

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

***EX TEMPORE* JUDGMENT**

Case no: HD-MC-CIV-MOT-GEN-2024/00134

In the matter between:

<b>HIKANOS THIRTY-EIGHT (PTY) LTD</b>	<b>FIRST APPLICANT</b>
<b>HIKANOS THIRTY-NINE (PTY) LTD</b>	<b>SECOND</b>
<b>APPLICANT</b>	
<b>HIKANOS FIFTY-FOUR (PTY) LTD</b>	<b>THIRD APPLICANT</b>
<b>HIKANOS FIFTY-FIVE (PTY) LTD</b>	<b>FOURTH APPLICANT</b>
<b>HIKANOS FIFTY-SIX (PTY) LTD</b>	<b>FIFTH APPLICANT</b>

and

**COMMISSIONER OF THE NAMIBIA REVENUE AGENCY      RESPONDENT**

**Neutral citation:** *Hikanos Thirty-Eight (Pty) Ltd v Commissioner of the Namibia Revenue Agency* (HC-MD-CIV-MOT-GEN-2024/00134) [2024] NAHCMD 610 (17 October 2024)

**Coram:** SCHIMMING-CHASE J  
**Heard:** 17 October 2024  
**Delivered:** 17 October 2024

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**ORDER**

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1. The applicants' application for an order that the respondent pays their costs of suit on a punitive scale is dismissed.
  2. The respondent is ordered to pay the applicants' costs of suit on a party and party scale.
  3. The matter is regarded as finalised and removed from the roll.
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**JUDGMENT**

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SCHIMMING-CHASE J:

[1] The sole question before court in this instance is whether the applicants are entitled to costs payable by the respondent for the institution of these proceedings. The respondent disputes that it is liable for the costs of the applicants.

[2] To make a determination, I must consider the background of the matter, which I do as follows.

[3] The applicants are all registered persons pursuant to the provisions of the Value-Added Tax Act 10 of 2000 ('VAT Tax Act'). They submitted valued-added tax ('VAT') returns on 25 September 2020 and according to the applicants; their input VAT deductible for the VAT period exceeded their output VAT, which entitled them to refunds once the respondent assessed the same. Eighteen months later and on 1 March 2022, the respondent assessed the applicants' returns and disallowed the applicants' claims for input tax

refunds for various reasons that I do not find relevant for purposes of the issue before court.

[4] Pursuant to s 27(1) of the VAT Tax Act,<sup>1</sup> the applicants lodged their objections on 17 June 2022, to the whole of the assessments by the respondent of 1 March 2022. This was done after they lodged a condonation and extension of time application on 20 May 2022 pursuant to s 27(2) of the VAT Tax Act.<sup>2</sup> On 17 April 2023, after clarification was sought by the respondent on 5 December 2022, the applicants supplemented their objections.

[5] There was no response to the applicants' objections by the respondent, despite regular follow-ups, and on 28 March 2024, the applicants lodged an application against the respondent seeking a mandamus directing the respondent to decide the objections lodged by the applicants within 30 days from the granting of the order by the court and where the respondent fails to timeously comply with the court's order, that the applicants would be entitled to approach the court to review and set aside the respondent's deemed objections and allowing the input VAT deductions claimed by the applicants. The applicants further sought a costs order on a scale as between attorney and client.

[6] The applicants filed an amended notice of motion on 22 April 2024 and set the matter down on the residual court roll given that the respondent did not

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<sup>1</sup> Section 27(1) provides that '[a]ny 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.

<sup>2</sup> Section 27(2) provides that '[u]pon application in writing by a person dissatisfied with an appealable decision, the Commissioner may, where satisfied that owing to absence from Namibia, sickness or other reasonable cause the person was prevented from lodging an objection to the appealable decision within the period referred to in subsection (1) and that there has been no unreasonable delay by the person in lodging the objection, accept an objection lodged with the Commissioner after the expiration of that period.'

oppose the relief sought, despite being served with the processes on 15 April 2024.

[7] On 10 May 2024, the matter came before me on the residual court roll where I heard counsel appearing for the applicants. I ordered that the applicants deliver heads of argument on or before 14 June 2024 to assist the court in making a determination and postponed the matter for hearing on 24 June 2024 at 10h00. The applicants duly delivered their heads of argument and on 21 June 2024, the respondent abruptly entered an appearance.

[8] On 24 June 2024, I heard counsel appearing for the parties and recorded that the respondent only intends to make submissions regarding costs and that the respondent does not oppose the main relief. Given this, I directed the parties to deliver affidavits and heads of argument in respect of the issue of costs and postponed this matter for a status hearing on 29 July 2024 to assign dates for hearing of the issue of costs. Subsequently, the matter was set down for hearing on 17 October 2024.

[9] I note that despite the court directing the respondent to deliver a replying affidavit on 2 August 2024. This was not done. Neither did the respondent deliver heads of argument as ordered by the court. This conduct is unacceptable and unprofessional.

[10] It was submitted by the applicants that the respondent communicated his decisions in respect of the applicants' objections on 21 May 2024, which decisions are dated 16 May 2024. Therefore, the mandamus is rendered moot and needs no determination. However, the applicants persist that they are entitled to punitive costs for lodging this application.

[11] The applicants assert that they lodged their objections on 17 June 2022 to the assessments made by the respondent. Some six months later, the respondent sought clarity regarding the assessments and on 17 April 2023, the applicants supplemented their objections.

[12] According to Ms Kevi Eises,<sup>3</sup> prior to the establishment of the Objection and Appeals Unit, objections were managed by the Objection Committee, which had been approved and established on 17 November 2022 and dissolved on 31 August 2023. She states that the applicants' objections were received by the Audit and Compliance Unit, which Unit then referred the objection NamRA's legal department on 5 September 2022. The legal department then referred the applicants' objections to the Objection Committee in November 2022.

[13] The Objection Committee reviewed the applicants' objections at a meeting of 27 June 2023 and directed the senior auditors, who were involved in the audit, to summarise the facts and legal grounds of objection to the Committee. This was done and resubmitted to the Committee on 24 July 2023 and the Committee discussed the objections in their meeting of 4 August 2023. The issue was kept on the agenda for the next meeting given that it was 'highly extensive'. Before the objections could be decided, the Objection Committee was dissolved and the objections were handed over to the newly established Objections and Appeals Unit on 20 October 2023 and the 'case' was allocated to Maria Mbeeli, a senior objection officer, on 21 October 2023.

[14] Ms Mbeeli deposes to an affidavit and states that she is a senior tax auditor at NamRA since 1 September 2023. She states that she is responsible for reviewing tax objections lodged by taxpayers in terms of the provisions of the VAT Tax Act. Ms Mbeeli states that she was only allocated the objection of the first applicant (namely, Hikanos Thirty-Eight (Pty) Ltd) in October 2023 and only discovered at a later stage the objections of the other applicants, which had 'previously been allocated to other colleagues'. After an internal decision was made to allocate all the applicants' objections to her for review, Ms Mbeeli discovered that the applicants claimed VAT input tax with different and contradicting amounts from tax invoices issued by Jimmey Construction (Pty) Ltd ('Jimmey'). She states that she needed clarity from Jimmey

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<sup>3</sup> She is the senior manager of the objection and appeal unit at the Namibia Revenue Agency ('NamRA'). This unit was apparently established on 1 September 2023 for the independent assessment of objections.

regarding the issue and during November 2023, contacted its liquidator (having learned that the entity had been finally liquidated) for the information,<sup>4</sup> but had received nothing despite following up on 9 January 2024. She states that in February 2024, she informed the applicants' legal practitioners that she was attending to the VAT objection decision and had requested information from Jimmey. This was after the applicants' legal practitioners sought a follow-up on the objection decisions.

[15] Ms Mbeeli states that on 7 March 2024, she finalised the objection review and submitted it to Ms Eises, who finalised the review of the objection report on 5 April 2024. She submitted the decision to the respondent's office on 26 April 2024 and the respondent returned the objection for input and amendments on 29 April 2024. It was resubmitted to the respondent's office on 3 May 2024 and was ultimately approved on 16 May 2024.

[16] The applicants take issue that there is no explanation proffered as to why the objections were only referred to the official dealing with the objections in October 2023 when the objections were lodged on 17 June 2022 and supplemented on 17 April 2023. More so, the applicants find issue with the fact that only the first applicant's objection was allocated to Ms Mbeeli when the officials of NamRA had been aware of the objections by all the applicants. This is not properly explained by the respondent. It is further an issue for the applicants that the respondent, in April 2023, undertook to finalise the objections by end of May 2023, but failed to do so. The applicants state that the deponents merely aver that the objections by the applicant were extensive but do not provide particularity on such a submission – there is no explanation proffered as to what made these objections so extensive that required approximately two years to make a decision.<sup>5</sup>

[17] Notably, the applicants take note that it took Ms Mbeeli another five months to consider the objections from when it was allocated to her, which

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<sup>4</sup> Ms Mbeeli states that she requested information for Jimmey to confirm if it had declared the VAT claimed by the applicants which was apparently crucial to NamRA's objection decision. No explanation is proffered what made this information crucial.

<sup>5</sup> See para 26 of the answering affidavit.

objections had already been dealt with, at that stage, by three (now defunct) committees and in respect of which a summary of the facts was provided and in respect of which a legal opinion was sought in September 2022. This does not bode well for the respondent.

[18] It is the applicants' stance that 'it is thus disingenuous and spurious for a public official to state under oath that a period of over 22 months is reasonable simply because section 27 of the VAT Act does not provide a timeframe within which the [r]espondent should issue his decision ... the decision must be taken within a reasonable time and deny that 23 months, is by any stretch of [the] imagin[ation] reasonable'.<sup>6</sup>

[19] I take note that various email correspondences were attached to the papers filed of record by both the applicants and the respondent. It is further noted that there was engagement between the parties regarding the objections. However, I understand the applicants' case to be that given the runaround that the respondent gave the applicants in making a decision regarding the objections, the applicants were given no choice but to institute these proceedings. I am alive to the fact that the prayer for mandamus is moot given that a decision was rendered by the respondent in May 2024 and that the issue of costs is the only issue alive before this court.

[20] This court is at a disadvantage. As intimated earlier, the respondent failed to deliver heads of argument despite an order to that effect. Thus, this court has no benefit of written arguments by the respondent. I will nevertheless consider the issue.

[21] In the heads of argument, the applicants contend that they seek a punitive costs order on an attorney and client scale and that the relevant enquiry this court must make in this regard is to consider whether the

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<sup>6</sup> See para 18 of the answering affidavit.

applicants were justified in approaching the court.<sup>7</sup> The applicants' arguments are succinctly set out as follows in their heads of argument:

'31. A delay of over two years to consider the Applicants objections and to allow or disallow the objections is unreasonable and taxpayers, such as the Applicants, should not be required to resort to court to have the Respondent carry out the very duties that the legislature intended him to.

32. The respondent failed to fulfill an obligation that is imposed upon him by the VAT Act within a reasonable time and the Applicants were left with no other alternative but to bring these proceedings for a mandamus to compel him to do so.

33. The respondent only fulfilled his obligations after the service of the application on him and after the applicants had already incurred legal costs to bring the application.

34. The applicants were justified in bringing the application and clearly sought an adverse costs order against the respondent. The applicants are entitled to the relief sought on the papers.' (Emphasis supplied).

[22] Although the issue of mandamus is moot and I need not make a determination thereon, I am of the view that to make a determination of whether the respondent must pay costs or not (and whether on a punitive scale), I must consider the merits to some extent.<sup>8</sup>

[23] To my mind, there is no proper explanation proffered by the respondent for the delay in making a decision. It was stated that when the objections were first received by the Audit and Compliance Unit on 17 June 2022, it was only sent to the legal department on 5 September 2022 – the period between 17 June 2022 and 5 September 2022 remains unexplained. Why did it take the aforementioned unit almost three months to refer the issue to the legal department? Again, upon the establishment of the Objection Committee in

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<sup>7</sup> *Jordaan v Namibia Civil Aviation Authority* (HC-MD-CIV-MOT-GEN-2020/00505) [2023] NAHCMD 422 (21 July 2023) paras 19-26.

<sup>8</sup> *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125 (HC).



November 2022, the objections were referred to it by the legal department but no explanation is proffered as to what took place in the interim. The period between November 2022 and 27 June 2023 (when the Objection Committee had their first meeting) is also not explained. In sum, there are various periods left unexplained by the respondent. There seems to be an unreasonable delay on the part of the respondent, which to my mind has not been properly addressed by the deponents. I also take note of the applicant's submission that there was summary of the dispute and legal opinion provided previously, yet it took Ms Mbeeli five months to consider the objections. It is also notable that no explanation is proffered as to why Ms Mbeeli needed the information from Jimmey – why was this crucial? This is not explained to the court.

[24] I will now consider the principles of costs before I make a determination. The trite principle is that a party must be indemnified for either instituting proceedings or attempting to evade liability by opposing a dispute. It is a well-established principle that costs are discretionary to the court and that the general principle regarding costs denotes that costs must follow the event.<sup>9</sup>

[25] Given the dilatory conduct of the respondent, I am of the considered view that this is a case where the applicants were strung along for almost two years (despite consistent follow-up correspondence as can be gleaned from the various email correspondence) by the respondent. I am of the view that the applicants were justified in bringing the application for a mandamus. Therefore, I hold the view that the applicants are entitled to their costs of the application. The question is now whether such costs should be on a punitive scale.

[26] An award for costs on attorney and client scale, as sought in this instance, is not lightly granted and the court will only do so where there are special grounds warranting the same.<sup>10</sup> The court in *Dornfontein Safaris (Pty)*

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<sup>9</sup> *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners* (HC-MD-CIV-ACT-CON-2021/00278) [2021] NAHCMD 358 (05 August 2021) para 8.

<sup>10</sup> Cilliers C *et al. Law of Costs*. LexisNexis (2023) at 4.09; See also *Nkume v Transunion Credit*

*Ltd v Ellis & Partners Legal Practitioners*<sup>11</sup> held that '[t]he principles on the instances where the court may, in its discretion order punitive costs are trite. As to whether a party has been able to meet the test for the granting costs on the punitive scale, has to be considered by reference to the evidence before court, which suggests that the said party has acted in a dishonourable, vexatious, vindictive or other improper manner. There are those cases where the evidence of that unacceptable behaviour may be gleaned on the papers'.

[27] The principles related to a punitive cost order denote, tritely, that a litigant must act in a manner that is unbecoming to warrant a punitive costs order. In the present instance and to my mind, the conduct of the respondent and his officials' was clearly dilatory and may have caused some prejudice to the applicants resulting in their approach to this court, but I see no unbecoming, vexatious or vindictive conduct by the respondent. The explanation proffered may well be unsatisfactory but the deponents on behalf of the respondent have evinced that they did keep in contact with the applicants' legal practitioners regarding the status of the objections and that they did not merely sit and keep the applicants in the dark. It is more apparent in the papers filed of record that the officials at NamRA did attempt to deal with the objections, though, in a dilatory, but no vexatious or vindictive manner. This conduct, however, does not amount to being dishonourable, vexatious or improper conduct, in my view. I am thus not persuaded to grant a punitive cost order against the respondent.

[28] For the foregoing reasons, I make the following order:

1. The applicants' application for an order that the respondent pays their costs of suit on a punitive scale is dismissed.
2. The respondent is ordered to pay the applicants' costs of suit on a party and party scale.

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*Bureau (Pty) Ltd and Another* 2014 (1) SA 134 (ECM).

<sup>11</sup> *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners* (HC-MD-CIV-ACT-CON-2021/00278) [2021] NAHCMD 358 (05 August 2021) para 13.

3. The matter is regarded as finalised and removed from the roll.

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E M SCHIMMING-CHASE

Judge

APPEARANCE

APPLICANTS: M Kuzeeko  
Of Dr Weder, Kauta & Hoveka Inc.,  
Windhoek

RESPONDENT: C Endjambi  
Of Office of the Government Attorney,  
Windhoek