NOT REPORTABLE

CASE NO.: A 74/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GIDEON JACOBUS DU PREEZ **Applicant**

and

THE MINISTER OF FINANCE **Respondent**

CORAM: **PARKER J**

Heard on: 2011 February 28

Delivered on: 2011 March 25

JUDGMENT:

PARKER J:

[1] The applicant, represented by Mr. Vaatz, has brought an application by notice of motion; and the applicant says that the application is brought-

> '...in terms of Article 18 of the (Namibian) Constitution ... for an order in the following terms:
>
> (1) Reviewing and correcting or setting aside the decision by the Respondent against the Applicant for the years 2000 to 2008 claiming an amount of N$100,769.09 in respect of interest and N$51,339.22 in respect of arrear tax. Such a high claim for arrear interest is unfair and unreasonable and thus subject to review in terms of Article 18 of the Constitution of the Republic of Namibia.

> (2) Granting such further and/or alternative relief as this Honourable Court may deem it;
>
> (3) Ordering the Respondent, to pay the costs of this application in the event of the matter being opposed.

The respondent, represented by Ms Potgieter, has moved to reject the application.

[2] It is wrong to say that the application has 'been brought in terms of Article 18 of the (Namibian) Constitution'; for, Article 18 merely guarantees a particular basic human right to individuals, sc. the right to 'administrative justice'. The application is brought rather in terms of Article 25(2) to 'enforce or protect such a right Chapter 3 of the Namibian Constitution contains basic human rights and an enforcement mechanism in terms of Article 25(2) in order to make those basic human rights justiciable in respect of individuals. The basic human rights are not inherently justiciable. The justiciability of the basic human rights in Namibia is provided for by the Constitution; and that is the basis upon which 'aggrieved persons' are 'entitled to approach the Court to enforce or protect' any of those basic human rights, including the Article 18 right.

This conclusion leads me to the next level of the enquiry; and I note at the threshold that this matter falls within an extremely short and simple compass.

[3] The applicant has brought basically a review application. That being the case the following principles should apply. The issue before the Court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal the review Court 'will not enter into, and has no jurisdiction to express an opinion on, the merits of an act of an administrative

body or an administrative official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review'. *(Davies v Chairman, Committee of the JSE* 1991 (4) SA 43 at 46H and the textual and case law authorities relied on) Thus, judicial review is not concerned with the decision, but with the decision-making process. *(Khader v Chairman, Town Planning Appeals Board* [1998] 4 All SA 201 (N) at 207) Of course, the reason for bringing proceedings under review or an appeal is in the normal cause of events the same, that is, to have the decision set aside. But where the reason for wanting this is, as is the situation *in casu,* that the decision maker took a wrong decision on the facts or the law, the appropriate remedy is an appeal (which, significantly, is provided for by the Act). But where the real grievance is against the procedure followed in the decision making it is proper to bring the decision under review (See Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa,* Vol. 2, 5th edn: p.1271.)

[4] It is incontrovertible and clear on the papers that the grievance of the applicant is that the respondent took a wrong decision on the facts or the law and so the applicant wants the decision to be set aside for that reason.

[5] In this regard, on the purpose of judicial review, I cannot do any better than to respectfully adopt that which was explained by Damaseb JP in *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 at 701H-J:

> 'Purpose of judicial review
>
> [53] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary (i.e. an administrative body or an administrative official) who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial

> review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires.*' If the decision is one that the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision.
>
> With limited exceptions, namely an error of law on the face of the record and the still-evolving doctrine of proportionality, the Courts are in principle not prepared to review the merits of the decision unless Parliament has created a statutory right of appeal. (See *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46-48; *The Western Australia Law Reform Commission* (1986) at para 1.9.) It must be borne in mind that 'in the absence of irregularity or unlawfulness, considerations of equity do not provide any ground of review'; *Davies (supra)* at 47G.'

[6] Additionally, one must not lose sight of the fact that there is no onus on the respondent whose conduct is the subject-matter of review to justify his or her conduct. On the contrary, the onus rests upon the applicant for review to satisfy the Court that good grounds exist to review the conduct complained of. *(Davies v Chairman, Committee of the JSE* supra; cited with approval in *Immanuel* supra at 702B)

[7] Has the applicant placed before the Court grounds which meet the epithetical mark 'good' in order to persuade the Court to review the conduct complained of? That is the only question that I must answer in these proceedings; and I proceed to do that now. All that appears on the papers and was taken up in refrain with great enthusiasm and verve by Mr. Vaatz is that the decision by the respondent contained in the computer printout of the income tax claims by the respondent against the applicant for the period 2000 to 2008, claiming an amount of N$100,769.09 in respect of interest and N$51,339.22 in respect of arrear tax 'is wrong' because 'such high claim for arrear interest is unfair and unreasonable and thus subject to review in terms of Article 18'. That

is all that Mr Vaatz puts forth on behalf of his client that the respondent acted unfairly and unreasonably. Doubtless, Article 18 of the Namibian Constitution, which counsel is so much enamoured with, enjoins administrative bodies and administrative officials to act fairly and reasonably, among other requirements; but counsel does not tell the Court upon what *legal basis* the respondent's decision complained of is alleged to be unfair and unreasonable within the meaning of Article 18; that is, on what ground, *as a matter of law,* is the respondent's decision unfair and unreasonable. (Italicized for emphasis)

[8] In *Trustco t/a Legal Shield and Another* Case No. A 150/2008 (Unreported) this Court explained fully the meaning of 'reasonableness', and the meaning of the adverb derivative 'reasonably' and what constitutes 'unreasonable' decision, particularly in judicial review proceedings under Administrative Law, as the present proceedings are; and I quote it here *in extenso* for a good reason, as will become apparent in due course. There, at pp. 28-29, the Court explained:

> '[31] In *Re Solicitor* [1945] 1 All ER 445 (Court of Appeal) at 446H, Scott LJ stated, 'The word "reasonable" has in law the prima facie meaning of reasonableness in regard to those existing circumstances of which the actor called upon to act reasonably, knows or ought to know.' And in his authoritative work *Administrative Law* (1984): p. 496, Baxter writes that when 'one is called upon to judge whether a decision is unreasonable, the decision might be viewed from various perspectives. For convenience these have been grouped into three categories' that are not rigidly compartmentalized: they run into each other and overlap markedly. The first category is the basis of the decision; that is, if a decision is entirely without foundation it is generally accepted to be one to which no reasonable person could have come. The second category is the purpose of, and motive for, the decision; that is, it is considered unacceptable for an administrative body and an administrative official to use its or his or her powers dishonestly. The third category is the effect of the decision; that is, reasonable persons do not advocate decisions which would lead to harsh, arbitrary, unjust or uncertain consequences. (See

Baxter, ibid.)

> [32] I respectfully accept Baxter's exposition on 'reasonableness' (the Baxter categories) as apropos to the enquiry presently being undertaken and so I adopt his exposition; that is to say, in my opinion, Baxter's explanation of the term 'reasonable' is a correct interpretation and application of the requirement of 'act reasonably' in Article 18 of the Namibian Constitution. '

[9] Furthermore, as Damaseb JP said in the above-quoted passage in *Immanuel* supra, at 701I, If the decision is one which the decision-maker was authorized to make, the only question which can arise is whether the decision is right or wrong.' It has not been contended that the respondent was not authorized to make the decision complained of by the applicant. And the applicant has not shown that in taking the decision complained of, the respondent acted outside the authority conferred by the Income Tax

Act, 1981 (Act No. 24 of 1981) (as amended) (the Act), that is, that the

respondent acted ultra vires (See *Immanuel* supra at 701I.) For instance, if the Act has outlawed the charging of arrears in tax or interest *in duplum* on such tax then the decision complained of in this matter will be ultra vires, constituting an illegality. An illegality committed by an administrative body or administrative official like the respondent in decision making is a good ground to review the decision that is made in the end because it will constitute non-compliance with a requirement imposed upon such administrative body or administrative official by the relevant legislation according to Article 18 of the Namibian Constitution. *A priori,* that decision would be unreasonable and unfair (for as Levy AJ correctly stated in *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 at 265E, 'an unreasonable decision would always be unfair'), within the meaning of Article 18 because the decision would entirely be without foundation (Baxter, ibid). But, as Ms Potgieter correctly submitted, interest *in duplum* is not outlawed by the Act; neither is the charging of tax in arrears. Thus, the existing circumstances under which the

respondent acted is the validity of the relevant provisions of the Act *(Re Solicitor,* ibid.) For these reasons, I come to the conclusion that the respondent's decision is not a decision which no reasonable person could have come to. I also find that the respondent did not use her power under the Act dishonestly or arbitrarily. (See Baxter, ibid.) These findings, on their own, debunk the entire basis of the applicant's grievance, leaving the application bereft of any merit therefore capable of calling in aid Article 25(2) of the Namibian Constitution. Nevertheless, I shall take the enquiry further in order to buttress my conclusion that the present application is singularly lacking in merit.

[10] The applicant does not challenge the decision making procedure that led to the decision complained of; for instance, on the basis that there has been a violation of the common law rules of natural justice of *audi alteram partem* or *nemo judex idoneus in propria causa est,* or any other common law rule whose violation would constitute an irregularity amounting to an unfair and unreasonable decision.

[11] It follows from all the aforegoing that the applicant has not shown that the decision complained of is tainted with an illegality or irregularities or there is an error on the face of the record. (See *Immanuel* supra at 702A.) I have said *ad nauseam* that the sole grievance of the applicant is that interest charged on the tax in arrears and the tax in arrears is unfair and unreasonable; thus, merely rehearsing a part of the provisions of Article 18 of the Namibian Constitution. But I have debunked that grievance.

[12] Having carefully considered the Baxter categories on 'reasonableness' and

the meaning of 'reasonableness' proposed by the English Court of Appeal in *Re Solicitor* supra against the contents of the papers filed of record in these proceedings, I come to the inevitable and reasonable conclusion that the applicant has failed to establish that the act of the respondent complained of is unfair and unreasonable within the meaning of Article 18 of the Namibian Constitution. In sum, the applicant has failed to establish that the decision of the respondent is tainted with irregularities or illegalities that go to show that there has been a failure of administrative justice, within the meaning of Article 18, read with, Article 25(2) of the Namibian Constitution. (See *Immanuel* ibid. and *Davies* ibid.)

[13] For the aforegoing reasoning and conclusions, I firmly hold that the applicant has failed to discharge the onus cast on him to satisfy the Court that good grounds exist to review the decision of the respondent.

[14] In the result, the application is dismissed with costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr A Vaatz

Instructed by: Andreas Vaatz & Partners

COUNSEL ON BEHALF OF THE RESPONDENT:

Ms C Potgieter

Instructed by: The Government Attorney