing Practice Notes and internal Circular Minutes to the extent that they relate to the interpretation of the various laws (see statement issued by the Law Administration, South African Revenue Service, 23 August 2005 on official South African Revenue Service Website (http://www.sars.gov.za/it/Interpretation%20Notes/interpretation_notes%201.htm)).

importantly, the administration of the tax system would be in danger of becoming unfair, uncertain and capricious.

There are however several fundamental principles which have traditionally dictated that an administrative body like SARS cannot be held to its representations in all circumstances. These principles have been most clearly delineated in the context of estoppel.

ESTOPPEL

In terms of the doctrine of estoppel, a person, and in a public law context, an administrative authority, is precluded or estopped from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice³.

The first of the principles which has led to the limitation of the application of the doctrine is that where a representation turns out to have been unauthorised by law (or *ultra vires*) the application of estoppel would have the effect of ratifying decisions that the administrator was not allowed to make and would conflict with the principle that lawful authority is required for all the actions and decisions of public bodies.

As stated by Baxter '*To allow a public authority to hold out incorrectly that it is empowered to act in a certain manner would permit it to arrogate powers to itself which it does not possess. This would open the door to all kinds of abuse and, were a public authority permitted to excuse someone from compliance with the law, this*

³ Baxter *Administrative Law* at 400

would constitute recognition of a dispensing power. It would enable officials to render legislation 'nugatory' or a 'dead letter'.⁴

In *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA), the Supreme Court of Appeal confirmed that estoppel cannot be raised effectively where the effect thereof would be the validation of a decision which is *ultra vires*.

In that case the Department of Education, Culture and Sport of the Eastern Cape Province entered into two leases with the respondent company without any reference to the tender board as required by statute. The Supreme Court of Appeal, following *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A), held that it is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel⁵.

The Court went on to state that *'If the leases are, in effect, 'validated' by allowing estoppel to operate, the tender board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large...The fact that respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations*

⁴ Baxter *Administrative Law* at 401-402. This quote is an echo of the words used in the case of *Collector of Customs v Cape Central Railways Ltd* (1888) 6 SC 402, which was decided more than a century ago. In that case the Premier of the Colony authorized the Collector of Customs to admit 1800 barrels of imported cement duty free in the mistaken belief that duty was not payable. The Supreme Court found that to bar the Collector from recovering the duty fixed by law in consequence of the representatives of the Government having illegally abandoned the payment of such duty *'would be to enable Government officials to render the Act of Parliament nugatory'* at 410.

⁵ At par 11

cannot alter the fact that leases were concluded which were ultra vires the powers of the department and they cannot be allowed to stand as if they were intra vires.’⁶

A related principle is that estoppel cannot operate where it would prevent a public body from performing a duty imposed upon it by statute. Where this is the case, it is necessary to enquire whether the provision imposing the duty is peremptory and whether the duty imposed is in the public interest. If it is, then the plea of estoppel cannot succeed⁷.

Thus in the important case of *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) the City Council instituted an action against the defendant for payment of an amount which it alleged it had undercharged the defendant in respect of electricity. The undercharging was as a result of the electricity meter at the defendant’s house having been incorrectly set.

The Court found that a section of the applicable ordinance made it unlawful to charge anyone for electricity otherwise than according to the tariff applicable to him; that the provisions of the section were peremptory and had been imposed in the public interest⁸. It held accordingly that an argument based on estoppel could not succeed.

⁶ At pars 12 and 13. See also *Strydom v Die Land-en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 815E-F. The application of this principle can be demonstrated with reference to the facts of *Income Tax Case No 1675 (1998) 62 SATC 219 (G)*. In that case the appellant sought to deduct the accumulated interest paid by him in respect of a loan which he had taken out in order to finance an investment. The South African Revenue Services had issued a Practice Note in which it stated that it was its practice to allow expenditure incurred in the production of interest to the extent that it does not exceed such income. The Practice Note itself indicated that ‘*Although, strictly in terms of the law, there is no justification for the deduction, this practice has developed over the years and will be followed by Inland Revenue*’. On an application of the principle that estoppel cannot be upheld if the effect would be the validation of an *ultra vires* act the Revenue Services would clearly not be held to this practice note.

⁷ *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) at 478A; *Union of Teachers’ Associations of South Africa and Another v Minister of Education and Culture, House of Representatives, and Another* 1993 (2) SA 828 (C) at 841D-G

⁸ At 479B-C

Finally, public bodies should not fetter the free exercise of their discretion in future by making promises or assurances in advance as to how the discretion will be exercised. In certain circumstances to allow estoppel to operate could have the effect of violating this principle⁹. This principle is dealt with separately below.

REVENUE LEGISLATION AND WAIVER OF TAXES

An extension and particular application of the rule which informs the first two of these traditional limitations, namely that lawful authority is required for all the actions and decisions of public bodies, is the long-standing principle of our law that the executive authority cannot renounce a peremptory statutory obligation imposed upon it by the legislature for the conservation of public monies¹⁰. Otherwise stated, public bodies may not waive taxes or remit monies due to them unless the relevant legislation expressly or by necessary implication authorizes them to do so¹¹.

The question of whether and in what circumstances SARS should be held to representations made by it to members of the public and individual members, must, in a tax context, necessarily be answered with reference to this rule.

The only common law exceptions to the rule are that a receiver of revenue is entitled to conclude a binding settlement for an amount less than his claim in the event of a

⁹ Hoexter *The New Constitutional and Administrative Law Vol II Administrative Law* (2002) at 22. See *Ampofo and Others v MEC Education, Arts, Culture, Sports and Recreation, Northern Province and Another* 2002 (2) SA 215 at pars 53 to 55 for an example of a case where this principle was held to apply in the context of legitimate expectation.

¹⁰ *Collector of Customs v Cape Central Railways (Limited)* 6 SC 402; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) at 481C

¹¹ *Burghersdorp Municipality v Coney* 1936 CPD 305 at 308; *Peri-Urban Areas Health Board v Administrator, Transvaal* 1954 (3) SA 169 (T) at 171H-172B; *Cape Town Municipality v Estate Weinberg* 1957 (3) SA 674 (C) at 677H; *Mercian Investments (Pty) Ltd v Johannesburg City Council* 1990 (1) SA 560 (W); *Pietermaritzburg Combined Residents and Ratepayers Association v Pietermaritzburg City Council* 1993 (3) SA 371 (N) at 375B.

thorny dispute (*City of Cape Town v Claremont Union College* 1934 AD 414 at 452) or where it is certain that it will not otherwise be able to recover the remaining portion (*Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) at 283G and 284D-286A, in which it was held that a tax collector could at common law agree to an arrangement in terms of section 311 of the Companies Act 61 of 1973, provided that he did not stand to receive less in terms thereof than he would have received in the event of a final liquidation).

In an income tax context the waiving of taxes arising from settlement is expressly authorised by Part IIIA of the Income Tax Act 58 of 1962. Section 88B(1) thereof confirms that *'The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable'*.

Section 88B(2) however acknowledges that circumstances may require that the strictness and rigidity of this principle be tempered where it would be to the best advantage of the state; and section 88B(3) explains that the purpose of Part IIIA is to prescribe when it might be appropriate to temper the basic rule in the interests of settling a dispute. The Part then describes in very careful detail the circumstances in which it will be appropriate to settle a dispute; the procedure for settlement and other related issues. The waiving of taxes is therefore very carefully circumscribed by the legislature.

In the *Durban City Council* case above, as part of its *ratio* that estoppel could not be upheld because it would have the effect of validating an act which was inconsistent

with a statutory provision which was peremptory and imposed in the public interest, the Court held that the City Council *'has no right to waive or renounce its rights to collect revenue which it is, in the interests of the general body of ratepayers, obliged by law to collect'*¹².

In *South African Co-operative Citrus Exchange Limited v Director-General: Trade and Industry* 1997 (3) SA 236 (SCA) the Supreme Court of Appeal quoted with approval a statement of the principle in the following terms *'the public has an interest in the due compliance with every requirement of a revenue statute...It is of the highest public importance that in the administration of such statutes every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled... Where there is no express provision for discretion...and none can be properly implied from the tenor of the statute, the Commissioner can have none; he must with Olympian impartiality hold the scales between taxpayer and Crown giving to no one any latitude not given to others.'*¹³

The courts have therefore found for revenue authorities in circumstances where the effect of a mistake will be the illegal abandonment of taxes. For example, in *Commissioner for Inland Revenue v The Master and Another* 1957 (3) 693 (C) Revenue officials had through serious negligence failed to object to a liquidation and distribution account in respect of taxes which were due. The Court having found that if the Commissioner had been a private person he would not have been entitled to an

¹² At 479E. That waiver will not be allowed where a provision was enacted in the public interest is confirmed in *South African Co-operative Citrus Exchange Limited v Director-General: Trade and Industry* 1997 (3) SA 236 (SCA) 245D.

¹³ At 244H-245A

order for the re-opening of the account, nevertheless afforded the Commissioner relief as the officials' failure amounted to an illegal abandonment of taxes¹⁴.

This rule then will necessarily inform the development of the law in terms of which SARS will be held to its representations and those of its officials.

Against this limitation the predicament of a taxpayer who has relied upon an *ultra vires* representation made by the Revenue authorities to his prejudice looms large and it is this which motivated the Court in the recent case of *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (the *Peter Klein* case) to which I now turn.

AN EXTENSION OF THE DOCTRINE OF ESTOPPEL?

Despite the fact that estoppel has traditionally been circumscribed by the rule that it cannot be upheld if the effect thereof would be to validate an *ultra vires* act, in the *Peter Klein* case the court sought to extend the doctrine beyond these limits.

The court held that the common law rule that estoppel cannot be raised to prevent or excuse the performance of a statutory duty or discretion, should be developed in line with section 39(2) of the Constitution of the Republic of South Africa 108 of 1996¹⁵ ('the Constitution'). This is because although the rule itself does not infringe any provision of the Bill of Rights, and is in conformity with the doctrine of legality implied in the Constitution, the blanket application of the rule may in certain instances

¹⁴ At 700E-F and 702G

¹⁵ Section 39(2) of the Constitution provides that 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

run counter to a fundamental rights provision or value which underpins the Constitution¹⁶.

The facts of the case were ideally suited to an argument in favour of the development of the common law rule. The plaintiff local authority sued the defendant, an owner of a block of flats, in respect of rates and sanitary services which it had neglected to charge. As a result of misrepresentations by the local authority that there was nothing owing by the defendant and the effluxion of time, the defendant had lost its statutory right of recourse against the occupiers. The defendant would therefore have suffered substantial prejudice if it were not permitted to raise an argument of estoppel.

The Court held that the common law should be developed to emphasise the equitable nature of estoppel and its function as a rule allocating the incidence of loss, and that the proper approach is for the Court to balance the individual and public interests at stake and decide whether the operation of estoppel should be allowed in a specific case¹⁷.

Boruchowitz J found support for his approach in *inter alia* academic literature and the minority judgment of Hoexter JA in *Trust Bank van Afrika v Eksteen* 1964 (3) SA 402 (A). He touched on the justification for maintaining the common law rule even when it results in undue hardship to the individual (namely that in its absence the operation of estoppel would threaten the *ultra vires* doctrine), but pointed out that the Constitution had altered the context in which the doctrine of estoppel in terms of the public law is to be viewed. Boruchowitz J also relied on section 33 of the Constitution

¹⁶ At par 34

¹⁷ At par 40

which provides that everyone has the right to administrative action which is lawful, reasonable and procedurally fair¹⁸. In this regard he noted that:

‘A rule of law which permits an organ of State, through its own carelessness or neglect, to deprive the defendant of a statutory right of recourse and then to render itself immune from a defence to that deprivation, which estoppel would offer the defendant is, in my view inconsistent with the culture of justification of which the right to reasonable administrative action is an important part. To permit the plaintiff to take advantage of the established rule against the raising of an estoppel where there is no alleged or minimal countervailing benefit to the plaintiff would, to my mind, be inconsistent with the entrenched constitutional value of reasonable public administration.’¹⁹

This case is specifically significant in a tax context because the peremptory obligation of a public authority to recover revenue was directly in issue²⁰. Despite the fact that the applicable ordinance imposed a positive duty to recover sanitary and other charges from the owners and occupiers of the premises in respect of which services were rendered, and the fact that the operation of estoppel would interfere with or hinder the plaintiff in the performance of its statutory obligation, the Court dismissed the exception to the plea of estoppel.

¹⁸ At pars 29; 30; 31; 32; 35; 36; 39

¹⁹ At par 37. To frame the question in terms of a countervailing benefit to the plaintiff/public authority is to over-simplify the problem as the issue is not whether the public authority is prejudiced or not but rather whether the public are prejudiced by its failure to collect revenue which is due. The emphasis should be on the balancing of the individual and public interests at stake as described in par 40. The approach is better described by Hoexter JA in *Trust Bank supra*: *‘The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel.’* (at 415-416)

²⁰ At pars 21 and 26

Baxter, writing before the *Peter Klein* decision, noted that by refusing to extend the operation of estoppel to the *ultra vires* acts of public authorities, the principle of legality is maintained and the interests of the general public are protected. However as he pointed out, it is undeniable that the individual who has been misled by representations concerning the public authority's powers is likely to suffer considerable prejudice. It is in this context that Baxter assessed the possibility of compensation in the form of damages being provided for an innocent representee who has suffered prejudice. He noted that it will not in all circumstances be possible to prove negligence, and compensation may not always be appropriate, for example, where the cost thereof outweighs the advantage to be derived from upholding the principle of legality. He concluded that '*it might sometimes be 'in the public interest' to allow public authorities to be estopped*'²¹.

The *Peter Klein* case is in line with English case authority. In *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, the Revenue, contrary to an earlier representation but in accordance with the statute, decided to tax a certain index-linked element payable on redemption of certain securities as income. The Crown argued that judicial review could not lie to oblige the Revenue to act contrary to its statutory duty. Bingham LJ rejected this argument accepting in principle that Revenue might in certain circumstances be bound to a representation even if the tax were payable on a proper construction of the relevant legislation²².

He required only that the taxpayer show that certain conditions had been fulfilled, including that he had '*put all his cards face upwards on the table*' with regard to the specific transaction in respect of which he seeks a ruling; that he had made plain that a

²¹ Baxter *Administrative Law* 403-404

²² At 110f

fully considered ruling was sought; and that he had indicated the use he intended making of the ruling sought. The ruling would also have to be clear, unambiguous and devoid of relevant qualification²³.

Despite the fact that the *Peter Klein* case was decided about six months before the decision in the *Eastern Cape Provincial Government* case above, it did not form part of the Supreme Court of Appeal's consideration of that case. It remains to be seen how the Supreme Court of Appeal and Constitutional Court would respond to an argument along the lines of that upheld in the *Peter Klein Investments* case, the end-effect of which is tentatively endorsed by Baxter²⁴.

In *Pharmaceutical Manufacturers Assoc of SA: In re Ex p President of the RSA* 2000 (2) SA 674 (CC) the Constitutional Court held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law²⁵.

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) the Constitutional Court describes the effect of the Constitution on the common law principles of *ultra vires* in the following terms:

²³ At 110g-j. Bingham LJ seems to justify this argument by reasoning that Revenue had acted within its managerial discretion by answering the question and that the making of the assurances was not inconsistent with the Revenue's statutory duty (at 109j-110c). See also the remarks of Judge J at 114e to 115b.

²⁴ The *Peter Klein* case was followed in *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng and Another (No 1)* 2003 (6) SA 280 (W) at 288B-E. The principle in the *Peter Klein* case was referred to but seemingly rejected in the *Phillips* case at par 31.

²⁵ At par 20. Section 1(c) of the Constitution provides that '*The Republic of South Africa is one, sovereign, democratic state founded on the following values ... Supremacy of the constitution and the rule of law*'.

‘There is of course no doubt that the common-law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to ‘administrative action’ the principle of legality is enshrined in s24(a)...’²⁶

Section 33(1) of the Constitution requires that administrative action be both lawful and reasonable²⁷. In relation to administrative action the principle of legality is now enshrined in section 33(1), but that section also requires reasonableness. The concept of reasonableness incorporates proportionality, which entails as one of its enquiries whether the measure (though it may be suitable and necessary) does not place an excessive burden on the individual, which is disproportionate in relation to the public interest at stake²⁸.

The Courts should, where it appears that a successful argument based on estoppel will have the effect of compromising the *ultra vires* doctrine or the principle of legality, also consider whether the individual’s right to reasonable administrative action might not, in the particular circumstances, outweigh that consideration.

DISCRETIONARY POWERS

As noted above, in certain instances, upholding an argument based on estoppel could run counter to the principle that public bodies may not fetter the free exercise of their

²⁶ At par 59. This is a reference to section 24(a) of The Constitution of the Republic of South Africa Act 200 of 1993 which provided that ‘*Every person shall have the right to lawful administrative action where any of his rights or interests is affected or threatened*’

²⁷ Section 33(1) of the Constitution provides that ‘*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*’

²⁸ De Ville *Judicial Review of Administrative Action in South Africa* 203 and the authorities cited in note 74

discretion in future by making promises or assurances as to how the discretion will be exercised. Where a public authority takes a decision upon the strength of the prior guidelines or directives issued by it, it is in danger of being brought on review on the basis that its reliance thereon excluded the proper exercise of its discretion and was thus unlawful.

However in the as yet unreported Supreme Court of Appeal case *Kemp and Others v Van Wyk and Others* (Case No 335/04) the Court went quite far towards shielding this type of decision from review.

In that case the Directorate of Animal Health had imposed an embargo upon the importation of cloven-hoofed animals from Zimbabwe. This was designed to meet the threat of foot-and-mouth disease. The first appellant however proposed in an application for a permit for the importation of animals into this country, that the animals would be subjected to a regime that entailed testing them before they entered the country, placing them in quarantine upon their arrival, and releasing them from quarantine only after further testing had positively established that they were free from the virus. After very briefly considering the application, the first respondent refused it, on the strength of the embargo.

The Court held that the first respondent had been entitled to evaluate the application in the light of the existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound it could not be said that he failed to exercise his discretion²⁹.

²⁹ At par 10

The Commissioner is very often called upon to exercise a discretionary power in terms of the various taxing statutes. To the extent that guidelines and rulings impede the proper exercise of his discretion in taking a decision, he will be open to review on the basis that he acted unlawfully. Although the Supreme Court of Appeal has set the threshold quite high, the Constitutional Court has not sounded the final note.

THE INSTANCES IN WHICH ESTOPPEL HAS BEEN UPHELD: POLICY; INTERNAL FORMALITIES AND DIRECTORY PROVISIONS

Finally as regards estoppel, there are particular instances in which the Courts have been prepared to allow an argument based on that doctrine to succeed. It appears that a court will be prepared to apply estoppel where a policy rather than a legal provision would be infringed. Thus in *Mossel Bay Municipality v Ebrahim* 1952 (1) SA 567 (C) where, due to a mistake of fact, a local authority granted a licence contrary to an existing policy, an argument of estoppel was upheld³⁰.

As noted by Van Winsen J, to exclude the operation of estoppel in such circumstances *'would open up a new and alarming avenue to a local authority to review a decision once taken to grant a certificate on the ground that had certain other facts, subsequently ascertained, been present in the minds of the Councillors when they took a decision to grant a certificate, such decision would never have been taken. It seems to me that where no statutory prohibition would be violated or duty left unfulfilled by reason of the operation of estoppel, the local authority must be held bound to its decision.'*³¹

³⁰ At 573C-E

³¹ At 574D-E. Baxter *Administrative Law* at 402

There is also authority to the effect that where there has been non-compliance with an internal formality a court will be prepared to apply estoppel. In *Roodepoort Settlement Committee v Retief* 1951 (1) SA 73 (O) the applicant committee was estopped from arguing that a sale which it had entered into was invalid by reason of the facts that when it made the decision to sell, two of its members were not qualified to be members, and that it had not obtained the Governor-General's consent. The court held that these were internal formalities which the committee should itself have ensured were properly observed³².

The principle is stated in the following terms in the Law of South Africa 'A distinction must be drawn between acts which are *ultra vires* of a statutory body and those which are within such body's powers if done after some internal formalities have been complied with. In the latter type of case persons dealing with the body may, in the absence of knowledge to the contrary, assume that all the necessary formalities have been complied with, and may plead an estoppel if the defence is raised that the necessary formalities have not been complied with'³³.

As noted by Baxter however, the distinction between acts which merely relate to 'internal formalities' is blurred and is often difficult to draw³⁴.

Lastly estoppel may succeed where the legal duty that has been violated is not mandatory (compulsory), but merely directory³⁵. In the English decision of *R v IRC*,

³² See *Khani v Premier, Vrystaat, en Andere* 1999 (2) SA 863 (O) where the *Roodepoort* case is distinguished.

³³ Joubert (ed) *The Law of South Africa* Vol 9 2nd ed par 675

³⁴ Baxter *Administrative Law* 403

³⁵ *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) at 478A. Baxter *Administrative Law* 403.

ex parte Unilever plc [1996] STC 681, the taxpayer had been routinely permitted to claim loss relief in spite of the fact that the statutory period for claiming the loss had expired. In finding that the Revenue was prohibited from disallowing the late claims, the Court considered it relevant that the statutory provision involved was regulatory. Sir Thomas Bingham MR stated that ‘*While a statutory provision is not to be overridden or disregarded simply because it is regulatory, it is not irrelevant in considering the overall picture that the provision is regulatory. It is one thing for the Revenue to forgive tax which Parliament has ordained shall be collected; it may be quite another for the Revenue to neglect a statutory time limit which, given the Revenue’s dealings with a particular taxpayer, lacks any useful purpose*’³⁶ (emphasis in the original).

SUBSTANTIVE PROTECTION OF SUBSTANTIVE LEGITIMATE EXPECTATIONS – PART OF OUR LAW?

A second potential remedy lies in the realm of the doctrine of legitimate expectation, although it is at this point in the development of our law far more likely that an argument based on estoppel will succeed. This is because our courts have been reluctant to enforce the substantive protection of substantive legitimate expectations. The question, which remains an open one, is whether or not the doctrine of legitimate expectation will always inevitably translate any kind of expectation, whether as to a procedure to be followed or as to a benefit to be received, into a procedural benefit, or whether it is capable of protecting substantive expectations by awarding a substantive benefit. The latter is sometimes called the doctrine of substantive legitimate expectation, and will for ease of reference be referred to as such in what follows.

³⁶ At 690

The practical relevance of the question can be demonstrated with reference to the facts of Case No. 10916 2003 (4) JTLR 90 (CSPCRT). In that case the liquidators of the taxpayer company met with representatives of the Commissioner, who agreed to the carrying forward of assessed losses and their application against post-liquidation interest income. On this basis returns were submitted, and liquidation and distribution accounts prepared until the Commissioner objected to the 14th liquidation and distribution account. For the first time, the Commissioner questioned whether the appellant carried on trading post liquidation and hence whether the assessed losses should be carried forward. The Commissioner subsequently issued revised assessments.

It was contended on behalf of the taxpayer *inter alia* that based on the agreement and on the Commissioner's conduct thereafter until its objection to the 14th liquidation and distribution account, the taxpayer had a legitimate expectation that it was entitled to apply its balance of assessed loss against the post-liquidation income.

What the taxpayer sought was a substantive benefit based on a substantive expectation.

***Traub* – authority for procedural relief**

In *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) the Appellate Division was required to determine whether the principles of natural justice and in particular *audi alteram partem* are confined to cases where the impugned decision affects the liberty, property or existing rights of the individual concerned, or

whether the impact of the principle is wider than this³⁷. Although this decision is by now well known, it is worthwhile describing it in some detail in order to establish precisely what it is authority for.

The respondents, all of whom were medical doctors had submitted applications to be appointed or reappointed to the position of senior house officer at a particular hospital to the head of the hospital departments concerned, who had then forwarded them with favourable recommendations to the Director of Hospital Services. The respondents relied upon a long-standing practice, in terms of which the Director as a matter of course approved the appointment of persons recommended by the head of the department concerned, to argue that they were entitled to be confirmed in the positions in which they were recommended, alternatively to have their applications reconsidered³⁸. The court *a quo* held that their applications were to be reconsidered after they had been afforded the opportunity of a fair hearing³⁹. This judgment and order, conferring procedural relief, were confirmed on appeal.

The *Traub* case finally settled that a litigant need not be affected in his liberty, property or existing rights in order to be entitled to be treated in accordance with the rules of procedural fairness, but that a legitimate expectation will suffice⁴⁰. The principle is now encapsulated in section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 which provides that '*Administrative action which materially and*

³⁷ At 748G-I

³⁸ At 747F

³⁹ At 747H

⁴⁰ At 761E to 762C. The Court acknowledged that whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. However it is clear that an expectation may arise either from an express promise given on or behalf of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue (at 756I; quoted in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at par 212)

adversely affects the rights or legitimate expectations of any person must be procedurally fair'.

The relief granted did not take the form of substantive relief. The doctors were not confirmed in the positions in which they were recommended. Nor is this case authority for the fact that our law provides substantive protection of substantive legitimate expectations.

The case simply makes it clear that the complainant may hold either a substantive expectation, that is, an expectation that a favourable decision will be made; or a purely procedural expectation⁴¹, that is that he or she will be heard or that some other procedure will be followed before an unfavourable decision is made⁴². But the relief obtainable in either case amounts only to a procedural benefit⁴³.

After Traub

In *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) O'Regan J confirmed that expectations can arise either where a person has an expectation of a substantive

⁴¹ For example in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) where the government of Hong Kong failed to honour a promise that illegal immigrants would be interviewed individually before being deported. In most cases the complainant will in reality have a substantive legitimate expectation rather than a procedural one, as in *Traub*, where the doctors expected to be appointed rather than to be given a hearing before any decision was made not to appoint them.

⁴² See the following paragraphs in the judgment:

'As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.'(at 758D-E)

'...Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing.' (at 758B)

⁴³ See Hoexter *The New Constitutional and Administrative Law* Vol II Administrative Law (2002) 217 to 219

benefit or an expectation of a procedural kind. She noted further that ‘*Once a person establishes that a legitimate expectation has arisen, it is clear from the language of s 24(b) of the interim Constitution that he or she will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation.*’⁴⁴(my emphasis). The learned Judge declined to rule on the circumstances in which, if any, a legitimate expectation could confer a right to substantive relief beyond that ordinarily contemplated by the duty to act fairly⁴⁵.

In *Durban Add-Ventures Ltd v Premier Kwazulu- Natal and Others* (No 2) 2001 (1) SA 389 (N) the Court held that the doctrine of legitimate expectation in South African law does not generate substantive rights⁴⁶.

In that case the applicant had been selected as a preferred finalist and invited to apply for a casino licence in accordance with a process devised in terms of certain provincial gambling legislation. The legislation was subsequently amended and new regulations promulgated. The new regulations had the effect of abolishing the status of preferred finalist. The applicant applied for an order declaring the amended regulations *ultra vires* and void in that they *inter alia* deprived it of its legitimate expectation that the licensing procedures would not be altered and of its status as a preferred finalist.

Booyesen J held that the doctrine of legitimate expectation was not capable of operation in the circumstances of the case, stating that ‘*If the applicant enjoyed a legitimate expectation in the present circumstances at best this would have afforded it a right to be heard before the new regulations were promulgated. The applicant,*

⁴⁴ At par 36

⁴⁵ *supra* and footnote 11. See further pars 38 and 39.

⁴⁶ At 408E

however seems to wish to use the doctrine of legitimate expectation in an effort to generate substantive rather than procedural rights. Such a strategy is not permissible in South African law.’⁴⁷

The learned Judge touched on the principled basis of his finding when he went on to state the following: ‘The doctrine of legitimate expectation may not be employed so as to place substantive constraints on the power of a lawmaker to enact delegated legislation and, in particular, could not operate in the present circumstances so as to inhibit the formation of government policy. For good reasons the Courts are reluctant to fetter governments from implementing changes to policy’⁴⁸ and ‘the doctrine of legitimate expectation cannot be used in the present context by the applicant so as to preclude the provincial government from giving effect to a policy which it considers to be in the public interest.’⁴⁹

Similarly in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W), the first respondent argued that on the basis of certain representations by the police and prosecuting authorities (in particular, their failure to prosecute him), he had acquired a legitimate expectation which afforded him a right against prosecution. Heher J, having found that the expectation relied upon by first respondent did not satisfy the requirements for the legitimacy of an expectation⁵⁰, stated further, relying on the authority of *Durban Add-Ventures*, that it seemed to him that ‘the claim of the first respondent to exemption from prosecution to all past offences committed in

⁴⁷ *supra*

⁴⁸ At 408F

⁴⁹ At 409I.

⁵⁰ Set out at par 28

*relation to offences involving prostitution at the Ranch amounts to a claim to a substantive right. But a legitimate expectation does not give rise to such a right.*⁵¹

Finally in *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) the question came before the Supreme Court of Appeal. The appellant, who had been an employee of Iscor before taking early retirement, argued that the respondent pension fund, in subsequently amending one of the pension fund rules without formulating it so as to include him, had committed a breach of its duty by *inter alia* frustrating a legitimate expectation that was engendered by Iscor's promises that improved retrenchment benefits would be implemented with retrospective effect.

In dealing with this aspect of the argument the Supreme Court of Appeal noted that the appellant was confronted with '*the fundamental difficulty that, in administrative law, the doctrine of legitimate expectation has traditionally been utilised as a vehicle to introduce the requirements of procedural fairness and not as a basis to compel a substantive result.*' Brand JA for a full court went on to confirm that '*according to the traditional approach, it matters not whether the expectation of a procedural benefit is induced by a promise of the procedural benefit itself or by a promise that some substantive benefit will be acquired or retained. The expectation remains a procedural one*'⁵².

The difficulty for the appellant was that he was claiming that on the basis of a legitimate expectation of a substantive benefit, the promise which gave rise to the substantive benefit should be fulfilled. The Court confirmed that the *Premier Mpumalanga supra* case could not be used in support of a claim based on the

⁵¹ At pars 26 and 29

⁵² At par 25

fulfillment of a substantive legitimate expectation; and was authority only for the fact that a legitimate expectation of fair procedure can be induced by a promise that a substantive benefit will be acquired or retained⁵³.

In an alternative argument by the appellant, the Supreme Court of Appeal was invited to follow the example of recent developments in English law by extending the doctrine of legitimate expectations so as to substantiate a claim for the fulfillment of a promise or undertaking. The Court ultimately declined to finally pronounce on this issue because, on the facts, the appellant would not in any event have been entitled to compel the performance of the promise by Iscor, since the promise was not made by the respondent fund, and the appellant had failed to establish the contents of the promise⁵⁴.

But in reaching that conclusion the Court made the following observations '*Before simply transplanting a legal concept from one system of law to another it is imperative first to examine the context in which that concept originated and developed in its system of origin. In deciding whether to adopt the doctrine of substantive legitimate expectation as part of our law, we will have to consider the possibility that the doctrine was developed as a solution to problems arising from the rule in English law that, generally speaking, an undertaking without valuable consideration is not enforceable. Since our law does not require valuable consideration for the enforceability of an undertaking ...the problem does not arise.*'⁵⁵ The Court noted that in England itself the development of the doctrine was

⁵³ At par 26

⁵⁴ At par 28. The majority judgment in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) likewise leaves the question open (at par 96) although the doctrine of substantive legitimate expectation found support in the minority judgment of Madala J (pars 208-212).

⁵⁵ At par 27

accompanied by a fair amount of controversy and that the doctrine had been rejected by the Australian High Court outright.

Finally, in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA), the Supreme Court of Appeal confirmed that substantive legitimate expectation does not form part of our law. In that case the Court *a quo* had set aside an examination pass mark decision of the South African Veterinary Council and ordered the Council to register the respondent as a veterinary surgeon on the basis of a legitimate expectation on the part of the respondent that the requirement for passing a special examination was other than it was⁵⁶.

The Supreme Court of Appeal questioned the propriety of the order, noting that '*it is by no means clear that a legitimate expectation can found an extra-procedural entitlement such as the substantive benefit claimed here.*' The facts of the case did not however require the Supreme Court of Appeal to resolve the issue of whether or not the doctrine of substantive legitimate expectation should form part of South African law.

LIMITATIONS ON A DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATION

Although the Supreme Court of Appeal has sounded a cautionary note, it has not closed the door on the adoption of a doctrine of substantive legitimate expectation into our law. The matter has also not been pronounced upon by the Constitutional Court and there is therefore room for the development of such a doctrine.

⁵⁶ At pars 1 and 3

In a tax context, in Case No. 10916 2003 (4) JTLR 90 (CSPCRT), the facts of which are described above, Davis J remarked *obiter* that there was substantial merit in the taxpayer's contention regarding its substantive legitimate expectation⁵⁷, as also in case No. 10664/2000 2001 (1) JTLR 1 (CSpCrt)⁵⁸.

The English Court of Appeal case of *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 is decisive authority in England for the doctrine of substantive legitimate expectation. The Court of Appeal held that the requirements of fairness should be balanced against any overriding interest relied upon by the public authority, and ultimately decide whether to disappoint the expectation would be so unfair as to amount to an abuse of power⁵⁹.

It is submitted however that in the development of the doctrine, the courts will, as the law presently stands, consider themselves bound by the same considerations which have circumscribed the operation of estoppel, including the rule that where a representation turns out to have been unauthorised by law (or *ultra vires*) a public authority should not be held to that representation.

⁵⁷ At 98B

⁵⁸ In the latter case, it appears that the taxpayer contended that it had decided to implement a system based upon a salary sacrifice with regard to certain schemes because of a ruling in terms of which the Commissioner for Inland Revenue had approved salary sacrifice systems. The taxpayer pointed to the SARS: Income Tax Practice Manual. It relied also on representations by the Commissioner's representative to argue that it had a legitimate expectation that the implementation of certain schemes incorporating such systems would not result in employees joining the fund incurring liability for income tax in respect of the portion of salary sacrificed.

⁵⁹ At par 57. For earlier support in English law see Taylor J in *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 2 All ER 518, 531d-f; *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 731g. For a comprehensive discussion of substantive legitimate expectation in English law, see Karen Steyn *Substantive Legitimate Expectations* [2001] JR 244

This appears from *inter alia* the Supreme Court of Zimbabwe case of *Commissioner of Taxes v Astra Holdings (Private) Ltd t/a Puzey & Payne*, 66 SATC 79. In that case the facts were that for several years the respondent company had not charged and collected tax on motor vehicles that it sold to members of the public who paid the purchase prices in foreign currency. It claimed to be acting upon advice contained in a letter addressed by the Principal Tax Examiner to another motor dealer. The Court found that the representations made in the letter were made in error of law, and that in acting on what was stated therein the Commissioner would not have been properly discharging its statutory duty⁶⁰.

The Court, having referred to Bingham's judgment in *R v Board of Inland Revenue ex p MFK Ltd* [1997] 1 All ER 91, continued in the following vein '*The question whether or not the principle of legitimate expectation is applicable to a decision of a public body depends upon the particular legislation in terms of which the decision was taken. It is clear in this case that the legislation required that sales tax be charged and collected by the motor dealer on all motor vehicles sold by him locally. The legitimate expectation created in Astra Holdings as a motor dealer would, in the circumstances, be that it should be taxed according to the law. I cannot think of a legitimate expectation arising out of an error of law to the effect that a tax which is due to revenue should not be collected. The expectation by Astra Holdings in that regard would be that it should remain untaxed by the mistake of law. That surely would not be a legitimate expectation.*'⁶¹ (my emphasis)

Similarly in Case No. 10916 2003 (4) JTLR 90 (CSPCRT) Davis J noted that the Commissioner '*is not obliged to follow a policy which is in violation of the tax laws*

⁶⁰ At 88B-C and 88E

⁶¹ At 92E-G. In the court *a quo* the Zimbabwe Fiscal Appeal Court framed the question in terms of a change of policy and upheld an argument of substantive legitimate expectation.

as set out in the Act or in any other Act of Parliament. In such a case [the Commissioner] would not be obliged to comply with an undertaking...'⁶²; and concluded that '*The doctrine of fairness suggests that, unless respondent has given an undertaking which is mistaken on the basis of law, it should be obliged, where it took the initial decision after it had applied its mind carefully to the issuing of the letter to the appellant, to follow that ruling.*'⁶³ (my emphasis)

In *National Director of Public Prosecutions v Phillips and Others supra* Heher J stated that '*any extension of the operation of legitimate expectation which relies on the conduct of an unauthorised State official or one acting beyond is statutory power ...is both unnecessary and undesirable*'⁶⁴.

It is submitted however that an argument along the lines of that adopted in the *Peter Klein* case in the estoppel context and expanded upon above would be of similar application here.

DISCUSSION PAPER ON A PROPOSED SYSTEM FOR ADVANCE TAX RULINGS

I now turn briefly to the South African Revenue Services Discussion Paper on a Proposed System for Advance Tax Rulings 2003⁶⁵ in terms of which it is proposed that an advance tax ruling system be legislated.

⁶² At 99G

⁶³ At 99I

⁶⁴ At par 31

⁶⁵ Published on official South African Revenue Service Website <http://www.sars.gov.za>

The Discussion Paper defines five types of rulings being '*binding general rulings*', '*binding private rulings*', '*binding class rulings*', '*binding product rulings*' and '*non-binding private opinions*'. For present purposes I shall confine myself to the second of these categories.

A binding private ruling is a written ruling issued to a taxpayer who seeks guidance on how SARS interprets and applies the tax law to a specific transaction or course of action. Such a ruling would relate to a proposed transaction or course of action which at the time of application for the ruling is still to be implemented by the taxpayer. The ruling would be given on the basis of the facts that the taxpayer presents in the application and it would not be SARS' duty or responsibility to verify these facts. It is proposed that this type of ruling would be binding on SARS but not on taxpayers.

Under the heading '*withdrawal or modification of ruling*' the following is *inter alia* proposed:

- '*Where it is discovered by SARS that a ruling it has issued is incorrect the ruling will be withdrawn or modified if the taxpayer has not yet commenced the proposed transaction or course of action*'
- '*Where it is found that a ruling issued by SARS is incorrect as a result of an error by SARS and the taxpayer has commenced with the transaction or course of action, the ruling will generally be withdrawn prospectively*'
- '*In the following circumstances where a ruling given by SARS is incorrect consideration will be given to the withdrawal or modification of a ruling with retrospective effect to the date the assessment(s) may*

be amended in terms of sections 3 or 79 of the Income Tax Act or equivalent sections in other Acts:-

- *Where there is a person(s) other than the person to whom the ruling was given who will suffer significant disadvantage if the ruling is not withdrawn and the person to whom the ruling was given will suffer comparatively less if the ruling is withdrawn.*
- *The ruling is incorrect and the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively*
- *The tax law affecting the ruling given is amended retrospectively.'*

It is also provided that before SARS decides whether a ruling is to be withdrawn the taxpayer will be given the opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling; and certain factors '*that will influence the decision to withdraw or modify the ruling prospectively rather than retrospectively*' are also listed.

It is clear that the discussion paper envisages that in certain circumstances an incorrect ruling shall despite the fact that it does not accord with the law be binding on SARS. The only time that withdrawal or modification of the rule will be effected with retrospective effect is in the circumstances listed above. These circumstances relate to a person or persons other than the taxpayer who will suffer significant disadvantage;

the ‘*material*’ erosion of the tax base, and, if a tax law affecting a ruling is amended retrospectively, a factor which sits uneasily in a list dealing with incorrect rulings.

This proposal appears to be an attempt to allocate the incidence of loss, and to balance the individual and public interests at stake. It purports to be, as in the case of the statutory provisions relating to settlement in an income tax context, a way of complying with the *ultra vires* doctrine in that there would now be empowering legislation in terms of which SARS may abandon taxes which, on a correct application of the law, are due.

There is however another principle involved which may be at stake and this relates to the separation of powers. It is submitted that this aspect of the proposed legislation would amount to an unlawful delegation of Parliament’s law-making power. This is because SARS would be empowered to make rulings which, even if they are inconsistent with the law as passed by Parliament, are binding. SARS could effectively use rulings to apply what the law is not. The manner and form provisions in the Constitution prescribing the way in which Acts of Parliament are passed would be subverted and an undemocratically elected authority would effectively make law through a process which is not transparent or accessible to the public⁶⁶.

The Policy makes it clear however that some sort of balancing is required between the individual interest of the taxpayer and the general public interest. This need may best be addressed through the principled development of the law of estoppel and substantive legitimate expectation.

⁶⁶ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) par 62

CONCLUSION

The common law rules in terms of which public authorities may be held to their representations are of particular significance in a tax context. This is because there is no formal advance tax ruling system currently in place in South Africa and although SARS routinely issues various practice notes and rulings, these are not statutorily binding.

As the law currently stands, relief may be found in the first instance in the doctrine of estoppel, provided that its enforcement does not have the effect of violating the *ultra vires* doctrine. In particular the rule that an executive authority cannot renounce a peremptory statutory obligation imposed upon it by the legislature for the conservation of public monies will defeat an argument based on estoppel where its effect would be that SARS is prevented from collecting revenue in accordance with a statutory duty.

Although this principle has been confirmed by the Supreme Court of Appeal, it remains open to the Constitutional Court to adopt an approach which balances the section 33 constitutional right to administrative justice with the public interest served by the *ultra vires* doctrine along the lines of the argument upheld in the *Peter Klein* case.

An argument based on estoppel will also fail if what is sought to be relied upon is a guideline in terms of which SARS has fettered its discretion.

As far as an argument based upon legitimate expectation is concerned, it is clear that a doctrine of substantive legitimate expectation does not form part of our law. However, despite sounding a cautionary note against the development of such a doctrine, the Supreme Court of Appeal has left the way open for its development. It is submitted that our courts may well move in the direction of recognising such a doctrine. This would be in line with English law, and in fact with our own law in that estoppel in effect already provides substantive relief.

Were the doctrine to be extended to include substantive legitimate expectation the courts will have to grapple with the same principles which have traditionally placed limitations on the enforcement of estoppel. In this regard it is to be hoped that, as in the case of estoppel, the common law will be developed in accordance with the precepts of the Constitution.