

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2017/00448

In the matter between:

TCIMS INDUSTRIAL (NAMIBIA) (PTY) LTD

APPLICANT

and

THE MINISTER OF FINANCE

1st RESPONDENT

COMMISSIONER INLAND REVENUE DEPARTMENT

2nd RESPONDENT

MINISTER OF INDUSTRIALIZATION, TRADE

AND SME DEVELOPMENT

3rd RESPONDENT

Neutral citation: *Tcims Industrial (Namibia) (Pty) LTD v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00448) [2018] NAHCMD 188 (28 June 2018)

Coram: PARKER, AJ

Heard: 14 June 2018

Delivered: 28 June 2018

Fly note: Revenue – Income Tax – meaning of ‘manufacturing activity’ in Income Tax Act 24 of 1981, s 1 – Words given wide meaning – The essence of manufacturing is that what is made shall be a different thing from that out of which it is made – Therefore ‘manufacturing activity’ involves final product being made either manually and /or mechanically or by way of other process – Act 24 of 1981 laying down that degree of ‘transformation’ required that process of ‘physical’ or ‘chemical’ transformation of materials should result in a ‘new product’ – Throw-away slag transformed by chemical process into economically valuable and saleable crushed matte and white-metal – Court concluding that process in applicant’s operation amounts to manufacturing activity within meaning of s 1 of Act 24 of 1981 – First respondent’s misinterpretation of s 1 constituting reviewable error of law – First respondent’s decision did not accordingly comply with requirement of relevant legislation and therefore unlawful and invalid – Court finding further that first respondent taking a decision in terms of s 5A(3) of Act 21 of 1981 without ‘concurrence’ of 3rd respondent, abrogated art. 18 of the Namibian Constitution for failure to comply with requirement of relevant legislation – Such decision being unlawful and invalid – Accordingly decision based on s 1 and decision based on s 5A reviewed and set aside – 1st respondent accepting holus bolus 2nd respondent’s misinterpretation of s 1 of Act 24 of 1981 there was no justification to refer the matter back to 1st respondent to reconsider it – Consequently court granted a declaration.

Summary: Revenue – Income Tax – meaning of ‘manufacturing activity’ in Income Tax Act 24 of 1981, s 1 – Words given wide meaning – The essence of manufacturing is that what is made shall be a different thing from that out of which it is made – Therefore ‘manufacturing activity’ involves final product being made either manually and /or mechanically or by way of other process – Act 24 of 1981 laying down that degree of ‘transformation’ required that process of ‘physical’ or ‘chemical’ transformation of materials should result in ‘new product’ – Throw-away slag transformed by chemical process into economically valuable and saleable crushed matte and white-metal – Court concluding that process in applicant’s operation amounts to manufacturing activity within meaning of s 1 of Act 24 of 1981 – First respondent’s decision based on first respondent’s misinterpretation of s 1 constituting reviewable error of law – First

respondent's decision did not accordingly comply with requirement of relevant legislation and therefore unlawful and invalid – Court finding further that first respondent taking a decision in terms of s 5A(3) of Act 21 of 1981 without 'concurrence' of 3rd respondent, abrogated art. 18 of the Namibian Constitution for failure to comply with requirement of relevant legislation. Court found that from slag which is rubbish is transformed by chemical process to crushed matte and white metal – Crushed matte and white metal have economic and saleable value unlike slag – Consequently, applicant's operation constituted manufacturing activity – Court found because third respondent is responsible for industrialisation, trade and small-scale manufacturing enterprise development the intention of Legislature is that his/her 'concurrence' is mandatory – Failure to obtain such occurrence before deciding is a reviewable error of law and is fatal – Consequently, court set aside the two decisions – Court found that because of the hard and unyielding attitude of 2nd respondent whose recommendation 1st respondent accepted holus bolus there was no justification to refer the matter back to 1st respondent to reconsider it – Court found that decision now does not involve technical knowledge and court is not ill-equipped to take the decision – Accordingly, court made a declaration sought in para 2 of the notice of motion.

ORDER

- (a) The decision by first respondent communicated to applicant in a letter dated 12 June 2017 by second respondent is reviewed and set aside.
- (b) It is declared that applicant's operation involving the process of producing white-metal and crushed matte from the slag amounts to manufacturing activity in terms of the Income Tax Act 24 of 1981.
- (c) First, second and third respondents are to pay applicant's costs jointly and severally, the one paying, the other to be absolved, and the costs include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER, AJ:

[1] In this application, applicant seeks the relief set out in the notice of motion, that is, substantively, the reviewing and setting aside of the decision of the 1st respondent and a declaration. In essence, the application concerns applicant's application to first respondent to register applicant's operation as a manufacturing activity within the meaning of s 1 of the Income Tax Act, 1981 (Act 24 of 1981), as amended, and first respondent's refusal to grant the application. The applicant is represented by Mr Barnard, and 1st, 2nd and 3rd respondents by Dr Akweenda. Both counsel submitted helpful written submissions, and I am grateful for their commendable industry.

[2] Dr Akweenda submitted that the issues are narrow and crisp. I agree. The determination of the application turns on a short and narrow compass, and it concerns the interpretation and application of s 1 and s 5A of Act 24 of 1981 and art. 18 of the Namibian Constitution.

B. Para 1 of notice of motion

B.1 Section 1 of Act 24 of 1981

[3] I shall start from the principle that as part of the requirements of fair, reasonable and just administrative action, the administrative body or official concerned must give reasons for its, his or her decision.

[4] In *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC), the Supreme Court, per O'linn AJA, stated that it is implicit in the provisions of art. 18 of the Namibian Constitution that an administrative organ exercising discretion is obliged to give reasons for its decision; and that there can be little hope for transparency if the law

allowed a public authority to keep secret the reasons for its decision. The court concluded that art. 18 requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once the public authority concerned has provided reasons for its decision, and so, not to disclose all the reasons for the administrative action is an abrogation of the principles relating to administrative fairness and justice, required by art. 18, for natural justice implies a right to reasons, rendering the administrative action in question unlawful and invalid.

[5] Mr Barnard submitted that, 'the second respondent is bound to the reason it gave for its decision in the letter informing the applicant of the decision, i.e. that the process employed by the applicant does not amount to a manufacturing activity as defined in section 1 of the Act. The second respondent is not entitled now to rely upon further reasons, that is, the non-compliance by the applicant with the requirements in section 5A(3)(a)' I accept the submission. The reasons in the aforementioned letter ('the 12 June 2017 letter') 'were not supplemented by or on behalf of the Minister (1st respondent) in accordance with the provisions of Rule 53 (1) (b) (now rule 76 (1) (b)) of the Rules of the High Court and ... only attempted to justify these reasons and other new ones in her 'answering affidavit'. (See *Lisse* (SC), para [11].) That is what respondents have done, and that is not right. It is irregular.

[6] For 1st respondent to 3rd respondent, the reasons in the 12 June 2017 letter are the reasons for rejecting applicant's application. (See *Lisse* at para 12.) As I say, I accept Mr Barnard's submission that 1st respondent is bound by the reasons given in the 12 June 2017 letter. It is therefore to that letter that I now direct the enquiry. But before I get to the interpretation and application of s 1 of the Act No. 24 of 1981, I wish to deal with Dr Akweenda's submission that the decision to register applicant's operation as a 'manufacturing activity' is left by the Legislature to the discretion of the Minister (1st respondent). I agree. And I did not hear Mr Barnard say it was not so left. But, as the Supreme Court observed in *Lisse*, per O'linn AJA, when a public authority is to act with discretion, it means the public authority must act within rules of reason,

justice and opinion, according to law not humour and not vague or fanciful, but legal and regular. I now proceed to determine if 1st respondent acted within rules of reason, justice and opinion, according to law, and legal regular, and I so do by considering the interpretation and application of s 1 of Act 24 of 1981.

[7] There is an overwhelming weight of authority supporting the proposition that 'the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made'. (Corbett AJ in *Secretary for Inland Revenue v Safronmark (Pty)* 1982 (1) SA 113 at 122, approving a statement by Darling J in *McNicol v Finch* (1906) 2 KB at 361. See also *Secretary for Inland Revenue v Hersamar (Pty) Ltd* 1967 (3) SA 177 (A) 1967 (3) SA 177 (A). There, the court, per William AJ, at 187, relies on *Income Tax Case 1052*, 26 S.A.T.C 253 at p. 255, where Van Winsen J, after reviewing the authorities, concluded that: 'The article claimed to have resulted from a process of manufacture must be essentially different from the article as it existed before it had undergone such process'.

[8] Furthermore, in *Merlus Seafood Processors (Pty) Ltd v Minister of Finance* 2013 (1) NR 42 (HC), after reviewing a bevy of authorities, including the three cases mentioned in para 7 above, came to a similar conclusion. There, Geier AJ concluded that the Legislature intended the concept 'new products' in section 5A of Act 24 of 1981 to be wide enough to include a transformation that resulted in 'changed' or 'different' products, that is, the end-result has 'changed' and is 'different' to the raw material with which it 'commenced'.

[9] In the instant case, applicant's operation is in a few words the following. Slag, which is rubbish or waste and of no economic value on its own, is by some 'chemical transformation' turned into 'new products' (to use the words of the legislation), being crushed matte and white-metal which would now be usable and saleable commodities; and therefore, of economic value. (See *Secretary of Inland Revenue v Hersamar (Pty) Ltd.*)

[10] The judicial pronouncements in the cases referred to previously constitute a welter of overwhelming authorities that support in no small measure Mr Barnard's submission that first respondent ought to have found that applicant's operation is a manufacturing activity within the meaning of s 1 of Act No. 24 of 1981. The interpretation put on the section by respondents is patently wrong, i.e. an error of law.

[11] As I said in *Viljoen v Chairperson of the Immigration Selection Board and Another* 2017 (1) NR 132 (HC), a misinterpretation of a statutory provision is a reviewable error of law: such misinterpretation resulted in the Minister not complying with the requirement of legislation. The Supreme Court put it succinctly thus in *Chairperson, Council of Municipality of Windhoek and Others v Roland and Others* 2014 (1) NR 247 (SC), para [53]: 'Article 18 imposes an obligation upon administrative officials (and bodies) to comply with requirements of relevant legislation'. I conclude therefore that the first respondent's decision based on the misinterpretation of s 1 of Act 24 of 1981 is offensive of art. 18 of the Namibian Constitution; and therefore, unlawful and invalid.

B.2 Section 5A

[12] On Mr Barnard's submission that in terms of section 5A(3) the Minister of Finance (1st respondent) may grant an application to register a company only with the 'concurrence' of the Minister of Trade and Industry (3rd respondent), Dr Akweenda responded that 'the Minister has to secure the "concurrence" of the third respondent if he decided to register a company'. Counsel continued, 'It is submitted that if the Minister (1st respondent) decides not to register a company the Minister (1st respondent) is not under an obligation to such "concurrence" of the third respondent.'

[13] With the greatest deference to Dr Akweenda, this submission is palpably wrong; and it is with great confidence that I reject it. With regard to the interpretation of s 5A (3), too, there is a reviewable error of law. Indeed, respondents admit in no uncertain terms that 1st respondent decided without the 'concurrence' of third respondent. But the

intention of the Legislature is that because 3rd respondent is responsible for industrialization, trade and small scale manufacturing enterprise development, that requirement is without a doubt mandatory. That, as I hold, is the intention of the Legislature. It follows irrefragably that under s 5A, too, 1st respondent acted without complying with the requirements of the relevant legislation. The result is that the decision respecting the interpretation and application of s 5A(3), too, is unlawful and invalid.

[14] Based on these reasons, I conclude that with regard to the requirements of both s 1 and s 5A(3) of Act 24 of 1981, the decisions are offensive of art. 18 of the Namibian Constitution. Consequently, the court is entitled to review the decisions of 1st respondent and set them aside, as I do.

[15] '[A]s a matter of constitutional principle', stated Smuts AJ, 'the exercise of public power in conflict with the law and thus invalid should be corrected or reversed in accordance with the principles of legality and the rule of law'. (*President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC), para 61) I shall return to this principle in due course.

[16] Based on these reasons, para 1 of the notice of motion is, accordingly, granted. I now proceed to consider para 2 of the notice of motion.

[17] Having set aside 1st respondent's decision on the basis of failure to comply with requirements imposed by the relevant legislation, I need not consider the other grounds of review – common law and constitutional – put forth by applicant. Furthermore, applicant did not ask the court in para 1 of the notice of motion to review and set aside the 1st respondent's decision and correct it. Applicant rather asked for a declaration that 'the process of producing white-metal and crushed matte from the slag amounts to a manufacturing operation'.

C. Para 2 of the notice of motion

[18] As to the declaration; Mr Barnard argued that applicant has made out a case for the grant of declaration. Counsel submitted that the declaratory relief is appropriate because a referral back to the second respondent will be futile. The reason, counsel continued, is that second respondent has repeatedly stated that he is convinced as to the nature of the process employed by applicant; that is, that applicant's operation is not a manufacturing activity, which I have rejected soundly. Thus, Mr Barnard's argument is that 2nd respondent has closed his mind, and a referral of the matter to the decision maker would be futile.

[19] Dr Akweenda's contrary argument is encapsulated in his written submission. Counsel stated:

'It is submitted that the applicant is not entitled to be granted a declaratory order, since the applicant did not meet the requirements of the definition contained in section 1 and the requirements set out in section 5A (3)(b) of the Act. The legislature granted the Minister a discretion. The Honourable Court has a discretion whether to grant a declaratory order. In the present case it is submitted that the Honourable Court should decline to exercise a discretion since according to the Minister and the Commissioner the applicant did not satisfy the requirements set out in the definition contained in section 1 and the requirements contained in section 5A (3)(b) of the Act.'

[20] The analysis I have made and the conclusion I have reached thereon on s 1 of Act 24 of 1981 in para B.1 destroy counsel's argument. The interpretation put on s 1 and s 5A(3) has been shown to be wrong, constituting a reviewable error of law in terms of art. 18 of the Namibian Constitution. Accordingly, I have set aside 1st respondent's decision.

[21] From what I said previously under paras B.1 and B.2, I conclude that the unlawful and invalid decision of 1st respondent violated applicant's right to administrative justice guaranteed to it by art. 18 of the Namibia Constitution; and so, the court will grant a

declaration that the decision is unlawful and invalid. See *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 239 (CA); *Mathlowa v Mahuma* [2009] 3 All SA 288 (SCA). In my judgment, therefore, applicant has established a right – a right to administrative justice – within the meaning of s 16 of the High Court Act, 1990 (Act No. 16 of 1990) which the court should protect by declaration.

D. Should the court correct the unlawful and invalid act?

[22] The applicant does not merely ask that the decision of 1st respondent be declared invalid and unlawful simpliciter. Applicant prays the court, as I have said previously, to declare that 'the process of producing white-metal and crushed matte from the slag amounts to a 'manufacturing activity'. Dr Akweenda argued contrariwise. Counsel submitted that the Legislature has given the administrative official, i.e. 1st respondent, to decide, and the court should not substitute itself for the 1st respondent and decide.

[23] On the issue, the Supreme Court propounded the principle in this way in *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC), para 61, per Smuts AJ, in this way;

'Under the common law, once invalid administrative action is established in review proceedings, the default remedy is to set aside the impugned act and remit it to the decision makers for a fresh decision. Only in exceptional circumstances will a court substitute its own decision for that of the decision maker, as was succinctly set out by the Chief Justice in *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism* 2010 (1) NR 1 (SC). This principle is reinforced by the separation of powers upon which our Constitution is based.'

[24] Some ten years previously in *Minister of Health and Social Services v Lisse* 2006 (1) NR 733 (SC), the Supreme Court set out circumstances under which a court, after setting aside the impugned administrative action, may correct it and not refer it back to the administrative body or official concerned to reconsider and decide afresh. There, the Supreme Court concluded that there was no justification for referring the matter

back to the administrative official, i.e. the appellant Minister, because there had been clear bias against the respondent Lisse, and furthermore, further delays would add to the prejudice which the respondent and his patients had already suffered. Thus, where the administrative official concerned has made up his mind and closed his mind to persuasion, there would be no justification for referring the matter back to the administrative body or official to reconsider the matter or where the referral back to the body or official will result in delays that were likely to prejudice the applicant. The court may itself also make the decision where there are sufficient facts before the court and where the matter is not of a technical nature and the court would not be ill-equipped to make the decision. (*Waterberg Big Game Hunting Lodge Otjihewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC))

[25] In the instant proceedings, upon the facts and in the circumstances, particularly the attitude of 2nd respondent whose recommendation, based on an error of law, the Minister accepted at one gulp, I conclude that there is no justification for referring the matter back to the 1st respondent to reconsider. The applicant would be prejudiced by any further delays, considering this is a business concern. There are employees to think about. There is investment to consider. And more important, the decision to make is now not of a technical nature. And the court is therefore not ill-equipped to make a decision. It involves the interpretation and application of legislation and this court has had the benefit of the authorities relied on in cases where the proper interpretation of 'manufacturing activity' in similar legislation was propounded.

[26] Based on these reasons, I think this is a proper case where the court should make the decision and not refer the matter back to 1st respondent to reconsider it. The only fly in the ointment is that the court cannot make a general declaration as prayed by applicant in para 2 of the notice of motion. Applicant is the aggrieved person and it has come to court to vindicate its constitutional right. The relief the court grants should aim at, and be tailored to, redressing the harm done to applicant. That much, Mr Barnard appeared to agree with. As to costs, I think costs should follow the event.

[27] In the result, I conclude that applicant's application succeeds to the extent set out in the order; whereupon I order as follows:

- (a) The decision by first respondent communicated to applicant in a letter dated 12 June 2017 by second respondent is reviewed and set aside.
- (b) It is declared that applicant's operation involving the process of producing white-metal and crushed matte from the slag amounts to manufacturing activity in terms of the Income Tax Act 24 of 1981.
- (c) First, second and third respondents are to pay applicant's costs jointly and severally, the one paying, the other to be absolved, and the costs include costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

For Applicant:

P C I Barnard
instructed by Cronjé & Co., Windhoek

For 1st, 2nd and 3rd Respondents:

S Akweenda
instructed by the Office of the Government
Attorney, Windhoek