

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV- CON-2017/01798

In the matter between:

STUTTAFORDS STORES NAMIBIA (PTY) LTD PLAINTIFF

and

COMMISSIONER OF INLAND REVENUE

1st DEFENDANT

MINISTER OF FINANCE

2nd DEFENDANT

ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA

3rd DEFENDANT

Neutral Citation: *Stuttards Stores Namibia (Pty) Ltd v Commissioner of Inland Revenue* (HC-MD-CIV-CON-2017/01798) [2018] NAHCMD 203 (4 July 2018)

CORAM: PRINSLOO J

Heard: 15 May 2018

Delivered: 25 June 2018

Reasons: 04 July 2018

Flynotes: Statute — Interpretation of — s 38 of the Value Added Tax Act 10 of 2000 and section 71 of the Income Tax Act 24 of 1981.

Revenue — Income tax — Assessment — First defendant objecting to tax assessment made by plaintiff's income for the year 2002 – Plaintiff's objection misplaced at the said offices, the objection was never considered by the second defendant as envisaged by s 71¹ of the Income Tax Act and plaintiff was never informed of the outcome of the objection.

Court — Jurisdiction — High Court — Income tax — Establishment of Special Income Tax Court not entirely ousting jurisdiction of ordinary courts — Ordinary courts retained review jurisdiction and jurisdiction for granting interim declaratory orders and determining legal issues in respect of taxation.

Summary: Approximately January 2002, the plaintiff conducted business in Namibia as a registered Value Added Tax (VAT) vender and conducted taxable activity as defined in section 4(1) of the Value Added Tax Act, Act 10 of 2000.

During the financial year ending in 2002, the plaintiff received a tenant allowance in the amount of NAD 2,691,547.00 from the lessor to fit out the shop. The said amount was expended to fit out the shop leased from the lessor and the said amount was reflected in the plaintiff's financial statements for the year ending 2002 as a receipt of capital nature.

The plaintiff submitted its income tax return and financial statements for the year ending 2002 as prescribed but was only assessed in December 2004. In the said assessment the first defendant treated the tenant's allowance as income instead of capital. Despite not accepting that same was income and not capital the plaintiff still had assessed loss of N\$327,497.00.

¹ (1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.

It is the plaintiff's case that since the commencement of the business in 2002 to the end of financial year 2008, the plaintiff made assessed losses. The said losses were assessed by the first defendant for purposes and as envisaged by the Income Tax Act.

In light of the fact of the first defendant's refusal to accept the amount of NAD 2,691,547.00 (tenant's allowance) as capital and not income, the plaintiff gave authorization to PWC to file an objection against the first defendant's assessment of the plaintiff's 2002 income. The said objection was lodged in writing with the second defendant on 10 February 2005 in terms of section 71 of the Income Tax Act 24 of 1981.

Due to the fact that the plaintiff's objection and/or file was misplaced at the said offices, the objection was never considered by the second defendant as envisaged by s 71² of the Income Tax Act and the plaintiff was never informed of the outcome of the objection.

Plaintiff pleaded that due to the second defendant's failure to comply with the obligations as set out in s 71(4)³ of the Income Tax Act and its failure to inform the plaintiff of the outcome thereof, the plaintiff was unable to lodge an appeal to the Income Tax Tribunal, in which instance the plaintiff pleaded that it would have been successful with its contention that the tenants allowance of NAD 2,691,547.00 was capital in nature and not revenue. In the alternative, the plaintiff pleaded that in the event of being unsuccessful in the Income Tax Tribunal, the plaintiff would have been successful in the special court for income tax appeals and further in the alternative that the plaintiff would be successful in the Supreme Court of Namibia.

However, despite the second defendant's failure to attend to the objection filed on behalf of the plaintiff for years, the first defendant, subsequent to the financial year end

² (1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.

³ (4) On receipt of a notice of objection to an assessment the Minister may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

for 2009, made a claim against the plaintiff for an amount of NAD 835,547.00. This amount was purportedly claimed in terms of the Income Tax Act which included penalties and interest calculated on the basis that for financial year of 2009, the plaintiff short paid the first defendant.

Plaintiff pleaded further that the claim in respect of the 2009 financial year without the determination of the plaintiff's objection in respect of the 2002 financial year is *ultra vires* the first defendant's powers and therefor constitutes a nullity.

Fast forward to 2016, on 03 March 2016 the plaintiff represented by Mr. Steyn agreed with the first and second defendant's director, Mr Chris Claasen that the plaintiff may again submit an objection to the 2002 assessment of the amount of NAD 2,691,547.00 to motivate the capital nature of the return. It was agreed that the objection will considered on an urgent basis and if the plaintiff's objection is upheld, the first defendant will immediately re-assess the plaintiff's income for year 2009.

In accordance with the agreement reached between the parties, the objection, including the application for condonation for late filing thereof was filed on 14 March 2016. On 26 May 2016 further correspondence was directed to the Director of the first and second defendant with reference to the meeting in March 2016 and the letter dated 14 March 2016. However, despite Mr Claasen acknowledging that the first defendant could not find the plaintiff's file and that he did not know whether the plaintiff's objection was ever considered and that the objection might have been lost and despite his invitation to plaintiff to file a new objection, pending the search for the file, the new objection was not considered but rejected as being out of time.

Plaintiff pleaded that the rejection of the objection lodged by Mr. Steyn was unreasonable in the circumstances and as a result a breach of the first and second defendants' obligations envisaged in Article 18 of the Constitution and constitutes a nullity.

On 22 November 2016 the first defendant again demanded payment in the amount of N\$828,494.28 from the plaintiff for income tax⁴ (NAD 126,546.60⁵) and tax⁶ (NAD 796,699.34) and income tax⁷ (NAD 0 but penalties and interest NAD 68,039.45), which was set out in detail in the particulars of claim.

In the letters⁸ of demand the first defendant claimed penalties and interest and also threatened to take coercive action against the plaintiff as envisaged in s 83 and 91 of the Income Tax Act and s 31 and 36 of the Value Added Tax, Act 10 of 2000.

Plaintiff further avers that the aforesaid demand was made in spite of the fact that the first defendant had full knowledge that the plaintiff disputed the amount claimed in paragraph 33.1 of particulars of claim throughout and that the plaintiff never received assessments in respect of the amounts claimed in paragraphs 33.2 and 33.3 of the particulars of claim. Plaintiff pleaded it would have been entitled to object to assessment if received.

On 13 December 2016 plaintiff's representative, Mr Steyn, responded to the defendants' letter of demand⁹ and drew the defendants' attention to a number of issues. Subsequently, the plaintiff's legal representatives issued a letter of demand¹⁰ on 24 March 2017. In return, the first defendant in a replying correspondence¹¹ dated 30 March 2017 invoked a set-off as envisaged by s 38(2) of the VAT Act against the VAT refund for income tax, employee tax and value added tax on import.

In the said correspondence, the first defendant's acting director admits the amount due to plaintiff. The amount due (NAD 3,820,385.57) is also supported by a consolidated

⁴ Paragraph 33.1 of Particulars of Claim

⁵ Demand based on the 2002 assessment where the amount of NAD 126,546.60 representing the alleged short payment in 2009)

⁶ Paragraph 33.2

⁷ Paragraph 33.2 of Particulars of Claim

⁸ Annexure G to the Particulars of Claim

⁹ Annexure H to the Particulars of Claim.

¹⁰ Annexure J to the Particulars of Claim.

¹¹ Annexure K to the Particulars of Claim.

statement of account¹² obtained by the first defendant and therefor the plaintiff pleaded that any set-off would be null and void for reasons advanced above.

The defendants submit that from the particulars of claim, it is clear that the claim by the plaintiff is for a refund of tax, as a tax vendor, as contemplated in s 38(1)(a) of the Value Added Tax Act 10 of 2000 (‘the Act’). The said claim is for payment of VAT refunds arising from input credits exceeding output VAT and such refunds of VAT are done in term of the provisions of s 38 of the Act. In terms of the provisions of s 38(2)¹³ of the Act, a tax return indicating an excess input tax over output tax constitutes a claim for refund and where the first defendant is satisfied that such a refund is justified, a refund is made.

The defendants further argued that on 24 March 2017, the plaintiff represented by its legal practitioners of record, demanded payment of an accumulated tax refund by means of a letter, annexure “J” to the particulars of claim.¹⁴ This first defendant rejected the claim for refund by means of a letter dated 30 March 2018,¹⁵ attached as annexure “K” to the particulars of claim.

It was further argued that in light of the rejection of the plaintiff’s claim for refund, s 38(9) limits the options available to the plaintiff and it reads as follows:

¹² Annexure B to the Particulars of Claim.

¹³ (2) Subject to this section, if, for any tax period, a registered person files a return reporting an excess referred to in subsection (1)(a), or any person, mission, organisation or government contemplated in subsection (1)(c) files a return of tax paid, the return shall constitute a claim for a refund, and where the Commissioner is satisfied that a refund is due to any such person, mission, organisation or government-

(a) the Commissioner shall first apply the amount of the refund in reduction of any tax, levy, interest or penalty payable by that person, mission, organisation or government in terms of this Act and may then apply any amount remaining or any portion thereof to any unpaid amount due in terms of the Income Tax Act, 1981 (Act 24 of 1981), the Sales Tax Act, 1992 (Act 5 of 1992), or the Additional Sales Levy Act, 1993 (Act 11 of 1993); and

(b) any credit balance remaining on the tax account of any such person, mission, organisation or government shall be refunded to the person, mission, organisation or government claiming the refund not later than the end of the second calendar month following the date the credit balance arose on the relevant tax account.

¹⁴ Particulars of claim: page 13 paragraph 39.

¹⁵ Particulars of claim: page 14-15 paragraphs 44-45.

'(9) A person claiming a refund under this section who is dissatisfied with a decision referred to in subsection (8) may challenge the decision only under Part VIII of this Act.'

The use of the word 'only' by the legislature is emphasized by Mr. Barnard and it was submitted that the intention of the legislator was exactly as the words indicate in as much as the challenge can only be by means of the procedure as set out in Part VIII of the Act.

The plaintiff however was of the view that it complied with the provisions of the Act by filing its returns and subsequent objection timeously. The first defendant failed to or neglected to deal with the objection. Despite this irregularity, the first defendant then claimed the amount of NAD 835,547.00, which decision together with a number of decisions was *ultra vires*.

Held – tax refund in terms of s 38 of the Value Added Tax Act is the ultimate result that plaintiff would like to achieve however, this result cannot be obtained until such time that the assessments have been done, objections dealt with and the claims by the defendants has been resolved.

Held further – if regard is had to the relevant sections in the VAT Act and the Income Tax Act, it is evident that the Commissioner or Minister, depending on the nature of the objection, must notify the vendor/taxpayer in writing of his/her decision, with the decision being the operative word in this instance.

Held further that – To enable the plaintiff to appeal against the objection decision, it inevitably means there had to be a decision. There was however no decision taken in respect of the plaintiff's objection due to the fact that the plaintiff's was lost. Therefore, the plaintiff had no recourse to the forums of first instance as set out in the VAT Act and Income Tax Act.

Held further that – the issues raised in this matter legal issues in nature and consequently, the High Court has jurisdiction over the matter. Furthermore, the special tax court and the tax tribunal are creatures of statute and as a result, do not have the jurisdiction to consider and grant review relief.

ORDER

1. Exception is dismissed with costs. Cost of one instructing and two instructed counsel.
2. The matter is postponed to 12 July 2018 at 15:00 for Case Planning Conference in terms of Rule 23(5).
3. Joint case plain must be filed no later than 09 July 2018 at 12:00.

JUDGMENT

PRINSLOO, J:

Background:

[1] This matter has a long history leading up to the current application before me. I am of the opinion that for purposes of this ruling it would be necessary to consider the particulars of claim which set out the history starting as far back as 2002.

[2] Since approximately January 2002, the plaintiff conducted business in Namibia as a registered Value Added Tax (VAT) vender and conducted taxable activity as defined in section 4(1) of the Value Added Tax Act, Act 10 of 2000.

[3] During the financial year ending in 2002, the plaintiff received a tenant allowance in the amount of NAD 2,691,547.00 (two million six hundred and ninety one thousand five hundred and forty seven Namibian Dollars) from the lessor to fit out the shop. The said amount was expended to fit out the shop leased from the lessor and the said amount was reflected in the plaintiff's financial statements for the year ending 2002 as a receipt of capital nature.

[4] Plaintiff submitted its income tax return and financial statements for the year ending 2002 as prescribed but was only assessed in December 2004. In the said assessment the first defendant treated the tenant's allowance as income instead of capital. Despite not accepting that same was income and not capital the plaintiff still had assessed loss of N\$327,497.

[5] It is the plaintiff's case that since the commencement of the business in 2002 to the end of financial year 2008, the plaintiff made assessed losses. The said losses were assessed by the first defendant for purposes and as envisaged by the Income Tax Act.

[6] In light of the fact of the first defendant's refusal to accept the amount of NAD 2,691,547 (tenant's allowance) as capital and not income, the plaintiff gave authorization to PWC to file an objection against the first defendant's assessment of the plaintiff's 2002 income.

[7] The said objection was lodged in writing with the second defendant on 10 February 2005 in terms of section 71 of the Income Tax Act 24 of 1981. As proof of receipt of the objection, the correspondence reflecting the date stamp of the second defendant was attached to the particulars of claim as Annexure 'D'.

[8] Due to the fact that the plaintiff's objection and/or file was misplaced at the said offices, the objection was never considered by the second defendant as envisaged by s

71¹⁶ of the Income Tax Act and the plaintiff was never informed of the outcome of the objection.

[9] Plaintiff pleaded that due to the second defendant's failure to comply with the obligations as set out in s 71(4)¹⁷ of the Income Tax Act and its failure to inform the plaintiff of the outcome thereof, the plaintiff was unable to lodge an appeal to the Income Tax Tribunal, in which instance the plaintiff pleaded that it would have been successful with its contention that the tenants allowance of NAD 2,691,547 was capital in nature and not revenue. In the alternative, the plaintiff pleaded that in the event of being unsuccessful in the Income Tax Tribunal, the plaintiff would have been successful in the special court for income tax appeals and further in the alternative that the plaintiff would be successful in the Supreme Court of Namibia.

[10] However, despite the second defendant's failure to attend to the objection filed on behalf of the plaintiff for years, the first defendant, subsequent to the financial year end for 2009, made a claim against the plaintiff for an amount of NAD 835,547. This amount was purportedly claimed in terms of the Income Tax Act which included penalties and interest calculated on the basis that for financial year of 2009, the plaintiff short paid the first defendant.

[11] Plaintiff pleaded further that the claim in respect of the 2009 financial year without the determination of the plaintiff's objection in respect of the 2002 financial year is *ultra vires* the first defendant's powers and therefor constitutes a nullity.

[12] Fast forward to 2016, on 03 March 2016 the plaintiff represented by Mr. Steyn agreed with the first and second defendant's director, Mr Chris Claasen that the plaintiff may again submit an objection to the 2002 assessment of the amount of NAD

¹⁶ (1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.

¹⁷ (4) On receipt of a notice of objection to an assessment the Minister may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

2,691,547 to motivate the capital nature of the return. It was agreed that the objection will be considered on an urgent basis and if the plaintiff's objection is upheld, the first defendant will immediately re-assess the plaintiff's income for year 2009.

[13] In accordance with the agreement reached between the parties, the objection, including the application for condonation for late filing thereof was filed on 14 March 2016. On 26 May 2016 further correspondence was directed to the Director of the first and second defendant with reference to the meeting in March 2016 and the letter dated 14 March 2016. However, despite Mr Claasen acknowledging that the first defendant could not find the plaintiff's file and that he did not know whether the plaintiff's objection was ever considered and that the objection might have been lost and despite his invitation to plaintiff to file a new objection, pending the search for the file, the new objection was not considered but rejected as being out of time.

[14] Plaintiff pleaded that the rejection of the objection lodged by Mr. Steyn was unreasonable in the circumstances and as a result a breach of the first and second defendants' obligations envisaged in Article 18 of the Constitution and constitutes a nullity.

[15] On 22 November 2016 the first defendant again demanded payment in the amount of N\$828,494.28 from the plaintiff for income tax¹⁸ (NAD 126,546.60¹⁹) and tax²⁰ (NAD 796,699.34) and income tax²¹ (NAD 0 but penalties and interest NAD 68,039.45), which was set out in detail in the particulars of claim.

[16] In the letters²² of demand the first defendant claimed penalties and interest and also threatened to take coercive action against the plaintiff as envisaged in s 83 and 91 of the Income Tax Act and s 31 and 36 of the Value Added Tax, Act 10 of 2000.

¹⁸ Paragraph 33.1 of Particulars of Claim.

¹⁹ Demand based on the 2002 assessment where the amount of NAD 126,546.60 representing the alleged short payment in 2009).

²⁰ Paragraph 33.2.

²¹ Paragraph 33.2 of Particulars of Claim.

²² Annexure G to the Particulars of Claim.

[17] Plaintiff further avers that the aforesaid demand was made in spite of the fact that the first defendant had full knowledge that the plaintiff disputed the amount claimed in paragraph 33.1 of particulars of claim throughout and that the plaintiff never received assessments in respect of the amounts claimed in paragraphs 33.2 and 33.3 of the particulars of claim. Plaintiff pleaded it would have been entitled to object to assessment if received.

[18] On 13 December 2016 plaintiff's representative, Mr Steyn, responded to the defendants' letter of demand²³ and drew the defendants' attention to a number of issues. Subsequently, the plaintiff's legal representatives issued a letter of demand²⁴ on 24 March 2017. In return, the first defendant in a replying correspondence²⁵ dated 30 March 2017 invoked a set-off as envisaged by s 38(2) of the VAT Act against the VAT refund for income tax, employee tax and value added tax on import.

[19] In the said correspondence, the first defendant's acting director admits the amount due to plaintiff. The amount due (NAD 3,820,385.57) is also supported by a consolidated statement of account²⁶ obtained by the first defendant and therefor the plaintiff pleaded that any set-off would be null and void for reasons advanced above.

[20] The plaintiff therefore claims that the first defendant is liable to the plaintiff in an amount of N\$3,820,385.57.²⁷ Plaintiff in the alternative prays for the reviewing and setting aside a number of decisions made by the defendants, i.e.:

- a) the first defendant's decision to treat the amount of NAD 2,691,875.00 in the plaintiff's financial statements for year 2002 as being income;

²³ Annexure H to the Particulars of Claim.

²⁴ Annexure J to the Particulars of Claim.

²⁵ Annexure K to the Particulars of Claim.

²⁶ Annexure B to the Particulars of Claim

²⁷ Being the total amount by which the plaintiff's input VAT exceeded the output VAT during the period 2006 to date of summons.

- b) the first defendant's decision to claim the amount of NAD 835,547.00 from the plaintiff since 2009's financial year end, based on assessment of the plaintiff's financial year 2009;
- c) the second defendant's omission to consider plaintiff's objection dating to 2005 in respect of plaintiff's financial year 2002;
- d) the first defendant's decision not to condone or consider plaintiff's objection lodged in March 2016;
- e) the first defendant's decision on 22 November 2016 to claim amounts pleaded in paragraph 33.1 to 33.3 of the particulars of claim on the basis that the amounts were never assessed;
- f) the first defendant's decision to invoke set-off in his letter dated 30 March 2017.

The exception taken:

[21] An exception was taken by the defendants to the plaintiff's particulars of claim on the basis that the particulars of claim does not disclose a cause of action and further that the particulars of claim lacks averments which are necessary to establish the jurisdiction of this court. The defendants advanced the following basis for the exception taken:

1.1 The claim by plaintiff is for refund of tax as contemplated in section 38(1)(a) of the Value Added Tax Act 10 of 2000 (hereinafter referred to as "the Act").

1.2 In paragraph 8 and 9 of the particulars of claim the plaintiff pleads that tax returns indicating an excess input tax over output tax were filed and the consequent liabilities of the first defendant to plaintiff as claimed arose over the period January 2002 to 29 May 2017.

1.3 In terms of the provisions of section 38(2) of the Act the tax returns referred to above constitute claims for a refund and where the first defendant is satisfied that a refund is due to the plaintiff any credit remaining after set off is applied to the plaintiff by no later than the end of the second calendar month following the date the credit balance arose.

1.4 On 24 March 2017 the plaintiff, represented by its legal practitioners of record, demanded payment of the tax refund by means of a letter annexure “J” to the particulars of claim.

1.5 The first defendant rejected the claim for a refund by means of a letter dated 30 March 2017, annexure “K” to the particulars of claim.

1.6 In terms of the provisions of section 38(9) of the Act the plaintiff if dissatisfied with the decision of the first defendant rejecting the claim, may challenge the decision only by means of the procedure provided for in part VIII of the Act (sections 27-29), by means of objection and appeal to the “special court for hearing income tax appeals” constituted under section 73 of that Act.

1.7 The honourable court does not have jurisdiction to entertain the claim.’

Submissions on behalf of the Defendant

[22] Mr Barnard submitted on behalf of the defendants that from the particulars of claim, it is clear that the claim by the plaintiff is for a refund of tax, as a tax vendor, as contemplated in s 38(1)(a) of the Value Added Tax Act 10 of 2000 (‘the Act). The said claim is for payment of VAT refunds arising from input credits exceeding output VAT and such refunds of VAT are done in term of the provisions of s 38 of the Act. In terms of the provisions of s 38(2)²⁸ of the Act, a tax return indicating an excess input tax over

²⁸ (2) Subject to this section, if, for any tax period, a registered person files a return reporting an excess referred to in subsection (1)(a), or any person, mission, organisation or government contemplated in subsection (1)(c) files a return of tax paid, the return shall constitute a claim for a refund, and where the Commissioner is satisfied that a refund is due to any such person, mission, organisation or government-

(a) the Commissioner shall first apply the amount of the refund in reduction of any tax, levy, interest or penalty payable by that person, mission, organisation or government in terms of this Act and may then apply any amount remaining or any portion thereof to any unpaid amount due in terms of the Income Tax Act, 1981 (Act 24 of 1981), the Sales Tax Act, 1992 (Act 5 of 1992), or the Additional Sales Levy Act, 1993 (Act 11 of 1993); and

(b) any credit balance remaining on the tax account of any such person, mission, organisation or government shall be refunded to the person, mission, organisation or government claiming the refund not later than the end of the second calendar month following the date the credit balance arose on the relevant tax account.

output tax constitutes a claim for refund and where the first defendant is satisfied that such a refund is justified, a refund is made.

[23] Mr. Barnard further argued that on 24 March 2017, the plaintiff represented by its legal practitioners of record, demanded payment of an accumulated tax refund by means of a letter, annexure “J” to the particulars of claim.²⁹ This first defendant rejected the claim for refund by means of a letter dated 30 March 2018,³⁰ attached as annexure “K” to the particulars of claim.

[24] It was further argued that in light of the rejection of the plaintiff’s claim for refund, s 38(9) limits the options available to the plaintiff and it reads as follows:

‘(9) A person claiming a refund under this section who is dissatisfied with a decision referred to in subsection (8) may challenge the decision only under Part VIII of this Act.’

[25] The use of the word ‘only’ by the legislature is emphasized by Mr. Barnard and it was submitted that the intention of the legislator was exactly as the words indicate in as much as the challenge can only be by means of the procedure as set out in Part VIII of the Act.

[26] Mr. Barnard submitted s 27 to 29 makes provision for the procedure to be followed if a taxpayer is dissatisfied with the decision of the first defendant, i.e.:

- a) objection to the decision of the first respondent must be lodged within 90 days after issue of the notice of the decision or assessment in question, or within an extended period as may be allowed on application;
- b) if an extension is applied for and not granted, a dissatisfied tax payer may challenge the decision, but only under Part VIII;

²⁹ Particulars of claim: page 13 paragraph 39

³⁰ Particulars of claim: page 14-15 paragraphs 44-45

- c) A tax payer dissatisfied with an objection may appeal against the objection by lodging an appeal within 60 days after being informed of the decision on the objection.

The relevant provision of the Income Tax Act of 1981 in respect of the appeal procedure is incorporated by reference in the Act.

[27] He further submitted that the jurisdiction of the High Court for the claim of a refund is thus excluded in terms of the provisions of s 27 to 29 (Objections and Appeals).

[28] I was referred to the matter of *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another*³¹ where the Constitutional Court in South Africa found that in South Africa the High Court has jurisdiction in tax cases:

- 'a) to grant declaratory relief where the case turned on legal issues only and does not require a factual enquiry.
- b) to grant interlocutory relief pending the finalization of the procedure provided by tax legislation.
- c) to grant review relief.'

[29] However, Mr. Barnard submitted that the claim of the plaintiff in the matter *in casu* does not fall in any of the three categories referred to by the *Metcash* matter. He further submitted that apart from the fact that the claim of the plaintiff does not fall within the aforementioned categories, there is a clear distinction to be had between the position in South Africa and Namibia as the South African legislation provides for an objection and appeal procedure. The jurisdiction of the High Court is not pertinently excluded, whereas in Namibian legislation it is due to the limitation to the procedure as

³¹ 2001 (1) SA 1109 (CC) at [40], [44] and [45].

prescribed in Part VIII of the Act. The unlimited jurisdiction of the High Court, as encompassed in Article 80 of the Constitution and s 16 of the High Court Act is therefore excluded by the legislator.

[30] In conclusion, Mr. Barnard submitted that the relief sought is in respect of collateral challenges amounting to review relief alternatively refund but ultimately the claim of the plaintiff remains one of refund of VAT which is regulated by s 38(1)(a) of Value Added Tax Act. He argued that even if s 38(1)(a) does not include review relief, the exception is still good in respect of the main claim.

Submissions on behalf of the Plaintiff

[31] Mr. Heathcote in his submissions proceeded to sketch the history of this matter as set out in the particulars of claim, which I will not repeat as same was discussed above.

[32] During his submissions Mr. Heathcote however emphasized that the plaintiff complied with the provisions of the Act by filing its returns and subsequent objection timeously. The first defendant failed to or neglected to deal with the objection. Despite this irregularity, the first defendant then claimed the amount of NAD 835,547, which decision together with a number of decisions was *ultra vires*.

[33] With reference to the amounts which the first defendant purports to set-off against the admitted amount due, owing and payable to the plaintiff was never assessed and as such there cannot be an 'objection decision' or appealable decision as defined by VAT Act capable of determination of the tribunal or the Special Income Tax Appeal Court.

[34] In addition thereto, the amount of the plaintiff's main claim is beyond the jurisdiction of the tribunal. The plaintiff's claim, including the Review relief can only be entertained and granted by the High Court of Namibia.

[35] Mr. Heathcote argued on behalf of the plaintiff that nowhere in the particulars of claim does the plaintiff claim for a tax refund. Section 38(1)(a) of the Value Added Tax Act refers to refund of tax but before any refund can be due and payable, there must be an assessment.

[36] Section 38(9) is the ultimate result when everything is done and an assessment is in place and first defendant has dealt with the plaintiff's claim, only then might there be merits in the defendant's exception. However as this was not done, all the actions following after the filing of the plaintiff's objection should be treated as if it does not exist.

[37] Mr Heathcote further argued the defendants' exception is against the entire claim. There was no application for the striking of any part of the claim and the exception is bad in law and should be dismissed. He argued that the defendants cannot now advance their exception against parts of the claim, and more specifically on the main claim because of the *Oude Kraal Principle*.³²

The court's approach to exceptions:

[38] On 12 February 2002, the High Court of Namibia in *Namibia Breweries Limited v Seelinbinder, Henning and Partners*³³ stated the approach to an exception as follows:

- (i) "The facts pleaded by the Plaintiff, which I must assume for purposes of this exception as true and capable of proof (cf. *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*, 1999 (1) SA 624 (W) at 632 C; *Marney v Watson and Another*, 1978 (4) SA 140 (C) at 144 (F).)³⁴"

³² *Oudekraal Estates (Pty) Ltd v Cape Town & Others* 2004 (6) 222 (SCA) – which says that, as administrative decisions are often acted upon in the belief that they were validly taken, they are accepted as valid until challenged and set aside by a court of law. Paragraph [31] at 243H - 244A/B.

³³ 2002 NR 155 (HC).

³⁴ At page 155.

(ii) “...the Court must remind itself that, having taken the exception, the Defendant must satisfy the Court that, on all reasonable constructions of the Plaintiff’s particulars of claim as amplified and amended (cf. *Kennedy v Steenkamp*, 1936 CPD 113 at 115; *Amalgamated Footwear and Leather Industries v Jordan & Co. Ltd*, 1948 (2) SA 891 (C) at 893; *Callendar-Easby & Another v Grahamstown Municipality & Others*, 1981 (2) SA 810 (E) at 812 H – 813 A; *Theunissen & Andere v Transvaal se Lewendehawe Koop Beperk*, 1988 (2) SA 493 (A) at 500 E; *Lewis v Oneanate (Pty) Ltd & Another*, 1992 (4) SA 811 (A) at 187 F – G and *Michael v Caroline’s Frozen Yoghurt Parlour (Pty) Ltd*, supra at 632 D) and on all possible evidence that may be lead on the pleadings (see: *Mckelvey v Cowan NO*, 1980 (4) SA 525 (Z) at 526 D –G), no cause of action is or can be disclosed.³⁵ (my underlining)

(iii) “The most beneficial construction that can be given to the pleading is that³⁶”

[39] The above approach was recently restated by the Supreme Court of Namibia in *Van Straten NO v Namibia Financial Institutions*³⁷ in the following terms:

“Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff’s pleadings are taken as correct³⁸. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed³⁹. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.⁴⁰”⁴¹

³⁵ Supra at page 159.

³⁶ Supra at page 159.

³⁷ (SA 19-2014) [2016] NASC (8 June 2016).

³⁸ *Marney v Watson & another* 1978 (4) SA 140 (C) at 144F.

³⁹ *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G followed by the High Court in *Namibia Breweries Ltd v Henning Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 158HJ. (Seelenbinder).

⁴⁰ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-G; see also *Seelenbinder* at 159A.

⁴¹ At p. 7 – 8, para [18]; *Claude Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd*, Case Number SA 41/2016, Unreported Judgement delivered on 6 February 2018, p. 7, para, [10].

The law on the exception raised

[40] The exception raised by the defendant is based on jurisdiction and what this court must decide on in this matter is whether the plaintiff was entitled to seek relief from the High Court without first exhausting the procedures provided for in part VIII of the VAT Act (s 27-29), by means of objection and appeal to the “special court for hearing income tax appeals” constituted under s 73 of that Act.

[41] The defendants are of the opinion that the case for the plaintiff is a pure and simple claim for VAT and in light thereof, the plaintiff has no choice but to follow procedure provided for in the aforementioned sections.

[42] Plaintiff argues to the contrary stating that nowhere in the particulars of claim does it claim refund of VAT. From the particulars of claim, it is clear that although the monetary claim is the amount of N\$3,820,385.57 in respect of the amount, that input VAT exceeded output VAT. However, there are a number of collateral claims that forms part of the monetary claim.

[43] I agree with Mr. Heathcote's argument that the tax refund in terms of s 38 is the ultimate result that plaintiff would like to achieve however, this result cannot be obtained until such time that the assessments have been done, objections dealt with and the claims by the defendants has been resolved.

[44] If the matter was as simple as a straight forward tax refund, the plaintiff would be obliged to follow the procedure as set out in section 38 as follows:

'2) Subject to this section, if, for any tax period, a registered person files a return reporting an excess referred to in subsection (1)(a), or any person, mission, organisation or government contemplated in subsection (1)(c) files a return of tax paid, the return shall constitute a claim for a refund, and where the Commissioner is satisfied that a refund is due to any such person.....'

[45] The claim for a refund must be made in writing and be accompanied by documentary proof of payment of the excess amounts within three years after the date the excess arose.⁴²

[46] Hereafter, the Commissioner shall serve on a person claiming a refund, a notice in writing of the decision in respect of the claim.⁴³ Any claiming a refund under this section who is dissatisfied with a decision referred to in subsection (8) may challenge the decision only under Part VIII of this Act.⁴⁴

[47] Section 27 sets out the objection process as well as the appeal process as follows:

'27 Objections

(1) Any person who is dissatisfied with an appealable decision may lodge an objection to the appealable decision with the Commissioner within 90 days after the date of issue of the notice of the decision or assessment in question or within such extended period as the Commissioner may allow on good cause shown in writing.

.....

(5) After considering the objection, the Commissioner may-

- (a) allow the objection in whole or in part and-
 - (i) alter any decision pursuant thereto; or
 - (ii) alter or reduce any assessment pursuant thereto; or
- (b) disallow the objection.

Hereafter:

⁴² Section 38(7).

⁴³ Section 38(8).

⁴⁴ Section 38(9).

(6) The Commissioner **shall** serve the person objecting with a notice in writing of the objection decision under subsection (5).'

[48] If the aggrieved vendor is still not satisfied, the said vendor can appeal the decision as follows:

'28 Appeals

(1) In this section "objection decision" means a decision taken by the Commissioner under section 27(5).

(2) Any person dissatisfied with an objection decision may, within 60 days after the person was served with a notice of the objection decision, lodge with the Commissioner a notice of appeal to the **special court** for hearing income tax appeals constituted under section 73 of the Income Tax Act, 1981 (Act 24 of 1981) or a **tax tribunal** constituted under section 73A of that Act.'

[49] The procedure provided for in Part VIII of the VAT Act is read with s 73(8) to (12), (14) to (17) and 74 to 76 of the Income Tax Act.

[50] Therefore, a person who is dissatisfied with an appealable decision may lodge and appeal to the Commissioner and a person dissatisfied with an objection decision by the Commissioner may lodge and appeal to the special court for hearing income tax appeals or the tax tribunal constituted under s 73A of the Income Tax Act.

[51] The tax tribunal constituted under s 73A provides that any appeal referred to in s 73(1) shall in the first instance be heard by the tax tribunal established by ss (2), where-

'(a) the amount of the tax in dispute does not exceed such amount of NAD 100 000.⁴⁵

⁴⁵ N\$ 100 000-00 - GN 107 in GG 3672 of 1 August 2006.

[52] The special court is a creature of statute and could only act in accordance with the powers conferred upon it by statute. In the instance of an appeal in terms of the VAT Act, s 28(5) provides that the powers included a right to:

'(a) affirming or varying the objection decision, including (in the case of an appeal , against an objection decision relating to an assessment) a decision to increase or decrease the assessment; or

(b) remitting the objection decision for reconsideration by the Commissioner in accordance with the directions of the court.'

[53] In the matter *in casu* the plaintiff filed its objection in terms of s 71(4) of the Income Tax Act. Sections 71 and 73 provide for objections and appeals that may be lodged against the decision of the minister. The relevant provisions read as follows:

'71 Time and manner of lodging objections

(1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.

[Subsec (1) substituted by sec 7 of Act 5 of 1997.]

(2) No objection shall be entertained by the Minister which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Minister is satisfied that reasonable grounds exist for delay in lodging the objection.

(3) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.

(4) On receipt of a notice of objection to an assessment the Minister may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

(5) Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive.'

[54] In the instance of an appeal in terms of the Income Tax Act s 73(13):

'(13) Subject to the provisions of this Act, the court may —

(a) in the case of any assessment under appeal, order such assessment to be amended, reduced or confirmed, or may if it thinks fit refer the assessment back to the Minister for further investigation and assessment;

(b) in the case of any appeal against the amount of the additional charge imposed by the Minister under section 66(1), reduce, confirm or increase the amount of the additional charge so imposed;

(c) in the case of any other decision of the Minister which is subject to appeal, confirm or amend such decision.'

[55] If one have regard to the relevant sections in the VAT Act and the Income Tax Act, it is evident that the Commissioner or Minister, depending on the nature of the objection, must notify the vendor/taxpayer in writing of his/her decision, with the decision being the operative word in this instance.

[56] To enable the plaintiff to appeal against the objection decision, it inevitably means there had to be a decision. There was however no decision taken in respect of the plaintiff's objection due to the fact that the plaintiff's was lost. Therefor, the plaintiff had no recourse to the forums of first instance as set out in the VAT Act and Income Tax Act.

[57] The question is then what recourse does the plaintiff have in this instance where there is no decision to appeal and plaintiff have no recourse to the High Court as argued by defendants? Where does it leave the plaintiff?

[58] Plaintiff maintains that because no decision was made regarding its objection, its constitutional right to fair hearing in terms of Article 12 was infringed as well as its right to administrative justice in terms of Article 18 of the Namibian Constitution.

[59] The Constitution protects the fundamental rights of taxpayers in Namibia and although the Constitution has been in existence for some 28 years, the rights of taxpayers has not been well developed within a constitutional context. Not many taxpayers challenge tax legislation or the conduct of Inland Revenue Services as being unconstitutional. There has thus been a lack of specific judicial decision in the context of tax legislation.

[60] Article 18 of the Constitution binds all organs of State. Ministry of Finances: Inland Revenue is an organ of State and accordingly it is bound by the obligations and duties imposed upon it by the Constitution.

[61] The issue of Administrative Justice is regulated by Article 18 of the Namibian Constitution, which reads as follows:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'(my underlining)

[62] Article 18 protects the right to administrative justice. It is one of the rights and freedoms forming part of Chapter 3 of the Constitution.

[63] In the matter of *Chairperson of The Tender Board Of Namibia v Pamo Trading Enterprises CC and Another*⁴⁶ the court stated as follows:

'[30] This court has made it clear that art 18 is to be interpreted 'broadly, liberally and purposively' to give the article a construction which is most beneficial to the widest amplitude.'

And at:

'[35] While art 18 advances the values of openness and transparency, the right enshrined is that of a person to fair and reasonable administrative action at the hands of an administrative body or official. Inherent in this right is the right to reasons for administrative action.'

[64] This is provided a decision has been taken.

[65] In LAWSA⁴⁷ the authors describe just administrative action as emanating from the non-judicial branch of government, such as organs of State. It implies a system of public administration which upholds principles of fairness, reasonableness, equality, propriety and proportionality. These principles, being accountability and control, review and supervision, openness and consultation are promoted, with both procedural and substantive elements. Procedurally just administrative action requires compliance with the rules of procedural fairness. Substantively just administrative action requires compliance with the requirements of reasonableness, proportionality and rationality.

[66] In the first tax-related case dealing with administrative law and the Constitution, *Metcash Trading Limited v C SARS and Another*⁴⁸ (but before the promulgation of PAJA), Kriegler J, in a landmark judgment (dealing with the 'pay-now-argue-later' principle) provided insight into the influence of the Constitution on administrative law, and the exercise by the Commissioner of his discretion in tax legislation.

⁴⁶ 2017 (1) NR 1 (SC).

⁴⁷ LAWSA Volume 1 Administrative Law 2nd ed Lexis Nexis at para 74 footnote 3

⁴⁸ 2001(1) SA 1109 (CC).

[67] In *Metcash*, Kriegler J made it clear that the High Court had the inherent power and jurisdiction to review decisions made by SARS. The question was: What is meant by a decision? In the judgment of *Metcash*, the 'decision' under consideration by the Constitutional Court related to a 'discretion' to be exercised by SARS.

[68] From the wording of s 27(5) of the VAT Act and s 71(4) of the Income Tax Act, it would appear that a similar discretion exists, in that the provisions are permissive in nature, as the word 'may' is used to allow the Commissioner of Inland Revenue or Minister to exercise its powers in respect of the outcome of an objection. It follows that a decision must be taken by Commissioner of Inland Revenue or Minister to enable it to invoke these discretionary powers.

[69] The Commissioner or Minister is obliged to exercise its powers and obliged to notify the taxpayer of his/her decision diligently and without delay.

[70] As is clear from Article 18 of the Constitution, if there is any transgression of these fair administrative procedural provisions, it would entitle the taxpayer to launch the appropriate judicial review application to the High Court.

[71] In essence, the effect of reading the constitutional provision together with the relevant legislation is that any decision that adversely affects the rights of a taxpayer must be subject to a procedural and substantive due process.

[72] The special tax court and the tax tribunal do not have the jurisdiction to consider and grant review relief.

[73] It is clear from the case law that I was referred to that the jurisdiction of the High Court is not ousted by the establishment of the special tax court.⁴⁹

⁴⁹ *Du Preez v Minister Of Finance* 2012 (2) NR 643 (SC) at [24] and *Mugimu v Minister Of Finance And Others* 2017 (3) NR 670 (HC) at [65].

[74] I am of the opinion that the issues raised on behalf of the plaintiff are legal questions which only the High Court may determine and therefore this court has jurisdiction to hear the matter.

[75] In conclusion, I am not convinced that the defendant was able to satisfy the court that on all reasonable construction of the plaintiff's particulars of claim as amplified and on all possible evidence that may be lead on the pleadings that no cause of action is or can be disclosed and therefore the exception must be dismissed.

[76] Order:

1. Exception is dismissed with costs. Cost of one instructing and two instructed counsel.
2. The matter is postponed to 12 July 2018 at 15:00 for Case Planning Confernece in terms of Rule 23(5).
3. Joint case plain must be filed no later than 09 July 2018 at 12:00.

J S Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

R Heathcote (with J Schickerling)
instructed by Koep & Partners, Windhoek

DEFENDANT:

P Barnard
instructed by Government Attorneys, Windhoek