

REPUBLIC OF NAMIBIA



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

Case no: HC-MD-CIV-MOT-REV-2022/00614

In the matter between:

JOSEPH EBEN TUZEMBEHO	1ST APPLICANT
HEBERT TJONGARERO	2ND APPLICANT
VIVIAN UPINGISANA	3RD APPLICANT
EDWARD LOUIS	4TH APPLICANT
KATAMUNDU KAHORONGO	5TH APPLICANT
DAWID MOOTU	6TH APPLICANT
WENDY KAMUIIRI	7TH APPLICANT
FREDRIK TJIKUZU	8TH APPLICANT

and

NAMIBIA REVENUE AGENCY (NAMRA)	1ST RESPONDENT
ATTORNEY-GENERAL OF NAMIBIA	2ND RESPONDENT
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	3RD RESPONDENT
MINISTER OF FINANCE	4TH RESPONDENT
COMMISSIONER FOR INLAND REVENUE	5TH RESPONDENT
COMMISSIONER OF REVENUE AGENCY	6TH RESPONDENT
CHAIRPERSON OF THE BOARD OF NAMRA	7TH RESPONDENT
NEDBANK LIMITED	8TH RESPONDENT
STANDARD BANK NAMIBIA LIMITED	9TH RESPONDENT

FIRST NATIONAL BANK NAMIBIA

10TH RESPONDENT

UNIVERSITY OF NAMIBIA

11TH RESPONDENT

SANLAM NAMIBIA HOLDINGS

12TH RESPONDENT

Neutral Citation: *Tuzembeho v Namibia Revenue Agency (NAMRA)* (HC-MD-CIV-MOT-REV-2022/00614) NAHCMD 620 (06 October 2023)

Coram: MASUKU J

Heard: 12 September 2022

Delivered: 06 October 2023

Flynote: Civil Procedure - Requirements for the granting of an interim interdict - Whether the court may grant an interdict in relation to performance of duties under a valid and binding piece of legislation whose provisions are sought to be impugned in related constitutional proceedings - Legislation - Income Tax Act 16 of 1981, as amended, ('the Act').

Summary: The applicants are Namibian individuals some of whom are employed by various institutions. They were issued with refunds by the tax authorities which are now suspected to have been fraudulent. The Namibia Revenue Authority, (Namra), in pursuance of the provisions of the Act called upon the applicants to provide documents in support of the refund, which it is claimed the applicants failed to provide. This culminated in Namra assessing the applicants' liability and issued instructions to the employers of the applicants to effect deductions from the applicants' salaries and emoluments. The applicants lodged a constitutional application challenging some of the provisions of the Act which application is to be heard in due course. In the interim, they applied for an order temporarily staying the implementation of certain provisions of the Act, pending the constitutional challenge. The applicants further sought an interim order compelling Namra to cease further deductions from their salaries and to also refund all the money it has deducted from the applicants in terms of the Act pending the constitutional challenge. The respondents opposed the application, chiefly stating that they

complied with the provisions of the Act and that it would appear and they allege that the applicants received money as tax refunds to which they were not entitled, thus entitling Namra to invoke the appropriate provisions of the law, which they did.

Held: That an applicant for the granting of an interim interdict must show that he or she has (i) a prima facie right although open to doubt; (ii) a well-grounded apprehension of harm if the relief is not granted; (iii) that the balance of convenience favours the granting of interim relief and (v) that the applicant has no other satisfactory remedy.

Held that: In the instant case, Namra is following the provisions of the Act which have not yet been held to be unconstitutional. For that reason, the applicants are not entitled to an interim interdict, the effect of which is to stop Namra from following the provisions of legislation that is binding.

Held further that: Because Namra was following the provisions of the Act which remain binding and enforceable, until set aside, the applicants had failed to establish a prima facie right and such the application for the relief sought must be refused.

Held: That it would only be once the provisions sought to be impugned have been held to be unconstitutional that Namra can be properly prevented from applying the unconstitutional provisions, as found by the court.

ORDER

1. The application for the stay of the decision made by the first respondent and that the Namibia Revenue Authority be interdicted and restrained from implementing its decisions, is refused.

2. The application for the 8th to 12th respondents to temporarily cease all and any deductions paid over to the Namibia Revenue Authority, is refused.
3. The application that the Namibia Revenue Authority refunds the money already deducted from the applicants, is refused.
4. Costs of the application are reserved for determination together with the constitutional challenge in Part B.
5. The matter is postponed to **19 October 2023** at **08:30** for directions regarding the conduct of the matter.
6. The parties are ordered to file a joint status report, together with a proposed draft order regarding the further conduct of the matter on or before close of business on **16 October 2023**.

RULING

MASUKU J:

Introduction

[1] This is an interlocutory application in which the applicants seek the granting of interim relief, pending a constitutional challenge to the validity of certain provisions of the Income Tax Act 24 of 1981, as amended, ('the Act').

[2] The applicants, in their wisdom, decided to adopt a two-pronged approach to the matter. They filed the present application as Part A and the constitutional application, as Part B. What is in essence sought in the present application, is an order temporarily staying all deductions from the applicants' salaries by the sixth respondent, the Namibia Revenue Authority ('Namra') and that all the money deducted from their salaries by Namra, be paid back to them, pending the determination of the constitutional application referred to above.

[3] The interim relief sought by the applicants is heavily opposed by the respondents, who came out guns blazing, importuning the court to dismiss this application with costs. The fate of the application will become apparent as this ruling unfolds.

The parties

[4] The applicants are various Namibian citizens, who are residents of Windhoek. They reside in various places within the Khomas Region. It is not necessary to identify them one by one, considering the collective relief they seek. What is common to them all, as they allege in their papers, is that they were issued with notices in terms of s 83 of the Act in terms of which demand was made for each of them to pay a specified amount to Namra.

[5] In this regard, certain entities, which appear as the eight to twelfth respondent, were ordered in terms of the Act, as employers, to deduct the amount allegedly owing to the fiscus by the applicants.

[6] Except for the employers, mentioned above, and cited as the eighth to the twelfth respondent, the rest are Government respondents, which include the Attorney-General, the Minister of Finance, the Government of the Republic of Namibia and the Chairperson of the Board of Namra. I will refer to them collectively as 'the Government respondents'. Where there is need to refer to a particular respondent, it shall be referred to using the appellation mentioned in the citation above.

Background

[7] Reduced to the bare minimum, the applicants, as briefly stated above, alleged that they were served with notices in terms of the Act and were, in that connection, required to make good the amount they allegedly owe to the fiscus in tax. The first applicant was alleged to owe N\$1 292 428, 06. The second applicant was alleged to owe N\$325 246, 43. The third applicant was to pay N\$160 775, 26, whereas the fourth applicant was alleged to owe N\$1 069 h 871, 66. The fifth applicant was alleged to owe N\$209 102, 23, whereas

the sixth applicant was alleged to owe N\$366 330, 35. The seventh applicant was adjudged to owe the fiscus N\$467 025, 53. Last but by no means least, the eighth applicant was recorded as owing N\$85 289, 24.

[8] The refrain from the applicants is that these deductions, which were ordered by Namra have placed a heavy financial burden on them such that they have landed in financial distress, unable to keep up with their other obligations to their families and other debtors. It is to the court that they have resorted for the court to suspend the on-going deductions from their salaries, pending the outcome of the constitutional application, which they have already launched.

[9] It should be mentioned that the eight to twelfth respondents do not oppose or support the application. In this regard, the eighth respondent, filed a notice to abide.

[10] The Government respondents, on the other hand, oppose the application. They contends that the applicants submitted tax returns with farming expenses during the years 2018 to 2021. Upon investigating the refunds issued to the applicants, Namra alleges that it found that some refunds were fraudulent, as there were no source documents in support thereof, hence the invocation of the provisions of s 64 of the Act to assist Namra in confirming the payments to the applicants.

[11] It is the Government respondents' case that the applicants have failed to make out a case for the granting of the interim relief. The said respondents maintain that the applicants owe the amounts set out above and they claim that they have acted purely in terms of the applicable law and the court cannot, at this stage, interfere with the process they have followed, which is allowed by the Act.

The applicable law

[12] It is common cause among the parties that the law applicable to the granting of interim relief, which is what the applicants claim, is settled. The formulation of the applicable principles, is traced to the requirements set out by Corbett J in *L F Boschoff Investments (Pty) Ltd v Cape Town Municipality*.¹ The learned Judge stated the requirements in the following manner:

‘Briefly these requisites are that the applicant for such temporary relief must show –

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.’

[13] There is no doubt that these requirements for the granting of interim interdicts have, over time, become part of the law of Namibia. They have been applied in many cases, too numerous to count. One that readily comes to mind is the case of *Vorster v Government of the Republic of Namibia*.²

[14] It is with regard to the above principles that the determination whether the applicants are entitled to the relief they seek, will be made. I will now turn to the arguments advanced on behalf of the parties by Mr Rukoro, for the applicants and Mr Tibinyane, for the Government respondents.

The parties’ arguments

[15] The mainstay of the applicants’ argument, as advanced by Mr Rukoro, is that the amount of money the agents ie, the employers, being the eighth to

¹ *L F Boschoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F.

²*Vorster v Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2019/00307) [2019] NAHCMD 334 (6 September 2019).

twelfth respondents, are remitting in pursuance of the provisions of the Act, leave the applicants with little or no money to be able to take care of themselves and their families. They are in fact left impecunious after the monthly deductions are effected. It was accordingly argued that the balance of convenience favours them.

[16] It was further submitted by Mr Rukoro that in the circumstances, the applicants are left with no other suitable remedy, as a claim for damages, if pursued, would be of little comfort as the pain of being rendered impecunious is ongoing. It was further argued that Namra is invoking an unfair administrative action by effecting the deductions and as such, the court should come to the applicants' rescue by issuing interim relief, pending the hearing of the constitutional application.

[17] Mr Tibinyane, for the Government respondents, argued contrariwise. It was the pinnacle of his submissions that the respondents did nothing more than follow the provisions of the Act and to the letter. It was his case that the decisions taken by the respondents were not arbitrary or unfair as the applicants were afforded an opportunity to challenge their assessed indebtedness.

[18] It was also urged on behalf of the respondents that the court should not lose sight of the fact that the commonality of the case against the applicants is that they all received refunds from the fiscus, which they have failed to justify with reference to relevant documents. It was on that very basis that the provisions of the Act, which culminated in the appointment of agents in terms of the Act, who were in law required to effect deductions from the applicants' salaries, were invoked. Mr Tibinyane thus urged the court to dismiss the application with costs.

Determination

[19] I am of the considered opinion that the issue of urgency, which the parties addressed in their heads of argument, is no longer of any moment. I

say so for the reason that when the matter was first called, on an urgent basis, the court, for reasons stated declined to deal with it on an urgent basis. The provisions of rule 73 were not invoked. It thus stands to reason that the matter is now being dealt with in the ordinary course.

[20] I am of the considered view that in deciding this very issue whether the applicants are entitled to the relief they seek, one should not close one's eyes to the relief sought in Part B of the application, namely, the constitutional relief, in terms of which certain provisions of the Act are sought to be impugned by the applicants as being unconstitutional.

[21] The difficulty that faces the court, in dealing with this matter, is that it is required, understanding the perilous position in which the applicants depose they find themselves, to stay the implementation of legislation, which is, at this moment valid before the determination regarding the constitutional invalidity has been decided. It places the court in a rather precarious position to order Namra not to enforce provisions of the Act, which as we speak, remain valid and enforceable.

[22] It would appear to me that the court would be placing the proverbial cart before the horse, if it were to incline towards what the applicants importuned. I say so for the reasoning of the Supreme Court in *Minister of Finance v Hollard Insurance Company of Namibia*,³ where the court reasoned as follows:

'[87] I am fortified in that view by the appellants' correct foundational premise that a duly enacted law must be complied with, until it is set aside in terms of the Constitution. Once a law is enacted, has been assented to and comes into force, it unquestionably represents the law of the land on the subject it covers.'

[23] When proper regard is had to the above quotation, it makes it immediately plain that the Act remains in force and that it must, until set aside by a competent court, in appropriate proceedings, be enforced by this court.

³ *Minister of Finance v Hollard Insurance Company of Namibia* 2020 (1) NR 60 (SC), p 82.

This renders the interim relief that the applicants seek, an invasion by the court into realms that it should not venture at this juncture. This is so because the proceedings sought to impugn the relevant provisions have not yet been decided. To grant the interim relief at this stage, would thus be tantamount to second-guessing the ultimate finding in Part B that the provisions relied on by the respondents, are unconstitutional but before that question fully and properly serves before the court.

[24] Having said this, the main question that lingers and cries for determination, is whether the applicants do, in the instant case, have a right to the order they seek before the provisions they seek to impugn, are set aside as unconstitutional. It appears to me that the validity of the provisions cited remains. Once that position stands, it would appear that the court cannot, in the circumstances, properly grant the interdictory relief sought by the applicants.

[25] It therefor appears that the applicants have not, in the premises, satisfied the first requirement, namely, that they have a *prima facie* right, although open to some doubt. I say so because the Government respondents claim that their actions are in line with the current statutory regime in place. It is only once the provisions are held to be unconstitutional that the court can be properly placed to grant the relief sought by the applicant.

[26] The learned author C B Prest,⁴ states the following, where he deals with the *prima facie* right in granting an interim interdict:

‘The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed, and if he does not do so, the application must fail. An applicant must establish “some just right”. It must not be a mere moral right; it must be a strict legal right.’

[27] In view of the foregoing, I am of the considered view that the applicants have not, in the instant case, been able to establish a *prima facie* right as

⁴ C B Prest, *Interlocutory Interdicts*, Juta & Co, 1993, p56.

required. The application, must, for that reason fail. I find it unnecessary, in the circumstances, to deal with the rest of the requirements of the interim interdict, considering that the applicants have, in my judgment, failed at the first hurdle.

[28] Having said this, I must mention that I am not insensitive to the plight of the applicants, regarding the harsh effects the decisions made by Namra have on them and their families. The court can, however, only intervene in terms of the law. The instant case would therefor call for the declaration of unconstitutionality in the applicants' favour, before the court could have the right to interfere with the respondents' exercise of their powers and functions under the Act.

Conclusion

[29] In view of the discussion and conclusions reached above, I come to the considered opinion that the application for the granting of an interim order must fail. As indicated, the fact that the court may sympathise or empathise with the applicants does not constitute a valid reason in law to grant the order they seek. All that can be done, is to speed up the hearing of the constitutional case in Part B of the application so that the applicants know the fate of their application at the earliest possible time.

Costs

[30] The ordinary rule that applies is that costs should follow the event. That said, the court however retains a discretion in issues of costs. I consider that the matter is not at a final end. I will, for that reason, reserve the determination of the costs of this application. They will be determined together with the costs of the constitutional application.

Order

[31] Having due regard to what is stated above, I am of the considered opinion that the following order commends itself as appropriate in this matter:

1. The application for the stay of the decision made by the first respondent and that the Namibia Revenue Authority be interdicted and restrained from implementing its decisions, is refused.
2. The application for the 8th to 12th respondents to temporarily cease all and any deductions paid over to the Namibia Revenue Authority, is refused.
3. The application that the Namibia Revenue Authority refunds the money already deducted from the applicants, is refused.
4. Costs of the application are reserved for determination together with the constitutional challenge in Part B.
5. The matter is postponed to **19 October 2023** at **08:30** for directions regarding the further conduct of the matter.
6. The parties are ordered to file a joint status report, together with a proposed draft order regarding the further conduct of the matter on or before close of business on **16 October 2023**.

T S MASUKU
Judge

APPEARANCES

APPLICANTS: S Rukoro

Instructed by: Jerome Tjizo & Co. Inc., Windhoek

RESPONDENTS: L K Tibinyane

Of Office of the Government Attorney