

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON THE SPECIAL PLEA OF JURISDICTION

Case No.: HC-MD-CIV-ACT-OTH-2021/01888

In the matter between:

SUPRA SALES (PTY) LTD

PLAINTIFF

and

COMMISSIONER OF INLAND REVENUE

FIRST DEFENDANT

MINISTER OF FINANCE

SECOND DEFENDANT

NAMIBIA REVENUE AGENCY

THIRD DEFENDANT

Case No.: HC-MD-CIV-ACT-OTH-2021/01894

In the matter between:

COMMERCIAL CORPORATION (PTY) LTD

PLAINTIFF

and

**COMMISSIONER OF INLAND REVENUE
MINISTER OF FINANCE
NAMIBIA REVENUE AGENCY**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Neutral citation: *Supra Sales (Pty) Ltd v Commissioner of Inland Revenue* (HC-MD-CIV-ACT-OTH-2021/01888) [2023] NAHCMD 590 (8 September 2023)

Coram: SIBEYA J
Heard: 27 July 2023
Delivered: 8 September 2023

Flynote: Application – Special Plea – Jurisdiction – Income Tax Act – Value Added Tax Act 10 of 2000 – Establishment of the composition of the special court *vis-à-vis* the *Kurger* judgments – Rule 54(3) *versus* Rule 61 of the High Court Rules.

Summary: Before court are two actions which are similar in nature and the relief sought is equally similar, and are against the same defendants. Save for minor factual specifications, they involve the same legal arguments and attracted one set of heads of argument from the parties. The plaintiffs each instituted action against the defendants for payment of interest regarding credits issued to the plaintiffs. The Commissioner of Inland revenue satisfied himself that credits were due to the plaintiffs and accordingly refunded them. The plaintiffs contend that the credits were refunded late, and, therefore claimed interest based on the late refunds. The interest claimed by Supra sales is payment in the amount of N\$511 345,64 while Commercial Corporation claims payment in the amount of N\$9 713 176,28.

The defendants raised several defences to the plaintiffs' claims and filed two counterclaims based on the determinations dated 30 May 2022. In the counterclaim filed in the Supra matter, the defendants claim payment in the amount of N\$5 518 527,49 and N\$2 164 297,68 for value added tax in terms of ss 80(2) and 25(1)(c) of the Value Added Tax Act 10 of 2000 (the VAT Act). In the counterclaim filed in the

Commercial Corporation matter, the defendants claim payment in the amount of N\$70 862 991,31 and N\$12 207 353,46 for value added tax in terms of ss 80(2) and 25(1)(c) of the VAT Act.

The plaintiffs raised special pleas that the court lacks the necessary jurisdiction to adjudicate the abovementioned counterclaims. It is these special pleas that the court is presently seized with for determination.

The defendants' opposition to the special pleas is based on two fronts. Firstly, that the special tax cannot be constituted by virtue of the judgment of this court of *Kruger v Minister of Finance of the Republic of Namibia* and secondly, that this court has inherent jurisdiction to hear and adjudicate the defendants' counterclaims and such jurisdiction is not ousted by the VAT Act or the Tax Act.

The defendants' replication to Supra's plea to their counterclaim was due to be filed on 31 August 2022 as ordered by the court on 27 July 2022. The defendants failed to replicate by the date ordered, but instead filed their replication on 3 October 2022. The defendants did not apply for condonation for such late filing, therefore, no condonation or leave was granted for the said default.

It was argued by Mr Totemeyer that there is no replication filed by the defendants as the purported replication was filed out of time and without leave of court. Mr Narib, on his part, argued that where a replication is filed out of time it means that there is an irregular step taken, therefore, the concerned party must object to the irregular step, failing which the provision regulation irregular proceedings becomes nugatory. He argued that, in *casu*, the plaintiffs failed to object to the alleged irregular step taken by the defendants, the result of which is that the replication is before and worthy of consideration.

Held: that a party in default of failure to file a pleading when it is due as aforesaid has the option to apply for upliftment of bar, extension of time, relaxation or condonation as provided for in rule 55.

Held that: rule 61 does not apply to pleadings filed outside the time frames provided for in the court order (case plan order or any extended time allowed by the managing judge), as that is specifically regulated by rule 54(3). The argument raised regarding the applicability of rule 61 to the present matter lacks merit and falls to be dismissed.

Held further that: the arguments raised that there is, as a result of *Kruger HC*, no special court to adjudicate tax appeals against objection decisions made under the VAT Act lacks merit. The court finds that the special court provided for in s 73 as an institution exists and could hear appeals subject to its members being appointed in accordance with the findings in the *Kruger HC*. The *Kruger HC* requires that an amendment of the Income Tax Act be promulgated to avoid empowering a member of the executive from appointing members of the special court and thereafter the special court can convene. Despite the fact that this is yet to occur, it could occur as soon as amendments to the Income Tax Act are promulgated and the could be operational.

Held that: since the Income Tax Act provides for tax appeal process to special court that is the court clothed with the jurisdiction of the tax appeals and related matters. It will be gravely unfair to the taxpayers concerned and the Minister for appeal process guaranteed to taxpayers and the Minister in the Income Tax Act to be circumvented through an appeal to this court or in a like manner or through a counterclaim on the same issue pending appeal to a special court.

ORDER

1. The court declines to exercise jurisdiction over the defendants' counterclaims as the content thereof is pending appeal to the special court for hearing of income tax appeals in terms of s 73 of the Income Tax Act 24 of 1981.

2. The defendants must jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs occasioned by the special plea on a party party scale and such costs to include costs of one instructing and one instructed legal practitioners.

3. The matter is postponed to 28 September 2023 at 08:30 for a status hearing.

4. The parties must file a joint status report on or before 25 September 2023.

JUDGMENT

SIBEYA J:

Introduction

[1] Before court are two actions which are similar in nature and the relief sought is equally similar, and are against the same defendants. Save for minor factual variations, they involve the same legal arguments and attracted one set of heads of argument from the parties. Although the matters were not consolidated, they were

heard jointly and it is only just and convenient to deliver one judgment in the two matters.

[2] In the main applications, the plaintiffs each instituted action against the defendants for payment of interest regarding credits issued to the plaintiffs. The Commissioner of Inland revenue satisfied himself that credits were due to the plaintiffs and accordingly refunded them. The plaintiffs contend that the credits were refunded late, and, therefore claimed interest based on the late refunds. The interest claimed by Supra Sales is payment in the amount of N\$511 345,64, while Commercial Corporation claims payment in the amount of N\$9 713 176,28.

[3] The defendants raised several defences to the plaintiffs' claims and filed two counterclaims based on the determinations dated 30 May 2022. In the counterclaim filed in the Supra matter, the defendants claim payment in the amount of N\$5 518 527,49 and N\$2 164 297,68 for value added tax in terms of ss 80(2) and 25(1)(c) of the Value Added Tax Act 10 of 2000 (the VAT Act). In the counterclaim filed in the Commercial Corporation matter, the defendants claim payment in the amount of N\$70 862 991,31 and N\$12 207 353,46 for value added tax in terms of ss 80(2) and 25(1)(c) of the VAT Act.

[4] The plaintiffs raised special pleas that the court lacks the necessary jurisdiction to adjudicate the abovementioned counterclaims. It is these special pleas that the court is presently seized with for determination. The special pleas are opposed by the defendants.

Parties and their representation

[5] The plaintiff in the 2021/01888 matter is Supra Sales (Pty) Ltd, while in the 2021/01894 matter is Commercial Corporation (Pty) Ltd. The above are companies with limited liability duly registered and incorporated according to the laws of the Republic, with their principal place of business situated at the corner of Iscor and Solingen Streets, Northern Industrial area, Windhoek. Supra Sales (Pty) Ltd will be referred to as 'Supra' while Commercial Corporation (Pty) Ltd shall be referred to as 'Commercial'.

[6] The first defendant in both actions is the Commissioner of Inland Revenue, responsible for carrying out the provisions of the Act, the Customs and Excise Act 20 of 1988 and the Income Tax Act 24 of 1981, with offices situated at the Minister of Finance, Moltke Street, Windhoek. The first defendant shall be referred to as 'the Commissioner'.

[7] The second defendant in both actions is the Minister of Finance, duly appointed as such in terms of the Namibian Constitution and whose address of service is the Office of the Government Attorney, 2nd floor, Sanlam Centre, Independence Avenue, Windhoek. He is further the Minister responsible for the Commissioner and shall be referred to as 'the Minister'.

[8] The third defendant in both actions is the Namibia Revenue Authority duly established in terms of the Namibia Revenue Agency Act 12 of 2017, whose address of service is the Office of the Government Attorney, 2nd floor, Sanlam Centre, Independence Avenue, Windhoek. The third defendant shall be referred to as 'Namra'.

[9] The plaintiffs are represented by Mr Totemeyer while Mr Narib appears for the defendants.

The special plea

[10] The plaintiffs raised the special plea of lack of jurisdiction in the following manner:

1. The defendants' counterclaim herein are based upon a purported determination in terms of section 80(2) of the Value Added Tax Act, 10 of 2000 ('the VAT Act') as set out in annexure A to the defendants' amended plea and annexures B and C to the defendants counterclaim.

2. The aforesaid annexures provides that if the plaintiff(s) is (are) dissatisfied with the purported determination, the plaintiff(s) may lodge a written objection thereto with the first respondent within 90 days after the date of such notices of determination.

3. The date of the notice of determination is 30 May 2022.
 4. Section 80(3) of the VAT Act determines that a person dissatisfied with a decision of the Commissioner under subsection (2) may challenge the decision only under Part VIII of the Vat Act.
 5. By virtue of the provisions of Part VIII of the VAT Act, the first respondent must consider the objection (*vide* section 27(5)), whereafter he shall serve the person objecting in writing with a notice of his objection decision (*vide* section 27(6)). Should a person be dissatisfied with the first defendant's objection decision under section 27(5) of the VAT Act, that person may challenge the objection decision only under Part VIII of the VAT Act.
 6. Part VIII of the VAT Act (*vide* section 28) prescribes that a challenge of a section 27(5) 'objection decision' shall be lodged by means of a notice of appeal to the special court for hearing income tax appeals constituted under section 73 of the Income Tax Act, 24 of 1981 or a tax tribunal constituted under section 73A of the Income Tax Act, 24 of 1981.
 7. The plaintiff(s) is (are) dissatisfied with the notice(s) of determination and has (have) duly lodged an objection thereto within the required 90-day period.
 8. The first defendant is yet to make an objection decision and, upon notice of such decision, the plaintiff shall be entitled to challenge such a decision in the court or tribunal referred to in paragraph 6 above.
 9. In the premises and by virtue of the aforesaid, the plaintiff denies that this Honourable Court has jurisdiction to adjudicate the defendants' counterclaim.'
- [11] As stated above, the defendants oppose the special plea. The basis of the opposition is apparent from the replication to Supra's plea to the defendants' counterclaim filed on 6 October 2022. The opposition is based on two fronts. Firstly, that the special tax cannot be constituted by virtue of the judgment of this court of *Kruger v Minister of Finance of the Republic of Namibia*,¹ and secondly, that this court has inherent jurisdiction to hear and adjudicate the defendants' counterclaims and such jurisdiction is not ousted by the VAT Act or the Tax Act.

¹ *Kruger v Minister of Finance of the Republic of Namibia* 2020 (4) NR 913 (HC).

[12] The defendants did not file a replication to Commercial's plea to their counterclaim. It follows from the failure by the defendants to file a replication to Commercial's plea to their counterclaim that the special plea of Commercial is unopposed, or at the very least, no grounds of opposition thereto were raised by the defendants. The special plea, therefore needs to be determined based on the grounds set out by Commercial.

[13] The defendants' replication to Supra's plea to their counterclaim was due to be filed on 31 August 2022 as ordered by the court on 27 July 2022. The defendants failed to file a replication by the date ordered, but instead filed their replication on 3 October 2022. The defendants did not apply for condonation for such late filing, therefore, no condonation or leave was granted for the said default.

[14] It was argued by Mr Totemeyer that there is no replication filed by the defendants as the purported replication was filed out of time, and without leave of court. Mr Narib, on his part, argued that where a replication is filed out of time it means that there is an irregular step taken, therefore, the concerned party must object to the irregular step, failing which the provision regulating irregular proceedings becomes nugatory. He argued that, in *casu*, the plaintiffs failed to object to the alleged irregular step taken by the defendants, the result of which is that the replication is before court and worthy of consideration.

[15] Rule 54(3) of the High Court Rules which regulates non-compliance with rules or court orders provide that:

'Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

[16] A party in default of failure to file a pleading when it is due as aforesaid has the option to apply for upliftment of bar, extension of time, relaxation or condonation as provided for in rule 55.

[17] The Supreme Court in *Somaeb v Standard Bank of Namibia Ltd*² remarked as follows regarding compliance with the rules of court:

[21] It is incumbent on every litigant to comply with rules of court in view of the fact that rules of court serve a specific purpose. In *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (B) quoted with approval in *S v Kakololo* 2004 NR 7 (HC) at 10C – the following was stated in *Molebatsi* (at 96G – H):

“The Rules of Court contain qualities of concrete particularity. They are not of an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easy-going and slipshod practice, which would reduce the high standard of practice which the Courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practice and administration thereof cannot be allowed to degenerate into disorder.”

[18] Rule 54(3), in my view, is one of the rules of that speaks to the overriding objectives of judicial case management to justly and speedily, efficiently and cost effectively resolve matters before court. For time immemorial, the party driven civil litigation was found to be an ineffective culmination in the court driven case management system. Rule 54(3) cements the grip that the court holds on the case management processes, without which the case management system will be inconsequential and trivialised, as court orders and specified time frames could be ignored with impunity. A situation that is foreign to our rules and certainly one that we cannot afford to have.

[19] The defendants sought none of these well-documented remedies available to a party similarly placed in default. It follows from rule 54(3) that when the defendants failed to file a replication by 31 August 2022, they were *ispsso facto* barred from doing so subsequently.

[20] I turn to consider whether Mr Narib can be said to be correct in the argument that since no objection of an irregular step was taken against the replication, it

² *Somaeb v Standard Bank of Namibia* (SA 24-2014) [2017] NASC (27 February 2017) para 21.

stands as filed record. Irregular proceedings are provided for in rule 61 which reads as follows:

‘(1) A party to a cause or matter in which an irregular step or proceeding has been taken by any other party may, within 10 days after becoming aware of the irregularity, apply to the managing judge to set aside the step or proceeding, but a party that has taken any further step in the cause or matter with knowledge of the irregularity is not entitled to make such application...’

[21] Rule 61 requires of a party, in a matter where an irregular step or proceeding was taken, to apply to court set aside such step or proceeding, failing which and where such other party has taken further action while being aware of the irregularity, cannot make such application. In my view, rule 54(3) is specific that if a party fails to deliver a pleading as per the court order, such party is barred. Rule 61, on the contrary, relates to any irregular step or proceeding taken.

[22] I find that rule 61 does not apply to pleadings filed outside the time frames provided for in the court order (case plan order or any extended time allowed by the managing judge), as that is specifically regulated by rule 54(3). I, therefore, find that the argument raised by Mr Narib regarding the applicability of rule 61 to the present matter lacks merit and falls to be dismissed, as I hereby do.

[23] When all is said and done, the fact remains that the defendants were barred from filing their replication to Supra’s plea to their counterclaim by their failure to comply with the court order. I find, as a matter of consequence, that the replication filed by the defendants is of no consequence and is regarded *pro non scripto*.

[24] Similar to the special plea raised by Commercial where no replication was filed by the defendants, the same fate applies to the special plea raised by Supra. Having concluded that the defendants filed no replications to the special pleas it follows that the special pleas are to be decided unopposed by the defendants and upon the facts pleaded by the plaintiffs.

Statutory context

The Income Tax Act 24 of 1981

[25] Section 27 and 28 of the Value-Added Tax Act provides that:

'Objections

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

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

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

(4) ...

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

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

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

(7) A person dissatisfied with a decision of the Commissioner under subsection (2) may challenge the decision only under this Part.

Appeals

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

(2) Any person dissatisfied with an objection decision may, within 60 days after the person was served with a notice of the objection decision, lodge with the Commissioner a notice of appeal to the special court for hearing income tax appeals constituted under section 73 of the Income Tax Act, 1981 (Act No. 24 of 1981) or a tax tribunal constituted under section 73A of that Act.

(3) Upon application in writing by a person dissatisfied with an objection decision, the Commissioner may, where satisfied that owing to absence from Namibia, sickness or other reasonable cause the person was prevented from lodging a notice of appeal within the period referred to in subsection (2) and that there has been no unreasonable delay by the person in lodging the notice, accept a notice of appeal lodged with the Commissioner after the expiration of that period.

(4) In any appeal to the special court against an objection decision, the person appealing shall be limited to the grounds set out in the objection referred to in section 27(3).

(5) In deciding an appeal, the special court may make an order –

- (a) affirming or varying the objection decision, including (in the case of an appeal against an objection decision relating to an assessment) a decision to increase or decrease the assessment; or
- (b) remitting the objection decision for reconsideration by the Commissioner in accordance with the directions of the court.

(6) The provisions of section 73(8), (9), (10), (11), (12), (14), (15), (16) and (17) and of sections 74, 75 and 76 of the Income Tax Act, 1981 (Act No. 24 of 1981), and any regulation made under the said Act relating to any appeal to the special court and to any appeal in terms of the said section 76, shall with the necessary changes apply to any appeal under this section.

(7) A person dissatisfied with a decision of the Commissioner under subsection (3) may challenge the decision only under this Part.’ (My underlining)

[26] Section 73 of the Income Tax Act provides that:

'Appeal to special court against Minister's decision

73. (1) Any person entitled to make an objection who is dissatisfied with any decision of the Minister as notified to him or her in terms of section 71(4) may, subject to the provisions of section 73A, appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provisions of this section.

(2) Every court so constituted shall consist of a judge of the High Court of Namibia, who shall be the President of the court, an accountant of not less than ten years' standing, and a representative of the commercial community: Provided that in all cases relating to the business of mining, if the appellant so prefers, such third member shall be a qualified mining engineer.

(3) The Minister may, by notice in the Gazette, constitute such court or courts, and may from time to time by such notice abolish any existing court or courts or constitute such additional courts as circumstances may require.

(4) Any court constituted or deemed to be constituted under the provisions of this Act may, subject to the regulations, hear and determine any appeal lodged under the provisions of this Act or any previous income tax law.

(5) (a) The members of any such court other than judges shall be appointed by the Minister by notice in the Gazette, and shall hold office for five years from the date of the relevant notice: Provided that the appointment of any such member may at any time be terminated by the Minister for any reason which the Minister considers good and sufficient, and shall lapse in the event of the abolition of the court in terms of subsection (3).

(b) Any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(6) The Judge-President of the High Court shall nominate and second a judge or an acting judge of that Court to be the President of such court, and such secondment shall be for such period or for the hearing of such cases as the said Judge-President shall determine.

(7) (a) Every notice of appeal shall be in writing and shall be lodged with the Minister within a period of thirty days after the date of the notice mentioned in section 71(4), and no such notice of appeal shall be of any force or effect whatsoever unless it is lodged within the said period.

(b) At any such appeal the person who made the objection shall be limited to the grounds stated in his notice of objection.

(8) If an assessment has been altered or reduced, the assessment as altered or reduced shall be deemed to be the assessment against which the appeal is made.

(9) At least ten days before the date fixed for the hearing of an appeal the Minister shall send to the person who made the objection or to his duly authorized attorney or representative a written notice of the time and place appointed for the hearing of such appeal.

(10) The hearing of an appeal may be adjourned by the court from time to time to any time and place that may seem convenient.

(11) The sittings of the court for the hearing of such appeals shall not be public, and the court shall at any time on the application of the appellant exclude from such sitting or require to withdraw therefrom all or any persons whomsoever whose attendance is not necessary for the hearing of the appeal under consideration.

(12) The Minister or any person authorized by him may appear in support of the assessment on the hearing of any appeal, and the appellant and any person who is interested in such appeal may appear in person or by his counsel, attorney or agent.

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

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

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

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

(14) Any assessment made by the Minister on reference under subsection (13) shall be subject to objection and appeal as in this Part provided.

(15) Any matter of law arising for decision before the court, and any question as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the President of the court, and the other members shall have no voice in such decision.

(16) Any decision of the court shall be recorded by the Minister.

(17) ...'

The effect of the Kruger judgments

[27] The centerpiece of this question is what is referred to as the Kruger judgments. This is the High Court decision of Kruger (supra) referred to as 'Kruger HC' and the Supreme decision of *Minister of Finance of the Republic of Namibia NO and Others v Kruger and Another*,³ herein referred to as 'Kruger SC'.

[28] In Kruger HC, this court this court declared ss 73(3), 73(5)(a), and 73(9) and 83(1)(b) of the Income Tax Act, unconstitutional and suspended the invalidity for a period of 12 months, to enable the respondents and the Legislature to attend to the said invalidity. In essence this court found that it offends the constitution and the doctrine of separation of powers for a member of the Executive to constitute a court as the Minister is empowered to by s 73(3).

[29] In the Supreme Court, the appeal was against the declaration of s 83(1)(b) of the Income Tax Act as unconstitutional. There was no appeal against the finding of

³ *Minister of Finance of the Republic of Namibia NO and Others v Kruger and Another* 2022 (3) NR 785 (SC).

the High Court that ss 73(3), 73(5)(a) and (b) of the Income Tax Act was unconstitutional.

[30] It was argued by Mr Narib that, considering that ss 73(3) and 73(5)(a) were not appealed against, and, therefore not upset on appeal, it follows that such provisions remain unconstitutional as declared in the Kruger HC. He further argued that resultantly, there is no statutory body akin to s 73(3) Special Tax Court, to adjudicate appeals against the objection decisions made under the VAT Act.

[31] Mr Totemeyer argued the contrary. He argued that what was declared unconstitutional by Kruger HC was ss 73(3), (5) and (9) of the Income Tax Act. He argued further that what was abolished was the authority of the Minister to appoint members of the Special Tax Court and not the Special Tax Court itself.

[32] In determining as to who of the parties is on the correct side of the law, I find it imperative to have regard to what was declared unconstitutional and the basis of such finding. Counsel are *ad idem*, and correctly so in my view, that in Kruger HC, the court found that it offended the Constitution and the doctrine of separation of powers for the Minister, a member of the Executive, to be empowered to constitute and appoint members of the Special Court to hear income tax appeals.

[33] The argument that occupied the parties as to whether Kruger HC means that there is no special court to adjudicate tax appeals, in my view, can be disposed of without breaking a sweat. This is premised on the fact that one peruses Kruger HC with no trace of a declaration of the special court (to hear income tax appeals) as unconstitutional. To the contrary, and stated above, the Kruger HC was concerned with the fact that a member of the Executive is clothed with powers to appoint members of the Special Court as offensive to the doctrine of separation of powers.

[34] I further find that the provisions of s 73(1) which provide for the appeal to the special court by any person dissatisfied with any decision of the Minister remain extant. Similarly s 73(2) which provides for suitable members to be appointed to the special court remain unquestioned. Section 73(4) which provides that the special court may hear and determine any tax appeal was equally not declared

unconstitutional and thus remains valid. The provisions of ss 27 and 28 of the VAT Act, cited hereinabove, have not been tempered with and thus remain effective.

[35] The above provisions, in my considered view, beg for the conclusion that the special court or its existence was not by any stretch of imagination declared unconstitutional nor is it implicit in the finding of Kruger HC that the special court is unconstitutional or non-existent.

[36] I, therefore, find that the arguments raised by Mr Narib that there is, as a result of *Kruger HC*, no special court to adjudicate tax appeals against objection decisions made under the VAT Act, lack merit. I find that the special court provided for in s 73 as an institution exists and could hear appeals subject to its members being appointed in accordance with the findings in the *Kruger HC*. The *Kruger HC* requires that an amendment of the Income Tax Act be promulgated to prevent empowering a member of the executive from appointing members of the special court and thereafter the special court can convene. Despite the fact that this is yet to occur, it could occur as soon as amendments to the Income Tax Act are promulgated and the court could be operational.

Does the High Court have jurisdiction?

[37] Mr Narib argued further that this Court retains its inherent jurisdiction by virtue of Article 80(2) of the Constitution.⁴ He placed reliance on a decision of the Supreme Court of *Du Preez v Minister of Finance*⁵ where the following was stated at para 24:

[24] The establishment of the Special Income Tax Court does not entirely oust the jurisdiction of the ordinary courts. The South African courts have held that the ordinary

⁴ Reliance was also placed on the Supreme Court decision of *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC) at p 17 para 32.

⁵ *Du Preez v Minister of Finance* 2012 (2) NR 642 (SC) para 24.

courts retain their 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 to the question of taxation where no questions of fact arise. The primary issue raised in this case is whether the imposition of interest and additional tax was 'unfair and unreasonable' administrative action. I am prepared to accept for the purposes of this case, that this is a legal question that the high court may determine. Given the outcome of this case, however, it is not necessary to decide this question finally in this appeal.'

[38] Mr Narib further argued that this court is vested with inherent jurisdiction to adjudicate all civil matters, including any dispute, regarding a disputed tax assessment, a tax benefit or a tax liability. He argued further that ss 27 and 28 of the VAT Act also do not oust the jurisdiction of this court. Mr Narib further argued with emphasis that that there is no subsidiary legal norm or legislative provision which is by-passed by invoking the jurisdiction of the court, and the doors will be closed to assessment of the appeals if the court does not invoke its inherent jurisdiction.

[39] Mr Totemeyer argued against the defendants' arguments pound for pound as it were. He submitted that the special court is a court of appeal and not of review. The special court affords a taxpayer the right to a complete and fresh rehearing on the merits of his or her objection against any assessment or determination made by the Commissioner. He further argued that the special court is a specialised body constituted to adjudicate tax appeals.

[40] Mr Totemeyer further argued that should this court assume jurisdiction over the matter, the plaintiffs will be deprived of the opportunity to pursue the appeals on the merits and will be limited to a narrow scope.

[41] In respect of the argument that the jurisdiction of this court is not ousted by the Income Tax Act, Mr Totemeyer argued that this court does not have an inherent appeal jurisdiction regarding administrative decisions. He argued that the court will have appeal jurisdiction regarding administrative decisions where the statute specifically creates the right to appeal to this court that such jurisdiction exists. He argued with force and might that this court's jurisdiction relating to the objection

decisions (including the counterclaims in this matter which are based on the objection decisions), is limited to review jurisdictions.

[42] Mr Totemeyer in argument agreed that the review jurisdiction of this court is not ousted by the Income Tax Act. He however argued that the counterclaims and the plaintiffs' objections require an adjudication of the merits.

[43] There is no dispute between the parties, correctly so in my view, regarding the inherent jurisdiction of this court in civil cases.⁶

[44] As alluded to above, the defendants' counterclaim is based upon the determination dated 30 March 2022 in terms of s 80(2) and 25(1)(c) of the VAT Act. The plaintiff state that they lodged written objections to the said determination with the Commissioner within the prescribed period of 90 days. The counterclaims of the defendants are based on the said determination. Literally, the counterclaims are based on the determination which are subject to an appeal before the special court for hearing of tax appeals. The hearing of the counterclaims by this court will, therefor, in my view, be tantamount to hearing a tax appeal, as both are based on the same facts and findings.

[45] It should be remembered that an ordinary appeal comprises of a rehearing of the merits of the matter limited to the evidence on which the decision of an inferior body was based. The wide appeal however goes beyond that and entails a rehearing of the matter and a fresh determination of the matter. This is the case with appeals to the special court for hearing tax appeals which permits a rehearing of the merits of the matter.

[46] Human R in *HNP v Sekretaris van Binnelandse Sake*,⁷ remarked as follows at p 280D-E regarding the right to appeal against a decision of an administrative official or tribunal:

⁶ Article 80(2) of the Namibian Constitution. *Masule v Prime Minister of the Republic of Namibia (supra)*. *Du Preez v Minister of Finance (supra)*. *Mugimu v Minister of Finance and Others* 2017 (3) NR 670 (HC) para 65.

⁷ *Sekretaris van Binnelandse Sake* 1979 (4) SA 274 (TPA) at p 280D-E.

'Any right of appeal that there they may be from the decision of an administrative official or tribunal clothed with statutory powers, but which is not an inferior court, exists only if an appeal has specifically been created by the relevant statute. There is no appeal on the merits from the decision of an administrative official exercising discretionary powers, unless afforded by the statute.'

[47] Section 73(6) of the Income Tax Act empowers the Judge-President of this court to nominate and second a judge or acting judge of this court to be the president of the special court. Appeals against decision of a special court. Section 76(1) and (2) on the other hand provides that the appellant in a special court or the Minister may appeal against any decision of that court to the Supreme Court. This, in my view, does not confer the appeal jurisdiction tax appeals to this court. The Income Tax Act further does not expressly confer appeal jurisdiction on this court.

[48] I find that since the Income Tax Act provides for tax appeal process to special court that is the court clothed with the jurisdiction of the tax appeals and related matters. It will be gravely unfair to the taxpayers concerned and the Minister for appeal process guaranteed to taxpayers and the Minister in the Income Tax Act to be circumvented through an appeal to this court or in a like manner or through a counterclaim on the same issue pending appeal to a special court.

[49] Considering further that the Legislature made it clear in the Income Tax Act that an appeal from the special court can only be lodged with the Supreme Court and with no mention of this court, supports the finding that this court lacks the necessary jurisdiction to adjudicate an appeal and similarly a counterclaim based on the determination that is subject of an appeal before a special court.

The stay of proceedings

[50] It was argued by Mr Narib that in the event that the defendants' arguments were not upheld that this court has the necessary jurisdiction to adjudicate their counterclaims, then the plaintiffs' claims should be stayed with costs, pending the final determination of the dispute by the special court for hearing of tax appeals constituted under the Income Tax Act. He argued that this is a legal point, even if it is

not pleaded that is raised on the authority of the Supreme Court decision of *Standard Bank Namibia Limited v Nekwaya*.⁸

[51] Mr Narib argued that in terms of s 38(2)(a) of the VAT Act, the Commissioner shall first apply the amount of the refund in reduction of any tax, levy, interest or penalty payable by that person and in *casu*, the appeal is against the finding of the Commissioner that the defendants are liable to pay VAT above the claim for interest launched.

[52] Mr Totemeyer argued that a stay of the proceedings is not sought by the defendants in the pleadings, and no case for such relief is made out. On this basis, he argued a stay of proceedings should not be entertained.

[53] The Supreme Court in the *Standard Bank* matter (*supra*) remarked as follows as paras 41-42:

[41] In respect of the legal point raised on appeal, this court in the matter of *Arangies v Neves & others*⁹ had held that parties had been 'permitted to raise issues of non-compliance or illegalities for the first time on appeal'. This court referred with approval to the matter of *Cole v Government of the Union of SA*¹⁰ where Innes J dealt with the same issue and remarked that there seemed to be no reason, either on principle or on authority, to prevent a litigant to take advantage of a legal point on appeal. It was also pointed out that if there was no unfairness to the party against whom it is directed, the court is bound to deal with it. The court held that: 'In presence of these conditions a refusal by a court of appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong'.

[42] Thus this court¹¹ in *Arangies* echoed the sentiments of Innes J in *Cole* where it held that it 'would create an intolerable position if a court of appeal is precluded from giving the

⁸ *Standard Bank Namibia Limited v Nekwaya*, Case no. SA 95/2020, delivered on 1 December 2022.

⁹ *Arangies v Neves & others* 2019 (3) NR 671 (SC) para 46-47.

¹⁰ *Cole v Government of the Union of SA* 1910 AD 263 at 272-273.

¹¹ Per Smuts JA.

right decision on accepted facts merely because one of the parties had failed to raise a legal point.’

[54] It is apparent from the Standard Bank decision that a litigant is allowed to raise a point of law for the first time on appeal in certain circumstances, for example where no unfairness is caused to the other party thereby.

[55] In *casu*, the argument by the defendants to stay the proceedings goes to the root of the plaintiffs’ claim as it is sought to stay the whole claims pending the final determination of the matter by the special court. The decision sought is, *prima facie*, likely to cause unfairness to the plaintiffs for it to be granted outright without being pleaded. This will further mean that the plaintiffs will not be afforded the opportunity to exercise their right to be heard on the issue of whether or not to stay the proceedings. For that reason I am not satisfied that a case has been made out for a stay of the proceedings to be granted. I am, therefore, not inclined to grant a stay of proceedings.

Conclusion

[56] In consideration of the findings and conclusions reached herein above, I find that the plaintiffs this court has no inherent jurisdiction to entertain appeals from administrative tribunals. The court is clothed with the appeal jurisdiction when a particular confers such right on a party aggrieved by a particular decision. I further find the special court for hearing appeal tax matters exist as provided for in the Income Tax Act, and its existence was not declared unconstitutional and invalid.

[57] The special court is the specialised court designated by the Legislature to adjudicate over appeal tax matters. It consists of members with specialised expertise to hear the merits of the tax appeals which constitutes a re-hearing of the matters, and this is the court clothed with the necessary jurisdiction to adjudicate tax appeals. The Income Tax Act does not confer appeal jurisdiction over tax appeal matters to this court. As a result, I find that this court lacks the necessary jurisdiction to entertain tax appeals and the related counterclaims filed by the defendants which

require adjudication of the merits and which are specifically assigned to the special court. The special plea of lack of jurisdiction, therefore, succeeds.

[58] In the event that I am wrong in the decision that this court lacks the necessary jurisdiction to entertain the counterclaims in this matter, I refuse to exercise jurisdiction over the counterclaims filed which relates to tax appeals as there is a special court with specialised expertise in the concerned to adjudicate over the matters.

Costs

[59] It is settled law that costs follow the result. No compelling reasons were advanced to deviate from the said principle neither could such reasons be deduced from the record. As a result the plaintiffs who are successful in these proceedings regarding the special pleas will be awarded costs.

Order

60] For the above reasons, I make the following order:

1. The plaintiffs' special pleas of lack of jurisdiction to adjudicate the defendants' counterclaims, are upheld.

2. The defendants must jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs occasioned by the special plea on a party party scale and such costs to include costs of one instructing and one instructed legal practitioners.

3. The matter is postponed to 28 September 2023 at 08:30 for status hearing.

4. Parties must file a joint status report on or before 25 September 2023.

OS SIBEYA
Judge

APPEARANCES

PLAINTIFFS:

R Totemeyer, SC
Assisted by C E Van der Westhuizen
Instructed by H.D. Bossau & Co,
Windhoek

DEFENDANTS:

G Narib

Assisted by E Nekwaya,
Instructed by the Government Attorney,
Windhoek