



**REPORTABLE**

CASE NO: SA 55/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF FINANCE OF THE REPUBLIC  
OF NAMIBIA N.O.**

**First Appellant**

**ATTORNEY-GENERAL OF THE REPUBLIC  
OF NAMIBIA**

**Second Appellant**

**PROSECUTOR-GENERAL OF THE REPUBLIC  
OF NAMIBIA**

**Third Appellant**

and

**WESSEL ANDREAS KRUGER**

**First Respondent**

**OLD MUTUAL LIFE ASSURANCE COMPANY**

**Second Respondent**

**CORAM:** SHIVUTE CJ, DAMASEB DCJ and ANGULA AJA

**Heard:** 4 July 2022

**Delivered:** 5 August 2022

**Summary:** A taxpayer approached the High Court seeking wide-ranging relief, including the declaration of section 83(1)(b) of the Income Tax Act 24 of 1981 (the Act) as unconstitutional and therefore invalid. Many of the orders sought by the

taxpayer were rejected, but the relief relating to the invalidity of s 83(1)(b) of the Act and other sections succeeded. The declaration of invalidity was suspended for a period of twelve months to allow the appellants and Parliament an opportunity to redress the situation. The High Court held that the section gave the Minister of Finance the power to obtain a civil judgment without giving notice or hearing to the tax payer. Furthermore, the court found that judicial oversight of the process of obtaining judgment and allowing the tax payer an opportunity to make representations to the authorities were absent from the process.

The court reasoned that the process thus amounted to the usurpation of judicial power by the Minister and to a situation where a party is acting in a matter in which he or she or it has an interest. The court held thus that s 83(1) infringed Art 78 of the Constitution and is invalid. The appeal lies against the decision declaring s 83(1)(b) of the Act unconstitutional. On appeal:

*Held*, that the High Court erred in finding that s 83(1)(b) was a mechanism for determining disputes over tax liability as such disputes were ultimately determined by the courts;

*Held*, that the issue of the constitutional validity of s 83(1)(b) had been considered and decided by the Supreme Court already in *Hindjou v Government of the Republic of Namibia* 1997 NR 112 (SC) (*Hindjou*);

*Held*, that the High Court was bound by the *Hindjou* judgment that decided as an objective matter that s 83(1)(b) did not infringe either Art 12 or Art 78 of the Namibian Constitution and it therefore erred in holding that the reasoning in *Hindjou* was confined to the facts of that case. There was nothing factual about the decision;

*Held*, that the High Court mistakenly relied on certain dicta of the Constitutional Court of South Africa that dealt with a different issue while rejecting pertinent observations in another judgment of that court dealing with the constitutional validity of a section closely related to our s 83(1)(b).

The appeal was accordingly upheld and the words 'and s 83(1)(b)' were ordered deleted from the relevant paragraph of the order of the High Court.

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## APPEAL JUDGMENT

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SHIVUTE CJ (DAMASEB DCJ and ANGULA AJA concurring):

### Introduction

[1] This is an appeal against the judgment and order of the High Court declaring section 83(1)(b) of the Income Tax Act 24 of 1981 (the Act) unconstitutional and therefore invalid. The declaration of invalidity was suspended for a period of twelve months to allow the relevant appellants and the Legislature an opportunity to address the impugned provisions of the Act. The appeal has an unusual feature in that this court is called upon to decide whether the constitutional validity of s 83(1)(b) was considered and decided by this court already and whether the court a quo was bound by the judgment of the Supreme Court dealing with this issue. It is 'unusual', because whether a matter had been decided by a superior court and whether the High Court is bound by a judgment of the Supreme Court ordinarily are not matters open for debate.

[2] In the proceedings precipitating the appeal, the High Court was approached by a taxpayer, one Wessel Andreas Kruger, seeking wide-ranging and largely abstract relief related to the income tax system in the country. Mr Kruger had cited the appellants and Old Mutual Life Assurance Company (OMLAC) as respondents. The claims against OMLAC were rejected by the High Court. As it is doubtful that OMLAC would have had an interest in the confined issue now raised

on appeal, it is not all too clear why it was cited as a respondent in the appeal, additional to Mr Kruger. It is not surprising therefore that OMLAC did not oppose the appeal.

[3] The orders sought by Mr Kruger amounted to essentially seeking extraordinarily far reaching administrative law and tax law reform in the country. The notice of motion was expansive as it sought some 79 considerably overbroad declaratory and mandatory orders. It also sought an order for the payment of certain monies from OMLAC. Many of the orders initially sought were abandoned mid-stream. The High Court censured as 'inappropriate' the manner in which the application was crafted as it created unprecedented prolixity, with papers running into thousands of pages.

[4] The application was heard from 3 to 7 June 2019 and was postponed for judgment to 13 March 2020. As the judgment was not ready for delivery on 13 March 2020, the matter was postponed on that day to 27 March 2020 for judgment. On 27 March 2020, the court a quo did not hand down judgment but only made an order. The order so given contained errors. The errors were subsequently corrected in another order, this time given with reasons for judgment. It is not entirely clear exactly when the judgment was handed down. On the face of it, the judgment indicates that it was handed down on 27 March 2020 but the appellants are adamant that only the order was handed down on that day.

[5] It would appear that the judgment was not handed down in open court because at that time the country was under COVID-19 lockdown. The confusion

surrounding the circumstances in which the judgment was handed down appears to have contributed to the delay in the filing of the notice of appeal, resulting in the appeal lapsing. This in turn has given rise to an application for condonation and reinstatement that remains one of the procedural issues to be decided. It is convenient to deal with the application for condonation and reinstatement as well as an ancillary application towards the end of this judgment.

[6] The appellants noted an appeal only against the declaration of invalidity of s 83(1)(b) on 27 July 2020. The appeal is not opposed by Mr Kruger either. In their notice of appeal, the appellants requested that counsel be appointed, with the assistance of the Society of Advocates, to argue the appeal in opposition as *amicus curiae*, in the event that Mr Kruger did not oppose the appeal. The appellants stated in their written heads of argument that despite their having engaged the Registrar of this Court and the Society of Advocates in this regard, no one was appointed to present argument in opposition.

[7] If I understand it correctly, the explanation for the decision not to appoint counsel *amicus curiae* by the Society of Advocates or the Registrar was that Mr Kruger had legal representation at the time the decision was made. We have thus heard argument from the appellants only. It is necessary to summarise the unavoidably lengthy judgment of the High Court to understand the context in which the appeal has to be considered and decided.

The High Court's reasoning

[8] One of the many legal points taken by the appellants in the High Court was the contention that Mr Kruger lacked locus standi to institute the proceedings in question except in certain limited matters which are not relevant in the appeal. The court addressed the question of standing at some length. It noted that Mr Kruger had not specifically alleged locus standi in his papers, a stance the court a quo deprecated as 'totally unacceptable'. However, the court raised the question whether the papers showed that Mr Kruger had such standing despite that this was not specifically asserted by him.

[9] The court ultimately found that Mr Kruger did not have locus standi in respect of certain relief he sought. It made no specific finding in that regard in respect of the relief relating to the declaration of invalidity of s 83(1)(b). Despite that, the appellants submitted in this court that they had been advised that because of the far-reaching implications of the finding of invalidity of s 83(1)(b) on the system of tax collection in the country, they should directly challenge the finding of invalidity on its merits.

[10] In dealing with the merits of the attack on the constitutionality of s 83(1)(b), the High Court rightly observed that this issue had previously served before our courts. It referred to the judgment of this court in *Hindjou v Government of the Republic of Namibia*<sup>1</sup>. While rightly noting that it was bound by the judgments of the Supreme Court in line with the *stare decisis* principle, it sought to distinguish *Hindjou* by observing that the issue of the constitutionality of s 83(1)(b) in that case

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<sup>1</sup>*Hindjou v Government of the Republic of Namibia (Receiver of Revenue) & another* 1997 NR 112 (SC) (*Hindjou*).

came before the Supreme Court 'as an afterthought'. It noted further that the issue 'was not initially raised on behalf of the appellant and was allowed midstream'.

[11] The court reasoned that the holding by the Supreme Court in *Hindjou* that the provisions of s 83(1)(b) had 'nothing to do with Article 78 of the Constitution' was 'confined to the facts of the *Hindjou* case'. It found therefore that unlike Mr Hidjou, Mr Kruger had made out a case that s 83(1)(b) infringed Art 78 of the Namibian Constitution.

[12] Focusing on the provisions of s 83(1)(b), the court a quo noted that the section gives the Minister 'judicial power to obtain a civil judgment without any hearing or notice to the tax payer' as to the amount due by the taxpayer. It noted further that the judicial oversight of the process of obtaining judgment and allowing the tax payer an opportunity to make representations to the authorities 'is completely excised' from the process. The Minister initiates the proceedings without notice and simply files a certificate, thereby obtaining a civil judgment 'with no pleadings, no service and no notice whatsoever on the taxpayer'.

[13] The court reasoned that such a practice was not justifiable as it allowed the obtaining of a judgment without resort to the courts. The process therefore amounted to the usurpation of judicial power by the Minister and to circumstances in which a party is acting in a matter in which he or she has an interest. The court a quo relied on certain passages in the judgment of the Constitutional Court of South Africa in *Chief Lesapo v West Agricultural Bank*<sup>2</sup> emphasising the crucial

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<sup>2</sup> *Chief Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC) (*Lesapo*)

importance of judicial oversight in the attachment and sale of a debtor's property.<sup>3</sup> While recognising that the observations made in *Lesapo* concerned a legal issue different from the one under consideration, the court nevertheless found the pertinent remarks made therein to be 'imminently apposite' in the case before it.

[14] The court also referred to equally pertinent observations made by the Constitutional Court in *Metcash v Commissioner of Inland Revenue*<sup>4</sup>, that dealt with the constitutional validity of provisions in the South African Value-Added Tax Act 89 of 1991 that are closely similar to the provisions of s 83(1)(b). The Constitutional Court in that case noted that a subsection in that country's Value-Added Tax Act providing that once the Commissioner's statement had been filed it has 'all the effects of a civil judgment' did not mean that the judicial functions have been thereby usurped as the execution process envisaged therein goes through the ordinary judicial oversight.

[15] The High Court strongly disagreed with this reasoning, stating it could not find in the case before it that judicial powers were not usurped in the process of execution because 'the court officials, who are not judicial officers in any event, although engaged, do nothing to the papers probably save assisting in completing the filing formalities'. Judicial officers do not play a part in the filing of the certificate by the Minister and court officials who are involved therein do not perform judicial functions and are presented with *fait accompli* in the form of the statement filed by the Minister. In those circumstances, so the court below reasoned, oversight was

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<sup>3</sup> Paras 10, 11 and 13.

<sup>4</sup> *Metcash Trading Ltd v Commissioner, South African Revenue Service & another* 2001 (1) SA 1109 (CC) para 52.



absent. The court concluded that the provisions of the section in question thus violated Art 78 of the Constitution and served to deny Mr Kruger and 'similarly circumstanced individuals' of their procedural rights before an adverse judgment could be issued against them.

Scheme of the Act relating to tax assessments and the rights of a taxpayer after an assessment

[16] To fully appreciate the provisions of s 83(1)(b) and the context in which the section was interpreted, it is of crucial importance to set out the scheme of the Act relating to assessments and the taxpayer's rights after an assessment, aspects that received no consideration let alone mention in the court a quo's judgment. The scheme of the Act was set out neatly by the Full Bench of the High Court in *Hindjou*<sup>5</sup>, the decision that ultimately came on appeal to this Court. The judgment of the Full Bench has not been reported.

[17] Chapter III Part II of the Act deals with assessments. Chapter III Part III creates a system of objections and appeals relating to disputes over a taxpayer's liability. Section 67(2) provides that once an assessment of a taxpayer's liability has been made, a notice of the assessment must be sent to the taxpayer. The notice of assessment to the taxpayer must contain the following information: (a) the particulars of the assessment and the amount of tax payable thereon; (b) the date before which any amount of tax determined to be due shall be paid; (c) that an objection to the assessment must be made in writing within 90 days after the

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<sup>5</sup> *Arnold Erich Hindjou v Government of the Republic of Namibia (Receiver of Revenue) & another* Case No 97 of 1996, unreported judgment of the High Court of Namibia delivered on 25 April 1996 (*Hindjou*).

date of the issue of the assessment; and (d) the place where an objection to an assessment must be lodged.

[18] In terms of s 70, a taxpayer is entitled to have access to the record of his or her assessments. Section 71 provides that if an objection to an assessment is made, this must be considered by the Minister of Finance (the Minister) and a decision thereon be made. Section 71(5) provides that 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, subject to the right of appeal, are final and conclusive.

[19] Where a taxpayer is dissatisfied with a decision of the Minister regarding the objection to the assessment, he or she may, subject to the provisions of s 73A<sup>6</sup>, appeal to a 'special court for hearing income tax appeals'. This right to appeal is set out in s 73 of the Act. The 'special court' in question is presided over by a judge of the High Court. The other members are an accountant of at least ten years standing and 'a representative of the commercial community'. In cases relating to the business of mining, if an appellant so prefers, the third member of the special court must be a qualified mining engineer. I digress to point out that ss 73(3),<sup>7</sup> 73(5)(a),<sup>8</sup> (b)<sup>9</sup> and 83(1)(a) were some of the impugned provisions in Mr

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<sup>6</sup> Section 73A(1) provides, amongst others, that an appeal referred to in s 73 is to be heard in the first instance by the tax tribunal established by subsec (2) of that section. An appeal from the tax tribunal lies to the Special Income Tax Court. It is not necessary for the purpose of this appeal to set out the detailed prerequisites and the procedure relating to appeals to the tribunal under s 73A.

<sup>7</sup> Providing for the constitution of the court.

<sup>8</sup> Regarding the appointment of members of the court (other than judges) by the Minister.

<sup>9</sup> Providing that a person appointed as a member of the court shall be eligible for reappointment 'for such further periods as the Minister may think fit.'

Kruger's application in the court below and were among the provisions ultimately declared unconstitutional and invalid.

[20] It may also be mentioned in passing that it is not apparent from the judgment of the High Court on what conceivable basis s 83(1)(a) was also declared invalid. It is mentioned in passing, because the decision declaring ss 73 and 83(1)(a) unconstitutional has not been appealed against and therefore the validity or otherwise of those sections is not an issue before us. As noted earlier, the appeal concerns a sole and confined issue of the finding of the invalidity of s 83(1)(b).

[21] Proceeding with the presentation of the scheme of provisions relating to assessments, a further appeal against the decision of the tax court lies from that court to the High Court<sup>10</sup> and from the High Court to the Supreme Court.<sup>11</sup> As was noted by the Full Bench in *Hindjou*, apart from these statutory provisions and case law, decisions of the Receiver of Revenue or Special Income Tax Court may be taken on review in appropriate cases.<sup>12</sup> I have given the context of the Act at the outset to demonstrate that the finding by the High Court that the execution mechanism created under s 83(1)(b) is bereft of judicial oversight cannot be supported. More about this later.

[22] A stage has now been set for the consideration of s 83(1)(b) in detail. Although only subsec (1)(b) of s 83 is in issue, to put the provisions in context, it is

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<sup>10</sup> Section 76.

<sup>11</sup> *Oryx Mining and Exploration (Pty) Ltd v Secretary for Finance* 1999 NR 80 (SC).

<sup>12</sup> Relying on *Rand Ropes (Pty) Ltd v CIR* 1944 AD 142 and *Crown Mines Ltd v CIR* 1922 AD 91 at 101.

necessary to set out the other two material subsections before the focus shifts to the impugned subsection. Section 83(1) insofar as is material provides as follows:

- ‘(a) Any tax or any interest payable in terms of section 79 shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the Government of Namibia and shall be payable to the Minister in the manner and at the place prescribed.
- (b) If any person fails to pay any tax or any interest payable in terms of section 79 when such tax or interest becomes due or is payable by him, the Minister may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of the tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgment lawfully given in that court in favour of the Minister for a liquid debt of the amount specified in the statement.
- (c) The Minister may by notice in writing addressed to the aforesaid clerk or registrar, withdraw the statement referred to in paragraph (b) and such statement shall thereupon cease to have any effect: Provided that, in the circumstances contemplated in the said paragraph, the Minister may institute proceedings afresh under that paragraph in respect of any tax or interest referred to in the withdrawn statement.’

[23] Section 83(1)(b) thus empowers the Minister to file a tax certificate with the clerk of court or registrar of a competent court, certifying the amount of the tax payable by the taxpayer. That process has the effect of a civil judgment in favour of the Minister, and may be executed accordingly. As noted above when dealing with the scheme of the Act, disputes over tax liability are determined by the courts and s 83(1)(b) does not purport to override that system. The section is certainly not a mechanism to determine disputes over tax liability.

[24] The findings by the High Court that s 83(1)(b) gives the Minister the power to obtain a civil judgment without any hearing or notice to the taxpayer; that judicial oversight of the process was lacking, and that the process amounts to usurpation of judicial power are erroneous as they had been arrived at by reading s 83 in isolation. A reading of the Act in context would have revealed that far from not being given notice of the assessment, the taxpayer is given an opportunity to object to the assessment and to have the process envisaged in the Act and case law to take its course.

[25] As noted by the Full Bench in *Hindjou*, it is the failure to object to the assessment which determines the taxpayer's obligation. In that sense each assessment is provisional until the taxpayer decides to object or not. If there is no objection he or she accepts the determination of his or her tax liability and such liability in a sense is determined by consent. If the determination has not been disputed, there would be nothing to be determined by an independent, impartial and competent court or tribunal. Neither Art 12 nor Art 78 is therefore engaged in those circumstances.

Constitutional validity of s 83(1)(b) already determined by this court

[26] The High Court rightly observed that the constitutionality of s 83(1)(b) served before our courts. However, it greatly erred by not finding that the issue was finally and authoritatively decided. The issue was decided not only by the Full Bench of the High Court, a judgment which is also binding on the court a quo but also by this court, essentially confirming the Full Bench's judgment. We were

informed from the Bar – quite fairly and properly – that the judgment of the Full Bench in *Hindjou* was not brought to the attention of the court below during the hearing of Mr Kruger's application. While the court a quo may not have had the benefit of studying the judgment of the Full Bench, it is apparent from the judgment of this court in *Hindjou* that the constitutional validity of s 83(1)(b) was the central issue for decision in both the High Court and the Supreme Court.

[27] To illustrate the point, this court in *Hindjou* approvingly referred at length to certain passages in the judgment of the Full Bench. At 114F, for example, Dumbutshena AJA, who prepared the judgment of the unanimous court, having reproduced some of the grounds of appeal, noted that the Full Bench 'paid particular attention to the submissions made by counsel' and referred to a passage from the judgment of the Full Bench where it was said:

'Mr Vaatz who appeared for the applicant contended that ss 83 and 84 of the Income Tax Act were unconstitutional as they conflicted with art 12 of the Constitution. Article 12 of the Constitution insofar as it is relevant to this application reads as follows. . . .'

[28] Having quoted Art 12 of the Constitution, Frank J who wrote the unanimous judgment of the Full Bench (the other judges being Strydom JP and Teek J), proceeded to deal with a further contention advanced by counsel for Mr Hindjou. The submission was that s 83 allowed for a judgment to be taken in the absence of the party affected by it and 'without notice to such party and that there is thus a determination of his obligation to the State in the form of tax due without recourse to an "independent, impartial and competent court or tribunal"'. The learned judge

was quoted in the judgment of the Supreme Court, at 114I, as having said that the error in counsel's submission was that it treated s 83 in isolation and not in the context of the Income Tax Act set out previously in the Full Bench judgment.

[29] A close reading of the judgment of the Supreme Court shows that Mr Hindjou in the High Court and initially in the Supreme Court as well attacked the constitutional validity of s 83(1)(b) on the basis that the provision infringed the right to a fair hearing provided for under Art 12 of the Constitution. Despite objection from counsel for the respondents, counsel for Mr Hindjou was allowed to argue the appeal also based on Art 78 of the Constitution, something he did not do in the High Court. It follows therefore that it cannot be correct, as stated by the court *quo*, that the constitutionality of s 83(1)(b) was decided in this court 'mid-stream' or as something of 'an afterthought'.

[30] It is also apparent from the *Hindjou* judgment that this court did indeed consider and decide the constitutional validity of the section in question. At the time *Hindjou* was decided, the functionary charged with the administration of the Act was the Secretary for Finance, hence reference in both judgments in *Hindjou* to 'the Secretary'. The Act was subsequently amended, substituting the phrase 'Secretary' for 'Minister'. This judgment has, therefore, adopted the new phraseology in line with the amendment, hence reference herein to the Minister.

[31] The judgment of this court in *Hindjou* may be summarised as follows: The court held that the section did not infringe Art 12 or Art 78 of the Constitution. It found that the challenge to s 83(1)(b) failed to distinguish between the

determination of the obligation to pay tax, and the collection of the amount that had been determined. The court reasoned that Art 78 and s 83(1)(b) performed different functions. Article 78 dealt with the independence of the courts. Section 83(1)(b) provided the Receiver of Revenue with a convenient method of collecting taxes and interest from people who did not dispute their income tax liabilities but failed to pay. The court held that there could be no conflict between the two.

[32] The Minister's determination had nothing to do with a fair trial. 'Determination' here meant calculating or ascertaining the exact amount of tax from taxable income. The Minister decides the amount of tax to be paid in income tax. In doing this, the Minister is not involved in a judicial decision. The word 'determination' in Art 12(1)(a) of the Constitution was concerned with a fair trial before an independent, impartial and competent court or tribunal. It did not refer to the Minister's determination of a tax liability. Section 83(1)(b) had nothing to do with the assessment of a taxpayer's tax liability.

[33] If a taxpayer was dissatisfied with the manner the judgment was entered, it was open to the taxpayer to make application to the court to set aside the judgment on the ground that it was entered in his absence. Section 83(1)(b) had nothing to do with Art 78 of the Constitution. The attack on the income tax collecting mechanism in s 83(1)(b) on the ground that it was unconstitutional was thus ill-conceived and the appeal was dismissed. There can therefore be no doubt that the constitutional validity of s 83(1)(b) was finally and authoritatively decided by this court.



The High was bound by the decision of this court in *Hindjou*

[34] There can also be no question that *Hindjou* is binding on the High Court. Article 81 of the Constitution provides that a decision of this court is binding on all other courts unless such decision is reversed by this court itself, or contradicted by an Act of Parliament lawfully enacted. As noted earlier, while rightly acknowledging that it was bound by the doctrine of precedent or stare decisis, the High Court decided that it was not bound by the decision of this court in *Hindjou*. The High Court stated that the issue of the validity of s 83(1)(b) had been belatedly raised in this court in *Hindjou*. It has already been noted that this finding is mistaken. The constitutional issue of the validity of the section in question had all along been an issue in *Hindjou* both in the High Court and in this court.

[35] As previously stated, in this court Mr Hindjou was allowed to amend his grounds of appeal to include also reliance on Art 78 of the Constitution, additional to reliance on Art 12. The belated raising of a ground of appeal based on Art 78 could not have been a reason for the High Court not following *Hindjou*, because it remained a constitutional issue irrespective of the stage at which the new ground was raised. The High Court's reason for not following *Hindjou* was stated to be its understanding that the excerpt in which this court held that s 83(1)(b) had nothing to do with Art 78 of the Constitution was 'confined to the facts of the *Hindjou* case'.

[36] Clearly, this finding is also a misdirection for the following reasons. First, as already stated, this court found in *Hindjou* that as an objective position, s 83(1)(b) was not unconstitutional. There was nothing fact-based in the decision.

[37] Second, s 83(1)(b) cannot be invalid in respect of some taxpayers, such as Mr Hindjou, and constitutionally valid in respect of other taxpayers such as Mr Kruger. It is objectively either valid or invalid for all. As was noted by the Constitutional Court of South Africa, amongst others, in *De Reuck*,<sup>13</sup> ‘. . . the subjective position of a particular applicant is irrelevant to the determination of the validity of a statutory provision; a statutory provision is either valid or invalid’.

[38] Third, the High Court did not explain on what basis Mr Kruger’s application was distinguishable on the facts from Mr Hindjou’s. The only distinguishing feature appears to be that the Minister had not taken or threatened to take any measures against Mr Kruger in terms of s 83(1)(b) nor did Mr Kruger assert that he reasonably apprehended that the Minister will take such measures against him. His was a purely abstract challenge which had nothing to do with the dispute between him and the Minister. In the case of Mr Hindjou on the other hand, s 83(1)(b) had been applied against him. The paradox in the approach of the High Court is that s 83(1)(b) is valid against a taxpayer (such as Mr Hindjou) in respect of whom it is used; but it is invalid as against a taxpayer (such as Mr Kruger) in respect of whom it is not used. It is plain that the High Court’s refusal to follow and apply this court’s decision in *Hindjou* is untenable. It is a glaring and impermissible example of a breach of the doctrine of stare decisis.

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<sup>13</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2004 (1) SA 406 (CC) para 85.

Mistaken reliance on the South African decision in *Lesapo*

[39] In *Lesapo* a provision of the North West Agricultural Bank Act 14 of 1981 which allowed the bank to seize a defaulting debtor's property without recourse to a court of law was held invalid. In para 28 of the judgment, the South African Constitutional Court held that the challenge 'must be understood in the context of its particular circumstances, which differ from those of the revenue cases'. The Constitutional Court thus distinguished the holding in *Lesapo* from the approach in revenue collection cases, which is different. The High Court, on the other hand, did not draw this crucial distinction even though, according to the appellants, the qualification was pertinently brought to its attention.

[40] In any event, in *Metcash*, which the High Court sought to distinguish, the Constitutional Court pointed to a fundamental difference between the statutory provision considered in *Lesapo* and s 40(2)(a) of the South African Value Added Tax Act, a corresponding Act with a provision almost identical to our s 83(1)(b). The Court held in *Metcash*, paras 51 and 52, as follows:

'Manifestly, s 40(2)(a) of the Act is a far cry from the kind of open ticket to self-help condemned in the *Lesapo* and kindred cases. Indeed, in a particular sense, s 40(2)(a) of the Act is the direct reverse of the provision found constitutionally unacceptable in *Lesapo*. Here, we have an administrative decision fixing liability for a statutory debt on the part of a debtor which, in terms of the scheme of the Act, cannot be executed upon otherwise than by involving the judiciary. In *Lesapo* this Court was concerned with a contractual debt which could be executed upon domestically without involving the judiciary. The two statutory provisions, far from being closely similar, are virtually diametrical opposites.'

[41] The Constitutional Court held that the section in question was not inconsistent with the constitutional right of access to court. Evidently, the High Court's approach to rely on *Lesapo* which dealt with a different issue and to attempt to distinguish *Metcash* which was directly in point, was mistaken. It follows from what has been said hereinbefore that the lapsed appeal enjoys good prospects of success. What stands between its possible reinstatement is the outcome of the application for condonation, an aspect to which the judgment turns next.

#### Applications for condonation

[42] As foreshadowed in paragraph [4] above, this matter, typical of a few other matters heard in this court, quintessentially suffers from the ignominy of having to start with an application for condonation, something one would have expected to be a thing of the past. That is not all; the application for condonation is not one, but three. The neglect to ensure that the appeal was rule-compliant and the appeal record complete resulted in the appellants seeking condonation for the late noting of the appeal; the late filing of the appeal record; and the omission of certain pages from volume 2 of the appeal record.

[43] The appeal was noted late and did not comply with rule 7(1)(a) of the Rules of Court, which requires an appeal to be filed within 21 days from the date of the judgment appealed against. The record of appeal was also filed late contrary to rule 8(2)(b) which requires the record of appeal to be filed within three months of the date of the judgment or order appealed against. Certain pages of the record were also missing, thereby making the record incomplete.

[44] The explanation given for the late noting of the appeal is that the application was decided at the height of the COVID-19 pandemic; while the country was under lockdown, and most people worked from home. On 27 March 2020, when the order was handed down, counsel for the appellants was not present in court as her employer had ordered staff to work from home to contain the spread of COVID-19. A copy of the judgment was delivered to the appellants' legal practitioners, the Government Attorney, only on 13 May 2022.

[45] Efforts to communicate with instructed counsel and to obtain instructions from the clients on the further conduct of the matter were hampered by a series of misfortunes, including a misfiled letter and the late delivery of a copy of the judgment that was handed down in the absence of the parties due to restrictions imposed under lockdown. Instructions to lodge an appeal were communicated on behalf of the appellants to the legal practitioners only on 15 July 2020.

[46] As to the late filing of the record, the explanation proffered is that the record could not be transcribed timeously because the physical file was misfiled at the registrar's office. The appeal record was filed only on 11 November 2020.

[47] Regarding the missing pages of the record, the legal practitioner seized with the case went on maternity leave and the file was assigned to another legal practitioner who did not peruse the record to satisfy herself that it was in order. She attributed this neglect to the pressure of work. The fact that some pages of

the judgment were missing from the record was only discovered by the practitioner who had the initial conduct of the matter when she returned from leave.

[48] Our law reports are replete with cases setting out the principles relating to condonation applications and containing admonitions by this court for legal practitioners to comply with the rules to stem the tide of applications for condonation in the Supreme Court. Indeed, there is an urgent need to apply the rules correctly to ensure that the Supreme Court is not turned into a condoning court. To regurgitate all the principles relating to condonation here would however not serve a useful purpose as the law on the point is settled. Suffice it to say that where there has been a full and satisfactory explanation for the failure to comply with a rule of court and the neglect is not flagrant, condonation may be granted. More so if the prospects of success on appeal are strong. The importance of the case also plays a crucial role in the milieu of the considerations. In this case, the explanations given for the infractions appear satisfactory.

[49] The missteps are attributable to genuine human errors no doubt exacerbated by the very difficult times we were living in under the grip of the pandemic. To say that life then was far from being normal or less than ideal is an understatement. The prospects of success as seen above are good. The appeal concerns the interpretation of a section in the legislation constituting a pivotal part of the State's revenue collection function of an already determined; undisputed, yet unpaid tax liability.

[50] The declaration of invalidity has far-reaching consequences on the country's ability to collect revenue. The judgment of the court a quo is palpably wrong as it contradicts a final and binding judgment of the highest court in the land, contrary to Art 81 of the Constitution and the hallowed principle of precedent so essential to a well-functioning judicial system. In those circumstances, I would grant condonation, reinstate the appeal and for the reasons set out in the preceding paragraphs of the judgment, uphold the appeal. The impugned section should be deleted from the substantive paragraph of the order of the High Court. This ultimately brings us to the order to be made, so as to dispose of the matter.

#### Order

[51] The following order is accordingly made:

- (a) The applications for condonation for the late noting of the appeal, for the late filing of the record and for the missing pages of the record are granted and the appeal is reinstated.
- (b) The appeal is upheld.
- (c) The words 'section 83(1)(b)' in paragraph 2 of the order of the High Court are deleted from that paragraph.
- (d) No order as to costs is made.

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**SHIVUTE CJ**

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**DAMASEB DCJ**

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**ANGULA AJA**



APPEARANCES

APPELLANTS: G Budlender SC  
Instructed by Government Attorney

RESPONDENTS: No appearance