

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00128

In the matter between:

LIVINGSTONE DAVID MUGIMU

APPLICANT

and

MINISTER OF FINANCE

FIRST RESPONDENT

COMMISSIONER OF INLAND REVENUE

SECOND RESPONDENT

BANK WINDHOEK LIMITED

THIRD RESPONDENT

BANK OF NAMIBIA

FOURTH RESPONDENT

PROSECUTOR-GENERAL

FIFTH RESPONDENT

Neutral citation: *Mugimu v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00128) [2017] NAHCMD 151 (19 May 2017)

Coram: ANGULA DJP

Heard: 28 April 2017

Delivered: 19 May 2017

Flynote: Applications and Motion Proceedings – Urgent Applications – Interim Relief Sought – Additional tax levied in terms of section 68 of the Income Tax Act 24 of 1981 (as amended) – Bank Windhoek at whose branch the applicant maintained two bank accounts was appointed by the Minister in terms of section 91 of the Act as the applicant’s agent and withdrew money from the applicant’s account and paid it

over to the Receiver of Revenue account – Applicant launched an urgent application for interim relief seeking an order *inter alia* the repayment of money into his accounts
- An applicant must establish a *prima facie* right before an interim relief can be granted
– Applicant failed to establish such a right – Application dismissed.

Summary: The respondents discovered that the applicant has been under-declaring his income and thus owed tax to the Fiscus – They then assessed the applicant and determined that the applicant owed the Fiscus a total sum of N\$37 972 678.14 being additional tax and interest – The applicant holds two bank accounts at Bank Windhoek – The Minister then appointed Bank Windhoek an agent for the applicant and was instructed to withdraw the positive balances from the applicant’s accounts and pay same over to the Fiscus as tax and interest due – As a result, the applicant was left with empty bank accounts – This prompted the applicant to launch an application on urgent basis in which he seeks interim reliefs including *inter alia* an order that the respondents repay the money – The respondents raised a few points *in limine* which were all dismissed – On the merits the applicant failed to establish a *prima facie* right.

Held that, establishing of a *prima facie* right is the primary requirement for the granting of an interim relief. Applicant failed to establish such a right. Application dismissed.

ORDER

1. The applicant’s non-compliance with Rules of this court relating to the service of court papers and the time periods in terms of Rule 73 is condoned and the matter is heard as one of urgency.
2. The following points *in limine* raised by the respondents namely:
 - (a) the application is in violation of the provisions of the Income Tax Act in that it is not permissible for the applicant to approach the court with unclean hands.

- (b) that the matter is not urgent; that the applicant has not satisfied the requirement of clear right to obtain an interim relief.
- (c) that the applicant is asking for an incompetent relief; that the applicant failed to joined the PSEMAS Medical Aid Fund.
- (d) that the applicant failed to comply with the statutory notice issued by the second respondent to the applicant in terms of the Act.

are dismissed.

3. The application for the issue of interim orders is refused.
4. The costs of this application are to stand over for determination at the end of the hearing of Part B of the application.
5. The matter is postponed to 7 June 2017 at 8h30 for case management conference.

JUDGMENT

ANGULA DJP:

Introduction

[1] It is said that there are two things in life which are certain: death and the payment of tax. This matter concerns the latter, the payment of tax.

[2] The respondents upon investigation, discovered that the applicant has been under declaring his income and thus owed tax to the Fiscus. They then assessed the applicant and determined that the applicant owed the Fiscus a total sum of N\$37 972

678.14 being additional tax and interest. The applicant has two bank accounts at Bank Windhoek both with healthy positive balances. The first respondent then appointed Bank Windhoek as an agent for the applicant and instructed Bank Windhoek to withdraw the positive balances from the applicant's accounts and pay same over to the Fiscus as tax due. Bank Windhoek duly complied and transferred the total sum of about N\$21 million to the first respondent's account held at the Bank of Namibia. The applicant has been left with empty bank accounts. It is those respondents' actions which prompted the applicant to launch this application on urgent basis in which he seeks certain reliefs.

[3] The application consist of two parts; A and B. In Part A of the notice of motion the applicant seeks interim orders in the following terms:

- '1. Condoning the applicant's non-compliance with the rules of this court relating to the services of court papers and time periods and dispensing with the requirements of rule 73 and ordering that the application be heard as one of urgency.
2. Ordering and restraining the first and second respondents not to persist and implement the decision they took on or about 15 March 2017 in relation to the appointment of the third respondent as the applicant's agent in terms of section 91 of the Income Tax Act and the determination and assessment they made for the applicant to pay an amount of N\$37,972,678.14 to the Receiver of Revenue.
3. Suspending the aforesaid decision taken about 15 March 2017 by the first and second respondents pending the finalisation of Part B of this application and finalisation of objections to the first respondent which objections are to be filed by the applicant within 15 days of the institution of this application as well as finalisation of the appellant processes.
4. Ordering the fourth respondent to forthwith repay all the amounts of money paid to it by third respondent from applicant's bank account acting as a purported agent of the applicant, into the applicant's business account to wit:

Livingstone David Mugimu (Dr)
Bank Windhoek Ltd

Business account number; 800 030 005 1

Branch: Oshakati

5. Interdicting and restraining the respondent's from interfering with the applicant's bank accounts (and funds there in) with the third respondent anyway in relation to this matter.
6. Ordering that the orders under paragraphs 2, 3, 4 and 5 hereof serve as interim interdicts with immediate effect pending the finalisation of Part B and applicant's objections to the purported assessment to be filed within 15 (fifteen) working days of institution of this application.'

In PART B of the Notice of Motion the applicant seeks certain review orders. It reads:

- '1. Reviewing and/or correcting and setting aside the decision taken on or about 15 March 2017 to appoint the third respondent as the applicant's agent and to assess and determine that the applicant owes an amount of N\$37,972,678.14 in terms of section 76 of the Income Tax Act.
2. Declaring that the first and second respondents' aforesaid decision is unlawful, arbitrary and unconstitutional.
3. Declaring the appointment of the third respondent as the applicant's agent in terms of section 91 of the Income Tax Act is null and void and of no effect.
4. Declaring the notice of assessment dated 15 March 2017 and received by the applicant on 29 March 2017 and all steps taken in pursuance thereof as invalid and null and void.
5. Costs of suit.
6. Further and/or alternatively relief.'

The parties

[4] The applicant described himself in the papers as a major male, medical doctor practising as Dr L D Mugimu Consulting Room at Etango Complex, Oshakati Republic on Namibia. He is originally from Uganda but has acquired permanent resident status in Namibia. He has been practising in Namibia as a medical doctor since 1991. Initially he worked in the public sector in Namibia for about 14 years but left and started a medical practice at Oshakati in northern Namibia.

[5] The first respondent is the Minister of Finance cited in his capacity as such and on the basis of his powers in terms of section 2 and other sections of the Income Tax Act, No 24 of 1981 (as amended) ('the Act').

[6] The second respondent is the Commissioner of Inland Revenue herein cited in his capacity as such, by virtue of the power he has in terms of the Act and his involvement in this matter particularly in terms of his delegated power in terms of section 3 of the Act.

[7] The third respondent is Bank Windhoek Limited, a banking institution registered as such in terms of the laws of the Republic of Namibia, with its main place of business situated at Independence Avenue, Windhoek.

[8] The fourth respondent is the Bank of Namibia, established in terms of the Bank of Namibia Act, Act No 15 of 1997. According to the applicant, the fourth respondent has been cited in these proceedings because of the nature of the interim relief and orders directed at repaying the applicant's money into his account at the third respondent's bank. Its main place of business is situated at number 71 Robert Mugabe Avenue, Windhoek.

[9] The fifth respondent is the Prosecutor-General of Namibia cited herein for the interest she may have in the proceedings. No order is sought against her. Her main office is situated at the High Court Building, Luderitz Street, Windhoek.

Factual Background

[10] The applicant says that he had invested money in his bank investment accounts held at the third respondent to enable him, in future to purchase high-tech equipment so that he could conduct all kind of specialised medical tests and investigation for his patients. He says that, in general medical, equipment are expensive and require availability of a considerable amount of funds. Over the years he invested close to N\$23 million which he then decided to call up during February 2017 as he has wanted to purchase a CT-scanner machine and some other equipment that would costs about USD 2 million.

[11] The applicant states further that his practice predominantly serves people with chronic diseases, the majority of whom are HIV patients. He is regarded as the second highest private doctor attending to HIV patients on a daily basis. He dispenses expensive and life-saving medicines (drugs). In order for him to be able to do that he requires a considerable amount of stock of expensive drugs. To replenish the stock, he needs to purchase medicine, equipment and other medical consumables almost every day. The central feature of his practice requires that he should be able to dispense expensive drugs for him to effectively assist his patients with chronic disease.

[12] Regarding his income tax status, the applicant says that he has been timeously submitting his income tax returns with the assistance of his accountant which tax returns were at all times submitted and confirmed as correct by the first and the second respondents. According to the applicant, the money he has invested is part of the income he has over the years declared and which has been assessed by the first and second respondents. Over the years he had been issued with successive certificates of good standing. In support of this allegation the applicant attached copies of the certificates of good standing for the years 2015, 2016 and the latest certificate dated on 24 March 2017.

[13] The applicant maintains two banking accounts at the third respondent's bank branch at Oshakati. During February 2017 the applicant decided to go to his country of origin, Uganda, for a holiday and medical test investigations for the period 23 February to 19 March 2017. In the meantime, he states, he was negotiating with a certain supplier to purchase a high-tech CT-scanner machine and other equipment.

He then requested the third respondent to disinvest his money which was invested in an investment account and to transfer such money to his business account so that it could be available for the payment once the transaction to acquire the CT-scanner machine had been concluded. Before he left for Uganda, he requested the third respondent to increase his daily limit for withdrawal to about N\$300,000 because he needed to make some payments in Uganda. The third respondent duly complied with the applicant's request and increased the daily withdrawal limit to N\$300,000.

[14] On 10 March 2017 he tried to withdraw money while he was in Uganda but could not. He then contacted a bank official at the third respondent's branch at Oshakati. The official informed him that his account was blocked as he had exceeded his travel allowance limit; and that his account was subject to statutory intervention by the fourth respondent and that the blockage would endure for 12 days.

[15] Upon his return, on 23 March 2017 he went to the third respondent's bank branch at Oshakati and discovered that all his money of over N\$21 million which was in his business account had been withdrawn on the instructions of the first and second respondents on 15 March 2017. The bank official handed him a letter dated 22 March 2017 addressed to him by the third respondent. The letter informed him that the amount of N\$ 22,200 948.91 had been withdrawn from his bank business account and paid over to the fourth respondent for the Receiver of Revenue. The letter further informed him that Bank Windhoek would not notify him of additional payments being made in terms of the said notice.

[16] The applicant relates further that he was also furnished with a letter dated 12 March 2017 addressed to the third respondent by the first and second respondent in terms of which the third respondent was appointed as the applicant's agent. The said letter was used by the third respondent as the basis to pay over the money from the applicant's account to the fourth respondent for and on behalf of the first and second respondents.

[17] The applicant then attended to the first and second respondent's branch office at Oshakati. He was informed by the officials that he had not owed any money to the Receiver of Revenue prior to February 2017 or as of 24th of March 2017. The reason

for that was that the official had provided him with a certificate of good standing dated 24th of March 2017.

[18] The applicant says that he thereafter realised that after 29 March 2017 the first respondent had also withdrawn a further amount of over N\$270,000 from his savings account. According to the applicant, all those withdrawals left him with no money at all. On 29 March 2017 he travelled to Windhoek to meet the first respondent's officials. He met a certain Mr Balbinus Hangula who informed him that he was working under the direction and supervision of the first and second respondents and that he was acting as an agent of first respondent. Mr Hangula showed him a letter dated 15 March 2017 addressed to the third respondent which indicated that the applicant owed the Receiver of Revenue an amount of N\$37,972 678.14. The applicant then showed Mr Hangula the certificate of good standing issued to him by office of Receiver of Revenue on 24 March 2017 at Oshakati as well as previous the certificates of good standing for the years 2015 and 2016. Mr Hangula however informed him that the first and second respondent's decision remains final and that they would continue deducting any money coming into either the applicant's business account or savings account. Mr Hangula then made him to sign an acknowledgement of receipt of the notice of assessment in terms of section 67 of the Act which was dated 15 March 2017. The applicant points out that the notice was never given to him prior to 29 March 2017. The applicant further points out that the notice of assessment could not be validly communicated to him after the first respondent had already instructed its agent, the third respondent, to pay over the applicant's money when he had not received the notice of assessment. He asserts that the notice of assessment is invalid and null and void. He advances a number of reasons why he contends that the notice is invalid.

[19] After 29 March 2017 the applicant returned to Oshakati and tried to engage another accountant to try to see whether he could get his money back on an amicable basis. The accountant was not able to help him and suggested that he obtains legal advice.

[20] Thereafter the applicant received a letter from the first and second respondents dated 13 April 2017 which requested him to provide them with more information on his expenditure in terms of section 64 of the Act. On 27 March 2017 the applicant received

an email, to which was attached a letter dated 15 March 2017 from the Permanent Secretary of the Ministry of Finance, indicating that certain of his medical aid claims were put on hold as they were perceived to be above the norm charged by his peers.

[21] The applicant relates further that when he met Mr Hangula on 29 March 2017, Mr Hangula provided him with the spreadsheet which appeared to indicate that the amount deducted from his account relates to the taxation for the years 2014 to 2017 taxation. The spreadsheet allegedly represents the gross income for that period, particularly from PSEMAS, a medical fund mainly for civil servants. According to the applicant, the amount reflected therein is incorrect and moreover his income over those years had already been assessed. Furthermore upon proper scrutiny of the spreadsheet, he has established that the first respondent's figure exceeded his income paid into his business account from years 2014 to 2017 by N\$10,807 939.35.

[22] Regarding the issues of interim relief and urgency, the applicant submits that the background facts set out earlier prove that the first and second respondents have infringed upon his fundamental right not to be subjected to arbitrary, unfair and unreasonable decisions. He submits that both the notice of assessment and appointment of the third respondent as his agent and the action of withdrawing money from his account are a nullity and constitute material irregularities which considered on those facts alone, are grounds for urgent interim relief.

[23] The applicant contends further, that because of the invasive and destructive effect of the actions by the first and second respondents he would be denied his fundamental right to practice his profession and trade as contemplated by Article 21 of the Namibian Constitution; that he will suffer irreparable harm if the interim relief is not granted and heard on urgent basis; that the first and second respondents have stifled him to the extent that he can no longer practice; that he is unable to pay salaries for his five employees; that he has abandoned the negotiation to acquire the CT-scanner machine which is necessary for his patients; that he is emotionally broken down by the treatment he has received from the first and second respondents; that as a result of his inability to buy medical products and to cover all other expenditures, his practice has come to a standstill; that he is unable to pay his rent unless the interim

relief is granted; that he has no funds and as a result he has had to borrow from family members to assist with the payment of his legal costs for this application.

[24] The applicant continues to say that he has decided to launch an objection against the notice of assessment but has been informed that the objection takes some months to consider and to conclude. For that reason he submits that he has no other alternative remedy other than obtaining interim relief. The applicant further points out that the amount of money that has been claimed as based on his income, apart from being inflated by more than N\$10 million, it does not take into account the deductions that he is allowed in terms of the Act. Moreover the first and second respondents have already assessed him in the past and therefore they are *functus officio* in respect of the assessment. For those reasons, he submits that the balance of convenience favours him to be granted interim relief.

[25] Regarding the issue of urgency the applicant states that he sought for a legal opinion from his legal practitioner during the first week of April 2017. His legal practitioner informed him that because the matter is complicated he would only be able to give him an opinion either on 11 or 12 April 2017 as he needed to carefully look at the issues and thereafter formulate an opinion. Thereafter his legal practitioner furnished him with his opinion on or about 11 and 12 April 2017 and advised him to apply for an interim relief pending the finalisation of review proceedings in this court and the finalisation of the objection. According to the applicant, because of the urgency of the matter, his legal practitioner cancelled his travel arrangement during the Easter holidays and prepared the application papers so that it could be served and filed by Tuesday, 18 April 2017. He says that he was convinced by his legal practitioner that the matter should at least be set down for hearing around 28 April 2017 in order to give the respondents time to respond.

[26] Finally the applicant states that he suffers from a health condition which requires daily medical attention and that for that reason he requires money to obtain important daily medical attention. He therefore reasonably fears for his health in this respect, if the interim relief is not granted.

Opposition by the first and second respondents

[27] The application is opposed by the first and second respondents. Initially the fourth respondent also opposed the application but withdrew such opposition at the commencement of the hearing of the matter.

[28] The opposing of affidavit on behalf of the first and second respondents has been deposed to by Mr Justus Sheefeni Mwafongwe in his capacity as Commissioner of Inland Revenue. Unless it is necessary to refer to the first and or second respondents separately, I will henceforth refer to them collectively as 'the respondents'. Mr Namandje appears for the applicant, whereas Mr Kashindi appears for the respondents.

[29] The respondents raised six points *in limine* namely that: the application is in violation of the provisions of the Income Tax Act in that it is not permissible for the applicant to approach the court with unclean hands; that the matter is not urgent; that the applicant has not satisfied the requirement of a clear right to obtain interim relief; that the applicant is asking for an incompetent relief; that the applicant failed to joined the PSEMAS Medical Aid Fund; and finally that the applicant failed to comply with the statutory notice issued by the second respondent to the applicant in terms of the Act.

Opposition to the merits

[30] As background information, the respondents point out that it is a requirement in terms of sections 55 and 56 of the Act that all tax returns must be filed with supporting information including the annual financial statements. They assert further that they acted within their powers in terms of section 91 of the Act when they appointed the third respondent as the applicant's agent.

[31] The respondents point out further that after receipt and approval of the applicant's self-assessment and issuance of a certificate of good standing, they received certain information from PSEMAS and other medical aid funds as well as from Bank Windhoek. The information was then examined in terms of sections 67, 68 and 69 of the Act. Upon comparison of what was paid out to the applicant from PSEMAS against the amount the applicant had declared in his financial statements, it

was found that there was huge differences of income for the years 2014 to 2016. Only the revenue received by the applicant from PSEMAS was used in the comparison, because the information from other medical aid funds was not available. That was also the reason why the applicant did not take into account the expenses incurred by the applicant in the operation of his business.

[32] The respondents went on to explain the process of tax self-assessment by saying that each tax-payer assesses him or herself and then submits such assessment to the respondents. In the case of the applicant, after he was assessed by the respondents' Oshakati office, his self-assessment was accepted at that point and estimate assessment in terms of section 68 of the Act was then issued to the applicant. The fact that a tax-payer has been assessed does not mean that he or she cannot be subject to further examination and assessment by the respondents. In terms of section 67 read with this sections 68 and 69 of the Act, the respondents are empowered to examine and assess the applicant. Therefore the concept of *functus officio* is not applicable in the present matter. In other words the respondents are not barred by law from re-examining or re-assessing the applicant until they are satisfied with his assessment.

[33] As a result of the discrepancies found between the amount declared and the amounts paid by PSEMAS to the applicant, a tax assessment was issued on 15 March 2017. The applicant collected the assessment from the respondent's office on 29 March 2017. On the same day the third respondent was appointed by the second respondent as an agent for the applicant in terms of section 91 of the Act to make payment of the tax amount due to the respondents. The third respondent then immediately paid over the money to the second respondent by transferring such money into the second respondent's account held by the fourth respondent. Thereafter on 13 April 2013, the second respondent in writing requested the applicant to provide information for the tax years 2013, 2014, 2015 and 2016.

[34] The respondents state further that the assessment made on 15 March 2017 includes that of the year 2017; that the reason for doing so was based on the income received from PSEMAS. According to the respondents the applicant earned an income of N\$21 481 707 during the tax year which ended 28 February 2017 by which time he

was supposed to have already paid 80 per cent of his total tax liability for the tax year 2017. The applicant had only paid N\$288 160 which is 3 per cent of his tax liability for 2017. The respondents therefore contend that the money the applicant had invested is tax money which should have been paid to the State.

[35] With reference to the letter from the Permanent Secretary of 15 March 2015 addressed to the applicant informing him that payment in respect of his claims to PSEMAS would be put on hold, the respondents point out that such decision had nothing to do with tax calculation because the tax calculation was based on the payments which had already been approved or paid.

[36] The respondents deny that the applicant has been complying with his tax obligations. In this connection the respondents point out that the applicant has merely been submitting his annual tax returns but failed to make declarations of his total annual income and under declared his income. Furthermore the acceptance of the annual tax returns by the respondents without assessments does not preclude the respondents from further examination and assessment of the applicant's self-assessments. Furthermore section 69 of the Act does not require the respondents to first notify the applicant when the first respondent conducts additional assessment.

[37] The respondents say that they could not provide the applicant with the assessment notice dated 15 March 2017 prior to appointing the third respondent as an agent because the applicant was out the country; furthermore that they could also not fax the notice to the applicant lest it fall in the hands of third parties and would contravene the obligation to preserve secrecy in terms of the Act.

[38] The respondents contend further that the process of assessment has not yet been finalised and accordingly that the court cannot intervene to stop the lawful process as provided under the Act. Furthermore the respondents are permitted to examine, assess and audit tax returns submitted by the applicant at any time and including for any previous years. In addition the applicant is in violation of the Act by misrepresenting facts to the respondents about his total annual incomes.

[39] It is the respondents' case that the applicant is obliged to pay tax due to the second respondent notwithstanding his right to lodge an objection; that the lodging of such objection does not take away the applicant's legal obligation to pay tax. Furthermore, if the applicant's objection is found to be valid he will be refunded in terms of section 94 of the Act.

General approach to the issues

[40] I will first consider the points *in limine* raised by the respondents. Thereafter I will turn to consider the requirements for interim relief. I will then briefly deal with the concept of 'pay now argue later'. I will then consider the parties' main submissions. Thereafter I will consider the grounds advanced by the applicant upon which he relies for the contentions that he is entitled to interim relief in order to determine whether he has satisfied the requirements for interim interdict.

Points in limine

Unclean hands

[41] The first point *in limine* raised by the respondents is that the applicant approached the court with unclean hands and therefore the court should not hear him. In this respect the respondents contend that the applicant has been violating and continues to violate the provisions of the Act in that he has been under-declaring his annual income for tax purposes; that it is highly possible that the applicant may continue to evade tax and may even permanently leave Namibia with all the money including money owed to the State in the form of tax, if the relief he seeks is granted. The respondents submit further that the applicant's conduct in failing to declare his total annual income and also in failing to lodge his objection in terms of the Act, amount to dishonesty and that he continues to act in bad faith under the circumstances. For those reasons the court should refuse to come to his aid and therefore the application should be struck from the roll.

[42] In response to that allegation the applicant states that he has been advised that the court does not easily deny a person access to court to enforce or to protect his

right provided that such right is not contaminated by dishonesty or other impediments. The applicant submits that the respondents make those allegations because they subjectively believe that the applicant did not comply with provisions of the Act; that the allegations are denied; that such allegations cannot be reasons to close the door of the court to him; and finally that such approach is incompatible with the basic rule of justice and fairness and contrary to the provisions of Article 12 of the Namibian Constitution.

[43] Generally speaking, the court's approach is not to close the door of the court in the face of the person who approaches the court to either enforce or protect his right unless there is evidence of fraud or dishonesty on the part of such person. This approach was echoed by Geier J in the matter of *Medical Association of Namibia v Minister of Health*¹. The learned judge said the following:

[53] Neither can it be said that there is any impediment, or that there are any exceptional circumstances, which would entitle the court to close its doors to the applicants. To do so in the circumstances of this matter and in the absence of any concrete proof of wrongdoing would obviously also 'run counter to art 12 of our Constitution where these rights of the applicants are guaranteed'. (My underlining for emphasis).

[44] Similarly the Supreme Court in the matter of *Shaanika v Windhoek City Police*² said the following at para. 28 regarding the doctrine of unclean hands:

[28] ...In the area of constitutional rights, in particular, courts should be slow to place barriers before the doors of the court. Fundamental to the functioning of a constitutional democracy is the right of citizens to approach courts to assert their constitutional rights and to have legal disputes determined, a right protected in Namibia by Article 12 of the Constitution. It is not necessary to determine in this case whether the doctrine of unclean hands has no place in the field of constitutional law at all, for here, as in *Black Range Mining*, the doctrine finds no application as there is no evidence of dishonesty, fraud or mala fides in the conduct of litigation on the part of the appellants.'

¹*Medical Association of Namibia and Another v Minister of Health and Social Services and Others* 2011 (1) NR 272 (HC) at para 53.

²*Shaanika and Others v Windhoek City Police and Others* (Case No.: SA 35/2010) Delivered 15 July 2013.

[45] I fully associate myself with the sentiments expressed by the courts in the aforementioned statements.

[46] In this matter there are allegations by the respondents that the applicant had been dishonest by under declaring his income. That allegation is disputed by the applicant. It is for that very reason that the applicant brought this application. For the time being the allegation remains an allegation and until such time that it has been proven. The applicant has the constitutional right in terms of Article 12 of the Constitution to have his dispute adjudicated by this court. In terms of the section under which the assessment in dispute, has been made and the money has been found to be due to the Fiscus by the applicant, the applicant has the right to challenge the decision of the respondents. Such challenge includes the lodging of an objection with the respondents in respect of such assessment and if such objection fails, the right to appeal. In addition the applicant has the right to approach this court for appropriate relief including interim relief.

[47] In the matter of *Du Preez v The Minister of Finance*³ the applicant brought a review application in the High Court to set aside the Minister's decision in respect of income tax concerning arrear interest charged on the taxed amounts owed. He complained that the interest exceeded the principal amount and that it was unfair and unreasonable and sought a review of the Minister's decision pursuant to the provisions of Article 18 of the Constitution. It was common cause that the applicant and his tax advisor had submitted fraudulent information that resulted in the revision of the previous assessment by the Minister. The application was dismissed by the High Court where after the applicant appealed to the Supreme Court. Notwithstanding the fact that it was common cause that the applicant's actions or conduct were tainted by fraud, both the High Court and the Supreme Court did not decline to hear the matter on the basis of the doctrine of unclean hands. In the circumstances I consider myself being bound by the Supreme Court's approach in the matter of *Du Preez* (supra).

[48] In any event, having given the matter due consideration I am unable to conclusively conclude on the allegations made by the respondents, that the protection of the rights the applicant seeks, in these proceedings are contaminated by dishonesty

³ SA 20/2011 [2012] NASC 4 (21 June 2012)

or fraud. Such finding, in my view, would require strong evidence, or to borrow from Geier J, requires '*concrete proof of wrongdoing*', given the constitutional imperative of the right of access to court. I therefore decline to accede to the respondents' request to strike the matter from the roll. This point *in limine* is therefore dismissed.

Urgency

[49] The next point *in limine* raised by the respondents is that the matter is not urgent. In support of this contention, the respondents point out that the assessment process has not yet been finalised because additional information from medical aid funds and banks have not yet been received and considered at the time of raising the assessment as mentioned in the second respondent's letter of 15 March 2017. In the respondents' view there is a high probability that the undeclared income amount by the applicant will increase. The respondents further point out that the applicant has at his disposal the remedy to lodge an objection and or to appeal as provided in the Act and therefore this application is not properly before this court and that the court has no jurisdiction to hear the application. The respondents further submit that there is no basis for the applicant to ignore the remedy available to him for lodging objection and appeal in terms of the Act. In the event the court were to find that the matter is urgent then in such event, the respondents contend that the urgency is self-created.

[50] The applicant points out that the respondents do not deny any of the material allegations proving that the matter is urgent as contemplated by the rules of this court. In particular the applicant points out that the respondents do not deny that the applicant's practice has closed down; that if the interim relief is not granted the third respondent is under instruction to continue paying over to the fourth respondent all the money coming into his bank account's leaving him with no money at all; and finally that the respondents do not deny that the applicant has a chronic medical condition that requires daily medication which condition requires availability of money.

[51] Rule 73(4) of the rules of this court requires the applicant to explicitly set out the circumstances which he or she avers renders the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. I am satisfied that the applicant has sufficiently set out the facts why he

alleges that the matter is urgent. I reject the respondents' contention that there has been a delay on the part of the applicant to bring the application and that such delay was self-created. On the facts before me I am satisfied that there has not been a delay on the part of the applicant and that the applicant brought the application as soon as it was reasonably and practically possible.

[52] The second requirement set by Rule 73(4) is inextricably interwoven with one of the four requirements for granting interim relief namely the requirement of '*no other satisfactory remedy*'. For that reason it cannot be considered in isolation from the requirement of 'no other satisfactory remedy' for granting of interim relief. I will consider the second requirement in conjunction with and when I consider whether the applicant has satisfied the 'no other satisfactory remedy' requirement for the granting of an interim relief.

Clear right

[53] The next point *in limine* raised by the respondents is that the applicant has failed to demonstrate that as a matter of substantive law, he has a clear right to violate the Income Tax Act by under-declaring his total annual income and providing falsified information to the Receiver of Revenue; and that such right is a legal right that needs to be protected. The respondents submit further that the applicant has failed to comply with the requirement of a clear right to enable this court to exercise its discretion in granting the relief sought in the notice of motion.

[54] In my judgment there is no merit in the arguments advanced on behalf of the respondents that have been described above. The point is clearly misconceived. The applicant correctly points out that in this type of proceedings where the applicant seeks only interim relief he is not required to prove a clear right he is only required to establish a *prima facie* right although open to some doubt⁴. I fully agree with the applicant's Counsel exposition of the legal position. A clear right is only required when one seeks a final interdict or relief⁵. Accordingly the point *in limine* is dismissed.

⁴ Prest: The Law and Practice of Interdicts. Page 50.

⁵ *Setlogelo v Setlogelo* 1917 AD p. 221.

Incompetency of the order seeking to repay back the money

[55] The fourth point *in limine* raised by the respondents is that the order sought by the applicant namely ordering the fourth respondent to repay the total amount of money paid to it by the third respondent from the applicant's bank account, acting as an agent for the applicant, would be incompetent. This is due to the reason that neither the third nor the fourth respondent has any authority in terms of the Act to repay any amount of money which is due to the State for tax purpose and is paid to the second respondent. The respondents point out further in this regard that such amount can only be refunded to the applicant in terms of section 94 of the Act.

[56] The applicant took the view that this point is completely spurious and that it does not warrant any dignification through a reply in detail and that it lacks merits. The court is not as fortunate to simply brush off a party's submission without advancing a reason for doing so; the court is bound to deal with a party's contention. It would appear to me in any event the short answer to this point is that the order is not sought in isolation. My understanding of the relief sought is that the fourth respondent will only be ordered to repay the money once the basis upon which the money was paid to it has been removed by the court's order. In other words if it is found, as contended by the applicant, that the notice of assessment was a nullity. This point *in limine* is equally dismissed.

Non-joinder

[57] The fifth point *in limine* raised by the respondents is that of non-joinder. In this respect, the respondents contend that the applicant in his founding affidavit has made serious allegation in connection with the information provided by the medical aid funds particularly the information provided by PSEMAS. Furthermore that the applicant was informed by the second respondent on 29 March 2017, that the assessment was raised as a result of information received from PSEMAS. For those reasons the respondents contend that the applicant failed to join PSEMAS or any other medical aid fund who are interested parties to this proceedings to answer to the allegations contained in the applicant's founding affidavit. Accordingly, the respondents contend

that this application is defective due to non-joinder and for that reason it must be dismissed with costs.

[58] Like with the preceding point *in limine*, the applicant again took the view that this point is equally unmeritorious and unjustified both in fact and in law and that furthermore that it is vexatious. I agree with the applicant that there is no merit in this so-called point *in limine*. The requirement for joining a party to legal proceedings is that such party to be joined must have direct and substantial interest in the outcome of the legal proceedings. The 'direct and substantial interest' has been held to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a 'legal interest in the subject matter of the litigation excluding an indirect commercial interest only'⁶. The interest must be a real interest not and merely an abstract or academic one⁷. A party cannot simply just be joined just because it has been mentioned in the legal proceedings.

[59] In my view the mere fact that PSEMAS has been mentioned as the source of some of the information upon which the respondents decision was based, does not make PSEMAS a necessary party to these proceedings. I have considered the paragraphs in the founding affidavit identified by the respondents as containing serious allegations about PSEMAS. I do not agree with the respondents' characterisation of the allegations as serious. The gist of the allegations is simply that some of the information used by the respondents to make an assessment, originated from PSEMAS.

[60] The correct approach to the point of non-joinder it is upheld, appear to be not to dismiss the action or application, but to stay the proceedings until the necessary party has been joined to the proceedings. This approach was propounded by Masuku J in the matter of *Maseko v Commissioner of Police*⁸. The learned judge after referring to the Harmse; *The Civil Practice of the Superior Courts of South Africa* as well as to some case law, expressed the view that the dismissal of the proceedings due to non-

⁶ See; Herbstein and Van Winsen: *The Civil Practice of the Superior Courts in South Africa* 3rd Ed. Page 168.

⁷ See: *Stelmacher v Christiaans* 2008 (2) NR 587 HC p 591 par 16.

⁸ [1778/09] [2011] SZ HC 66 (17 January 2011).

joinder would be harsh in the extreme; that a postponement would be the correct procedure as none of the parties would suffer unjustly. The defaulting party would be ordered to pay wasted costs occasioned by the postponement. Furthermore the postponement would allow the necessary party to be joined to the proceedings. I must say I prefer the approach advocated by the learned judge.

[61] It is not necessary for me to decide in this matter whether the matter should be dismissed or postponed because I am of the considered view that PSEMAS has no direct and substantial interest in this proceedings. For the foregoing reasons the point *in limine* is rejected.

Failure to comply with the statutory notice

[62] The sixth and final point *in limine* raised by the respondents is that the applicant failed to comply with the statutory notice. In this connection the respondents point out that the second respondent in his letter to the applicant dated 15 March 2017 requested the applicant to lodge his objection to the assessment within 90 days from the date of receipt of the notice; and that the 90 days period has not lapsed. Therefore by not lodging the objection as prescribed by the Act, the applicant is in default of the lawful request and has approached the court while in default of a statutory notice. Accordingly, so the argument goes, the application is defective and must be struck from the roll.

[63] The applicant's response to this point *in limine* is that the lodging of the objection is an ordinary remedy which is not immediate and is not an effective remedy to protect him from suffering irreparable harm. Furthermore that the applicant has been informed by the first respondent's officials that the process of considering objections take months to finalise. In any event the applicant's attitude is that it does not recognise the notice because it is a complete nullity in that it is not in compliance with the peremptory requirements of the Act.

[64] Again, in my judgement there is no merit in this point *in limine*. On the respondent's own admission, and it is common cause, the period of 90 days within which the applicant has been advised to lodge the objection have not yet expired.

Furthermore the applicant says that he will file his objection within 14 days of the institution of this application and he will also finalise the appeal process.

[65] In my view the applicant has the right to bring review proceedings against the respondents to review their decisions irrespective of the fact whether he has filed his objection or not. The applicant is in within his right to bring the application notwithstanding the fact that he has not as yet lodged his objection in terms of the Act. The Supreme Court in the matter of *Du Preez (supra)* held that the establishment of the Special Income Tax Court does not entirely oust the jurisdiction of the ordinary courts; that ordinary courts retain the right of review as well as the jurisdiction to issue declaratory orders in appropriate cases. In particular, courts retain the jurisdiction to determine legal issues connected with the question of taxation where no question of fact arises⁹. At the heart of this matter is the legal interpretation of the powers of the respondents vested upon them by the Act; whether or not they are allowed to act the way they did.

[66] In the light of the foregoing, this point *in limine* likewise stands to be dismissed.

The merits in respect of interim relief

[67] Having dealt with the points *in limine* I now proceed to consider the merits.

[68] The requirements for the granting of interim relief are well settled. They are:

- (a) a *prima facie* right;
- (b) a well-grounded apprehension of irreparable harm if the relief is not granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.

To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion¹⁰.

⁹ *Du Preez v The Minister of Finance* (supra) at par 24. Quoting with approval *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001(1) SA 1109 (CC) at paras 44 – 7.

¹⁰ See: *Nakanyala v Inspector-General* 2012 (1) NR 200 at par 36.

[69] It is also well settled that the granting of interim relief can be utilised in review proceedings¹¹.

[70] The degree of proof to establish *prima facie* right is well established. It has been summarised by Justice Harms in *The Law of South Africa* and was cited with approval by Smuts J in the matter of *Nakanyala* (supra) at par 46. It reads as follows:

'The degree of proof required has been formulated as follows: The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed.'

[71] I now proceed to consider the requirements for interim relief.

No other satisfactory remedy or could not be afforded substantial redress in due course

[72] I did earlier in this judgement indicate that I will consider the second requirement for urgency together with the requirement for interim relief. I decided to do so because in my view the requirements for 'non-satisfactory remedy' and 'not being afforded substantial redress' go hand-in-hand. This approach was also correctly in my view, suggested by Counsel for the applicant.

[73] Mr Kashindi submitted that the applicant brought this application without exhausting the procedure of objection and appeal provided by the Act. Accordingly the application is not properly before this court and that the court has no jurisdiction to hear the application. This submission is misplaced.

¹¹ *Nakanyala* (supra)

[74] It has been held that the mere fact that the legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention to oust the jurisdiction of a court of law and that such right is barred until the aggrieved person has exhausted his or her statutory remedies¹². The ousting of the court's jurisdiction is not easily assumed. The Act provides for the right to object, however the applicant, says that he has been informed by Mr Hangula that the objections take a long time before they are heard. This allegation has not been denied by the respondent. It does not also appear that there are prescribed time limits within which an objection has to be finalised. Furthermore the appeal in the Special Income Tax Court, operates like an ordinary court. There is a right to legal representation, the right to adduce evidence and to challenge or rebut adverse evidence on the issue raised in the tax-payers notice of appeal. In addition, when all has been said and done in that court, there is a right of appeal from that court to the Supreme Court. I have earlier in this judgment referred to the Supreme Court's stance in the matter of *Du Preez* where it referred with approval to the decision of the Constitutional Court of South Africa in the *Metcash* matter (*supra*) and held that the establishment of the Special Income Tax Court does not entirely oust the jurisdiction of the ordinary courts; that the ordinary courts retain the right of review as well as the jurisdiction to issue declaratory orders in appropriate cases. In particular, courts retain the restriction to determine legal issues connected to the question of taxation where no question of facts arises¹³.

[75] It follows from the foregoing that even though the Special Income Tax Court operates like an ordinary court, it does not have the power to issue interim declaratory orders; those powers have been left with the High Court. It follows therefore in my view, that notwithstanding the creation of right of objection and appeal by the Act, it was never the intention on the legislature to bar taxpayer's recourse to ordinary court to seek interim relief. My conclusion on this point is therefore that the applicant has no other satisfactory remedy, and furthermore he could not be granted alternative relief in due course.

¹² See: *National Union of Nambian Workers v Naholo* 2006 (2) NR 659.

¹³ *Du Preez* (*supra*) par 24.

[76] The next requirement for granting interim relief is a *prima facie* right. Before embarking on the inquiry whether the applicant has established such a right, I consider it necessary to set out the legal context in which in which our tax system is founded.

The concept of 'pay now argue later'

[77] Our taxation system is based on the concept of 'pay now argue later'. Mr Justice Kriegler in the matter of *Metcash (supra)* observed that it is a concept applied in the taxation dispensations of many countries in the world. The concept was found by the Constitutional Court of South Africa in the matter of *Metcash*¹⁴, not to be unconstitutional in the context of the South Africans Value-Added Tax Act 89 of 1991. In that matter a taxpayer sought to impugn the legislation in terms of which it is applied contending that it was, incompatible with section 34 of the South African Constitution. Mr Justice Kriegler writing for the court summarised the import of those provision as follows:

[60] In considering justification it is important to remember that the limitation under section 40(5) is limited in its scope, temporary and subject to judicial review. There are three additional features. First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-evident. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose. As stated earlier, the scheme of VAT instituted by the Act is a complex one which relies for its efficacy on self-regulation by registered vendors and regular periodic payments of VAT. Requiring them to pay on assessment prior to disputing their liability is an essential part of this scheme. It reduces the number of frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality. Section 40(5) plays an important role in this scheme. In order for a "pay now, argue later" scheme to work, it is necessary that the Commissioner is able to obtain execution against a taxpayer without having first to air the subject matter of the objection which will be adjudicated upon by the Special Court in due course. There is therefore a close connection between the overall purpose of the "pay now, argue later" rule and the effect of section 40(5).

¹⁴ 2002 (4) SA 317 (CC).

[61] Secondly, the principle “pay now, argue later” is one which is adopted in many open and democratic societies. In many of these jurisdictions, as well, some scheme for immediate execution against a taxpayer is provided to ensure that the rule is efficacious. Given its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.

[62] Thirdly, the effect of the rule on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation. The rule is not absolute but subject to suspension in circumstances where the Commissioner considers it appropriate. The exercise of this power by the Commissioner constitutes administrative action within the contemplation of section 33 of the Constitution and as such is reviewable as discussed above. The existence of this discretionary power therefore reduces the effect of the principle “pay now, argue later” in an appropriate manner. In all these circumstances, therefore, I am persuaded that even if the effect of section 40(5) constitutes a limitation on the right entrenched in section 34 of the Constitution, it is a limitation which is justifiable within the meaning of section 36.

[78] There has been no material difference between our Income Tax Act and the South African Income Tax Act, given the historic relationship prior to Namibia’s independence. Until about February 2011 our section 78 of the Act read the same as the corresponding section in the South African Income Tax Act. Therefore the judicial interpretation or pronouncements by the South African Courts on their Income Tax Act would be highly persuasive in the interpretation of our Income Tax Act. From 1 February 2011 the Income Tax Act of South Africa was however amended in terms of which the Commissioner for Inland Revenue has been vested with the discretion to suspend payment of tax taking into account consideration set and stipulated factors¹⁵.

[79] Our Act remains the same as it was before. Section 78 of the Act entrenches the concept of pay now argue later. It provides that the obligation to pay and the right to receive and recover any tax chargeable under the Act shall not, unless the Minister so directs, be suspended by any appeal or pending the decision of a court of law under section 76. Section 76 concerns the appeal to the Supreme Court against the decision

¹⁵ Subsection (1) of Section 13 of Act 18 of 2009.

of the Special Income Tax Court¹⁶. The effect of section 78 is that the noting of an appeal does not suspend the taxpayer's obligation to pay the tax assessed. In other words any pending appeal by a taxpayer on his or her assessed tax liability does not suspend his or her liability to pay the assessed tax amount.

[80] In summary, at the heart of the concept '*pay now argue later*' are the considerations of public interest in obtaining full and speedy payment of the tax amount due to the Fiscus. Furthermore it limits the ability of noncompliant taxpayers to use objection and appeal procedures as a strategy to delay payment of their tax.

Prima facie right

[81] In my view the concept discussed above provides the context in which the applicant's contention that he is entitled to interim relief, is to be considered. The question whether the applicant has established that he has a *prima facie* right is to be considered with reference to the review grounds advanced by him. Firstly in respect of the respondents' determination and assessment of the applicant's obligation to pay additional tax plus interest in the amount of N\$ 37 972 678.14 to the Fiscus; and secondly, the first respondents' decision to appoint the third respondent as agent for the applicant to collect the money.

[82] The first ground advanced by the applicant is that the amount which represents the alleged gross income for the period 2014 to 2017, particularly the income received by the applicant from PSEMAS, is incorrect. The applicant contends that the amount on which he has been assessed exceeds the income paid into the applicant's business account during the period 2014 to 2017 by N\$10 807 939.35.

[83] The second ground is that the notice of assessment dated 15 March 2017 is invalid and null and void for the following reasons:

83.1 The notice does not state the date on which the tax amount shall be paid as required by section 67(2)(b) of the Act; the notice includes the assessment for the year 2016. In this respect the applicant submits that,

¹⁶ Subsection (2).

for this reason alone, the notice is a nullity in that it is *ultra vires* the provision of section 67(3) of the Act which provides that the notice of assessment shall not be issued before the expiry of the last filing date of as fixed by section 56(1)(a). The applicant points out that the 2016 returns are only due on 30 June 2017

- 83.2 The notice is unlawful as it was made without affording the applicant an opportunity to be heard as contemplated by Article 18 of the Constitution; that the decisions by the respondents to issue the notices that the notice of assessment and the notice to appoint the third respondent as agent for the applicant are unlawful because the respondents acted beyond their powers in an arbitrary manner; that the appointment of the third respondent without giving the applicant opportunity to be heard is unlawful; furthermore the third respondent had no right to withdraw the applicant's money from his account without informing the applicant or giving the applicant notice; that the notice was unlawful in that it required the third respondent to pay over their money to the Fiscus within 24 hours while the notice of assessment was only communicated to the applicant on a later date on 29 March 2017 and not before as required by section 67(2) (b) of the Act; and finally that the assessment and the appointment of the third respondent were inconsistent with the doctrine of legality and the rule of law.

The applicant's main submissions

[84] Mr Namandje for the applicant submitted that when the money was withdrawn from the applicant's account by the third respondent acting as an agent for the applicant, the applicant had not been served with any notice of assessment as contemplated by section 67 of the Act. Furthermore the notice did not specify the date by which the determined amount of tax should become due as required in terms of section 67(2)(b) of the Act as contemplated under section 98(2) of the Act. It follows therefore, so the argument goes, that by the time the third respondent transferred the money from the applicant's account to the fourth respondent's, there was no tax amount due to be paid by the applicant to the first and second respondents, in law.

Counsel further submitted that his contention is reinforced by the fact that the respondents, after conducting the assessment in terms of section 67 of the Act, issued the applicant with a certificate of good standing on 24th March 27, after the transfer by the third respondent of the money from the applicant's bank account to the fourth respondent. It is then submitted that the first and second respondents' actions were arbitrary entitling the applicant to approach this court for declarators including the declarator that the purported notice of assessment dated 15 March 2017 was a complete nullity.

Respondents' main submissions

[85] Mr Kashindi for the respondents submitted, rather broadly, that sections 67 to 70 of the Act give powers to the respondents to examine the taxpayer's returns on income, to estimate assessments and to make additional assessments. Pertinently that the assessment in question was raised in terms of section 69(1). Counsel submitted that section 69 does not require the first and second respondents to notify the applicant when the first respondent conducts an additional assessment.

[86] It is necessary to quote the sections upon which Counsel's submissions are premised in order to consider the conflicting contentions in perspective.

[87] Section 67 provides as follows:

'67 Examination of return and assessment:

- (1) A return of income and computation of a taxpayer's liability for tax furnished in accordance with section 56 shall be subject to examination by the Minister.
- (2) Upon examination of a taxpayer's return and computation of liability for tax the Minister shall issue to the taxpayer a notice of assessment stating-
 - (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 any objection to the assessment must be lodged in writing within a period of 90 days of the date of issue of the notice of assessment;
 - (d) the place where an objection to an assessment must be lodged.
- (3) A notice of assessment to be issued in terms of subsection (2) to a taxpayer, other than a company, shall not be issued before expiry of the last date for the filing of an income return as fixed by section 56(1A), irrespective of the date on which the return was actually furnished by the taxpayer. (Underlining supplied for emphasis)
- (4) Every return of income furnished by a taxpayer and the assessment made under subsection (2) shall be filed and be retained by the Minister for such period as the Minister may determine, after consultation with the Auditor-General.'

[88] Section 69 reads as follows:

'69 Additional assessments:

- (1) If at any time the Minister is satisfied-
 - (a) that any amount (including any amount the incorporation of which in an assessment would result in the reduction of any loss ranking for set-off or in only a portion of such amount becoming chargeable with tax) which was subject to tax and should have been assessed to tax has not been assessed to tax either under this Act or any previous income tax law; or
 - (b) that any amount of tax which was chargeable and should have been assessed under this Act or any previous income tax law has not been assessed; or
 - (c) that, as respects any tax which is chargeable and has become payable under this Act or any previous income tax law otherwise

than under an assessment, such tax has not been paid in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax,

he shall raise an assessment or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year of assessment in respect of which the amount or amounts in question is or are assessable, and notwithstanding the provisions of section 71(5) and 73(18) or the corresponding provisions of any previous income tax law: Provided that save to correct any error of calculation the Minister shall not raise an assessment under this subsection in respect of any amount, if any previous assessment made upon the person concerned has in respect of that amount been amended or reduced pursuant to any order made by a special court for hearing income tax appeals constituted under the provisions of this Act or any previous income tax law, unless the Minister is satisfied that the order in question was obtained by fraud or misrepresentation or non-disclosure of material facts.(underlining supplied for emphasis)

- (2) The provisions of sections 66 and 68 shall apply to any assessments or additional assessments made by the Minister under the powers conferred by this section.'

[89] My understanding of the two section is this: section 67 on the one hand deals with the normal or usual yearly assessments by the Minister. The section provides for the procedure to be followed by the Minister after the Minister has assessed the taxpayer following the taxpayer's submission of his tax return. By way of paraphrasing the section provides that once the Minister has calculated the taxpayer's tax liability he has to issue the taxpayer with a notice of assessment. The notice must specify the amount of tax payable by the taxpayer; the date on or before which such tax amount determined is to be paid. The notice must further inform the taxpayer that if he or she has objection to the assessment, such objection must be made within a period of 90 day calculated from the date of the notice. Finally the notice must state the place where the notice is to be lodged.

[90] Section 69 on the other hand deals with additional assessment by the Minister. The section empowers the Minister to at '*any time*' raise assessment or assessments on any amount or amounts notwithstanding that an assessment had previously been made upon a taxpayer. The section stipulates the basis upon which the Minister can raise additional assessments: the Minister must be satisfied that any amount which should have been assessed and has not been so assessed or any amount of tax which was chargeable should have been assessed or any tax which is chargeable and has become payable and such tax has not been paid.

[91] It is the applicant's case that he has over the years timeously been submitting his annual tax returns and has been assessed by the Minister and to that effect he has been issued with successive certificates of good standing. It follows therefore in my view as a matter of logic and common sense that such assessments had been carried out by the Minister in terms of section 67 because on the applicant's own version he has been submitting his returns and had already been assessed by the Minister. My conclusion is that the applicant's contention on this point that the assessment which is the subject matter of this application has been done in terms of section 67 cannot be correct. I have carefully studied the notice of assessment dated 15 March 2017 issued to the applicant in order to determine on what basis the applicant alleges that the assessment in dispute was made in terms of section 67. Nowhere does the notice of assessment professes to be in terms of section 67. It would appear that the applicant simply assumed that the notice of assessment was issued in terms of section 67. The notice appointing the third respondent specifically cited section 91 as an authority under which the third respondent was appointed. There is no basis for the applicant's assumption that the notice of assessment was issued in terms of section 67. The applicant's interpretation or reading of section 67 is incorrect; it stands to be rejected and I do so.

[92] The respondents' contention is that the assessment constitutes an additional assessment levied in terms of section 69. As it would appear from the analysis of the provisions of section 69 earlier in this judgment, the section gives powers to the Minister to at any time raise an assessment or assessments on any amount which was chargeable or should have been assessed even if that amount had previously been

assessed. It is the respondents' case that the assessment in question is an additional assessment because upon examination of the applicant's previous returns the respondents discovered that he had been under-declaring his income. This means that the applicant's previous income which should have been assessed had not been properly assessed or the tax charged on that had not been properly charged or paid. It is therefore my considered view that the first respondent acted in terms of section 69 and that he levied additional tax on the applicant in terms of that section.

[93] I now move to consider whether the appointment of the third respondent was unlawful as contended by the respondent. Mr. Namandje argued that the purported appointment of the third respondent on 15 March 2017 as the applicant's agent and that when the third respondent transferred of about N\$21 million from the applicant's bank account, no notice of assessment was lawfully issued in terms of section 67 read with section 98 of the Act. Counsel points out that the notice was only served on the applicant on 29 March 2017. Accordingly, so the argument goes, when the third respondent was appointed as an agent there was no tax due as contemplated by section 91.

[94] Section 98 stipulates the manners in which notices, documents and communications issued by the Minister are to be served on the taxpayers. It provides that such notice, demand or communication shall be deemed to have been effectually issued, given, sent or served if delivered to the taxpayer, or left with an adult person residing or occupying or employed at the taxpayers last known abode or office or place of business; or if sent by registered post to the taxpayer is last known address.

[95] As pointed out earlier in this judgment, the applicant's case is premised on the assumption that the notice of assessment was issued in terms of section 67. I have already in this judgment found that because this was an additional assessment the notice of assessment was not made in terms of section 67 and therefore the provisions of the said section find no application. It is common cause that the third respondent was appointed on the same day that the notice of additional assessment was issued. The notice was issued after the first respondent had made the determination or assessment. It is therefore not correct as submitted by Mr Namandje, that when the third respondent was appointed as agent no tax was due as contemplated by section

91. It has been held in any event that the obligation to pay tax exists independently from the appointment of a third party as the collecting agent¹⁷.

[96] With regard to the applicant's contention that the notice of assessment is invalid, null and void in that it *inter alia* failed to state the date on which the amount determined is due for payment, I have already found that the assessment was not issued in terms of section 67, but it was issued in terms of section 69. In any event insofar as it may be necessary for the notice to state the date, section 1 of the Act defines the '*date of assessment*' in relation to any assessment to mean the date specified in the notice of part of such assessment as the date or where the due date is not specified, the date of such notice. Based on the foregoing definition the date of notice in the instant matter was 15 March 2017. That was the date when the additional tax determined by the first respondent became due and payable.

[97] In any event section 86 of the Act, provides that the production of any document under the hand of the Minister purporting to be a copy or an extract from any notice of assessment shall be conclusive evidence of such assessment and shall furthermore be conclusive evidence that the amount appearing in such document is correct. It would appear therefore that by virtue of the provisions of section 86, the notice of assessment issued by the respondent on 15 March 2017 constitutes conclusive evidence of the correctness of amount stated therein.

[98] As to the applicant's contention that the notice is an nullity and that it is *ultra vires* the provisions of sections 67(3), once again in light of my finding that this section 67 is not applicable, it follows that the contention is misplaced and cannot be sustained.

[99] In respect of the applicant's contention that the assessment is unlawful as it was issued without giving the applicants an opportunity to be heard as contemplated by Article 18 of the Namibian Constitution, I have already earlier in this judgment pointed out that our taxation system is based on the concept of 'pay and argue later'. The concept is entrenched in our tax system by section 78 of the Act. I have also

¹⁷ *Contract Support Services (Pty) Ltd v Commissioner, South African Revenue Services, and Others* 1999 (3) SA 1133.

earlier in this judgment referred to the position adopted by the Supreme Court in the matter of *Du Preez* when the court referred with approval to the judgment of the Constitutional Court of South Africa in the matter of *Metcash* in which it was held that the concept does not offend against the provisions of the Constitution.

[100] In my judgment there is no merit in the applicant's contention that the appointment of the third respondent is unlawful as it was made without the applicant being given an opportunity to be heard and that the appointment was made prior to the notice being issued and communicated to him. Section 91 of the Act empowers the first respondent to appoint agents for the purpose of the effective and efficient collection of tax. Section 91 does not require prior notice to be given to the taxpayer in respect of who is to be appointed as an agent. Therefore there is no basis for the contention that the appointment of the third respondent as agent for the applicant was unlawful.

[101] The facts in the present matter together with arguments advanced with regard to the appointment of the third respondent as agent for the applicant are almost similar to the facts and the arguments advanced in the matter of *Contract Support Services (Pty) Ltd and Others v Commissioner, South African Revenue Services and Others*¹⁸.

[102] The facts in that matter may be briefly summarized as follows: The Commissioner had upon comparison of several of the applicants' documents found certain disparities which led him to estimate that an amount in excess of R6 million was due to the Fiscus in respect of VAT. The Commissioner then appointed Standard Bank as the agent for the applicants, in terms of section 47 of the South African VAT Act. The notice appointing Standard Bank as agent was delivered prior to the delivery of the assessment notice to the applicants. The applicants then lodged objection to the assessment. Pending the resolution of that issue the applicants applied for an interim order reviewing and setting aside the decision by the Commissioner to issue the notices to appoint Standard Bank as an agent. The application was opposed by the Commissioner and the Receiver of Revenue.

¹⁸ 1999 (3) SA 1133 (W).

[103] One of the arguments advanced by the applicants was that the manner in which the decision had been taken contravened the Constitution of the Republic of South Africa in that the principle of *audi alteram partem* should have been observed in the decision authorizing the issue of the notice appointing Standard Bank as agent. As in the instant matter, the applicant in that matter also argued that the appointment of Standard Bank as agent had taken place before the notice of assessment had been issued, therefore the notice had been *ultra vires*.

[104] In dismissing the application the court held that not all administrative acts required the application of the *audi alteram partem* rule before they were given effect. The court further held that section 47 itself did not require prior a hearing. The court further pointed out that the requirement of a prior hearing would defeat the very purpose of the notice by alerting the defaulting VAT payer of the intention to require payment from him or her, thus making it possible for the VAT payer to defeat the purpose of the section. Accordingly the court held that by necessary implication the provision of section 47 excluded the *audi alteram partem* principle.

[105] It was further held that the decision to issue the section 47 notice was not inextricably linked to the assessment made; that the liability to pay VAT was based upon a system of self-assessment and the amount payable had to be the correct amount owing. The court further pointed out that it could not be contended that the liability to pay the unpaid VAT only arose when the Commissioner made the assessment; that the obligation to pay VAT existed independently of any assessment. The court accordingly held that the notice was not *ultra virus*.

[106] Our courts have accepted the principle that not all administrative acts required the application of the *audi* principle before such acts are given effect¹⁹. The provisions of the VAT Act and most of the provisions of the Income Tax Act are the same in all material respects. For instance section 42 of our the Vat Act also makes provision for the Minister to appoint and agent for the Vat registered vendor to collect VAT amount due to the Fiscus by such vendor.

¹⁹ See: *Moster v Minister of Justice* 2003 NR 11 (SC).

[107] Section 91 of the Act does not require prior notice or prior hearing. The insistence on giving prior notice would render the collection of tax nugatory with the taxpayer dissipating the money, leaving the Minister with no money to collect. In this matter the respondents allege that they decided to act in the manner they did because they were concerned that the applicant would withdraw the whole money and leave the country for his country of origin, Uganda. If it is subsequently found that the additional assessment was in anyway incorrect after the hearing, the Minister has been vested by section 94 with the power to refund the taxpayer, the money collected from the taxpayer but not due to the Fiscus.

[108] The applicant's obligation to pay tax exists independently from the notice to appoint the third respondent. The appointment of the third respondent is part of the tax collection mechanism vested upon the respondents by the Act. It follows therefore from the foregoing, in my considered view, that the notice appointing the third respondent was lawfully issued and was valid and of force and effect. The applicant's contention in this regard cannot therefore be sustained.

[109] The applicant raised a point in his papers, of *functus officio*. In this connection, the applicant contented that in view of the fact that the first respondent had already assessed the applicant on previous occasions and had issued him with certificates of good standing, he has become *functus officio* and therefore he was not entitled to levy additional tax upon the applicant. This point was not persisted with by counsel in his heads of argument. This may be because Counsel took the view that, as Counsel put it, '*the applicant has the comfort and full entitlement to describe his case as 'excellent and complete unanswerable by the respondents'*'. For the sake of completeness I feel obliged to briefly deal with the argument. As pointed earlier herein, section 69 has a clear purpose in the scheme of the Act. That purpose is to enable the Minister, when he is satisfied that any amount which should have been assessed has been not so assessed, to raise an assessment in respect of such amount, notwithstanding previous assessments in respect of the of past years. It is clear from the language of the section that it empowers the Minister to conduct multiple assessments on the taxpayer provided that the Minister is satisfied that a taxpayer's income has escaped previous assessments. It is further clear from the provisions of the section that the concept of *functus officio* does not find application. Similarly defenses such as double jeopardy

and the 'one off rule' do not apply. The Minister is entitled to exact tax until he is satisfied that he has, so speak, received his pound of flesh.

[110] In summary and in conclusion I found that section 67 of the Act upon which the applicant's case is premised is not applicable. In respect of the facts of the matter, my finding is that the probabilities favour the respondents' version. I found further that the applicant's explanation of possession of such enormous amount of cash unconvincing. Regarding the issuance of the certificates of good standing to the applicant by the Receiver of Revenue, it would appear to me that such certificates are of limited purpose. Each certificate is valid for 60 days only. I am saying so because upon perusal of each certificate it states the purpose for which it has been issued. The 2015 certificate states: "Certificate of Good Standing" for 'Home Affairs'. The 2016 certificates states: "Certificate of Good Standing" for 'Other Purposes' and the 2017 "Certificate of Good Standing" states: 'For License Renewal'. I am in any event of the view that the issuance of the certificate was never intended to constitute a bar to exercise of the statutory power vested upon the Minister by section 69 to conduct or levy additional assessments upon a taxpayer to whom such certificates have been issued.

[111] Taking into account all the foregoing, I have arrived at the conclusion that the applicant has not at this stage of the proceedings made out a *prima facie* case for the interim relief sought. Establishing of a *prima facie* right is the primary requirement for the granting of an interim relief. In other words the other requirements become relevant only when *prima facie* right has been established²⁰. In view of my finding that the applicant has failed to establish a *prima facie* right it is not necessary for me to consider the remaining requirements for granting interim relief.

[112] In the circumstances, I make the following order:

1. The applicant's non-compliance with Rules of this court relating to the service of court papers and the time periods in terms of Rule 73 is condoned and the matter is heard as one of urgency.

²⁰ Prest (supra) page 57.

2. The following points *in limine* raised by the respondents namely:
 - (a) the application is in violation of the provisions of the Income Tax Act in that it is not permissible for the applicant to approach the court with unclean hands.
 - (b) that the matter is not urgent; that the applicant has not satisfied the requirement of clear right to obtain an interim relief.
 - (c) that the applicant is asking for an incompetent relief; that the applicant failed to joined the PSEMAS Medical Aid Fund.
 - (d) that the applicant failed to comply with the statutory notice issued by the second respondent to the applicant in terms of the Act.

are dismissed.

3. The application for the issue of interim orders is refused.
4. The costs of this application are to stand over for determination at the end of the hearing of Part B of the application.
5. The matter is postponed to 7 June 2017 at 8h30 for case management conference.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT:

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RESPONDENTS:

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