

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK



NAMIBIA, MAIN DIVISION,

RULING

Case No: HC-MD-CIV-ACT-CON-2017/01798

In the matter between:

STUTTAFORDS STORES NAMIBIA (PTY) LTD

PLAINTIFF

and

COMMISSIONER OF INLAND REVENUE

1ST DEFENDANT

MINISTER OF FINANCE

2ND DEFENDANT

ATTORNEY GENERAL OF THE REPUBLIC OF
NAMIBIA

3RD DEFENDANT

Neutral Citation: *Stuttafords Stores Namibia (Pty) Ltd v Commissioner of Inland Revenue* (HC-MD-CIV-ACT-CON-2017/01798) [2020] NAHCMD 397 (14 September 2020)

CORAM: SIBEYA, AJ

Heard: 18-19 November 2019; 10-12 February; 02-03 March and 15 June 2020

Order: 17 August 2020

Reasons: 14 September 2020

Flynote: **Special pleas raised** – Lack of jurisdiction – Matter brought to High Court instead of Special Tax Court – Delay in instituting review proceedings – No Coercive action – Not permissible to bring a collateral challenge where there is no coercive action

– Collateral challenge not allowed to upset a valid administrative act – High Court has the necessary jurisdiction to entertain administrative decisions in tax matters – Special pleas lack merits.

Summary: The plaintiff instituted action proceedings in the High Court against the defendants for the claim of a Tax refund and other review reliefs. The defendants defended the actions and raised the following special pleas: lack of jurisdiction, in that by virtue of s 38(9) of the Value Added Tax “the Act”, the High Court has no jurisdiction to entertain this matter which involves a claim for VAT refund; that the plaintiff unduly delayed instituting the proceedings; that there was no coercive action which would have required a collateral challenge and that a collateral challenge cannot be raised to upset a valid administrative decision.

Held, that, the establishment of special tax courts does not oust the jurisdiction of the High Court to review, grant relief and decide issues of law.

Held, further that, where a decision offends the Constitution, the court will utilize its Constitutional mandate to review the decision.

Held, further that, a collateral challenge is raised to avoid an enforcement of an invalid decision and there is no time bar to a collateral challenge against an invalid decision.

Held, further that, an administrative officer is compelled to comply with the statutory requirements necessary to arrive at a decision.

Held, further that, the defendants’ failure to carry out a tax assessment, to safeguard the plaintiff’s tax file and to consider the plaintiff’s objection entitles the plaintiff to raise a collateral challenge, which can be raised to review an administrative decision.

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1. The special pleas are dismissed with costs, such costs to include costs of one instructing and two instructed counsel.
 2. The matter is postponed to 17 September 2020 for case management.

JUDGMENT

SIBEYA AJ:

[1] The plaintiff instituted action proceedings against the defendants in this court on 29 May 2017. The plaintiff claims the following:

- (a) Payment in the amount of N\$3,820,385.57 ...;
- (b) Interest charged at a rate of 11% (*Eleven Percent*) per annum for the refunds made later than 2 (Two) calendar months after the credit has arisen,
- (c) Alternatively,
 - (i) Reviewing and setting aside the First Defendant's decision to treat the amount of N\$2,691,875.00 (*Two Million Six Hundred and Ninety One Thousand Eight Hundred and Seventy Five Namibian Dollars*) in the Plaintiff's financial statements for the year end 2002 as being income;
 - (ii) Reviewing and setting aside the First Defendant's decision to claim an amount of N\$835,547.00 (*Eight Hundred and Thirty Five Thousand Five Hundred and Forty Seven Namibian Dollars*) from the Plaintiff since the 2009 financial year end, based on the assessment of the Plaintiff's financial year ended 2009;

- (iii) Reviewing and setting aside the Second Defendant's decision not to consider the Plaintiff's objection in respect of the Plaintiff's financial year ended 2002 and declaring same as being null and void and contrary to section 71(4) of the Income Tax Act, 1981 and Article 18 of the Constitution of the Republic of Namibia;
- (iv) Reviewing and setting aside the First Defendant's decision to not condone and consider the Plaintiff's objection lodged on 14 March 2016 as being null and void and contrary to the provisions of Article 18 of the Namibian Constitution;
- (v) Reviewing and setting aside the First Defendant's decision on 22 November 2016 to claim the amounts pleaded in 33.1 to 33.3 above for the reasons in (i) to (iv) above and on the basis that such amounts were never assessed, including in particular First Defendant's decision on 22 November 2016 to claim an amount N\$596,050.00 (Five Hundred and Ninety Six Thousand and Fifty Namibian Dollars) for interest on alleged overdue Income Tax, as being contrary to section 79(4) of the Income Tax Act.
- (vi) Reviewing and setting aside the First Defendant's decision to in the particular circumstances invoke set-off in his letter dated 24 March 2017;
- (vii) Payment in the amount of N\$3,820,385.57 ...;
- (viii) Interest charged at a rate of 11% (*Eleven Percent*) per annum for the refunds made later than 2 (Two) calendar months after the credit has arisen...'

[2] The defendants defended the action and filed their plea together with special pleas. The special pleas raised are: lack of jurisdiction; undue delay to review the impugned decisions; no coercive action and collateral challenge.

[3] The plaintiff is Stuttafords Stores Namibia (Pty) Ltd, a company that conducted business in Namibia as a registered value-added tax (VAT) vendor and selling merchandise to the public.

[4] The first defendant is the Commissioner of Inland Revenue, responsible for carrying out the provisions of the VAT Act 10 of 2000, the Customs & Excise Act 20 of 1998 and the Income Tax Act 24 of 1981.

[5] The second defendant is the Minister of Finance while the third defendant is the Attorney-General of the Republic of Namibia both of whom were duly appointed in accordance with the Constitution of the Republic of Namibia.

[6] Mr. *Heathcote SC* appeared for the plaintiff while Mr. *Barnard* appeared for the defendants.

[7] Plaintiff is a supplier in terms of the VAT Act.¹ Plaintiff charged output VAT during its business operations. Registered VAT vendors are obliged to complete VAT returns and file them with the first defendant (the Commissioner). The vendors can claim Input Credit on their VAT returns for payments made to their suppliers or credits due. Where Input Credit exceeds Output VAT due for a specified period of time, the Commissioner should refund the vendor within 2 months after such credit arises. Failure to make a refund attracts interest at the rate of 11% per annum calculated from 2 months after the Input credit arises.

[8] The plaintiff claims a refund of the alleged Input credit and further seeks review and setting aside decisions of the first and second defendants. The defendants deny being liable to the plaintiff.

[9] This matter served before this court where the defendants raised an exception to the plaintiff's particulars of claim. The basis for such exception was that the particulars of claim does not disclose the cause of action and that this court lacks jurisdiction to hear the matter. *Prinsloo J* in *Stuttafords Stores Namibia (Pty) Ltd v Commissioner of Inland Revenue*² set out the historical background to this matter which requires no

¹ Section 1.

² (HC-MD-CIV-ACT-CON-2017/01798) [2018] NAHCMD 203 (04 July 2018).

repetition in this ruling. In her ruling on the exception raised *Prinsloo J* found that:

'[73] It is clear from the case law that I was referred to that the jurisdiction of the High Court is not ousted by the establishment of the special tax court.

[74] I am of the opinion that the issues raised on behalf of the plaintiff are legal questions which only the High Court may determine and therefor this court has jurisdiction to hear the matter.

[75] In conclusion, I am not convinced that the defendant was able to satisfy the court that on all reasonable construction of the plaintiff's particulars of claim as amplified and on all possible evidence that may be led on the pleadings that cause of action is or can be disclosed and therefore the exception must be dismissed.'

Special plea of lack of jurisdiction

[10] The defendants contend that the High Court has no jurisdiction to entertain this matter as the nature of the plaintiff's claim constitutes a claim for refund. Plaintiff claims a refund of VAT which accumulated over a period of time. The Commissioner refused to pay the refund. Any challenge against such refusal can only be proceeded with under Part VIII of the VAT Act so the defendants' contention went, through objection and appeal to the special tax court. The special tax court is established in terms of the Income Tax Act.³

[11] The defendants placed reliance on s 38(2), (6), (8) and (9) of the VAT Act. The said sections provide that:

'(2) Subject to this section, if, for any tax period, a registered person files a return reporting an excess referred to in subsection (1)(a), or any person, mission, organisation or government contemplated in subsection (1)(c) files a return of tax paid, the return shall constitute a claim for a refund, and where the Commissioner is satisfied that a refund is due to any person, mission, organisation or government –

³ S 73.

(a) The Commissioner shall first apply the amount of the refund in reduction of any tax, levy, interest or penalty payable by that person, mission, organisation or government in terms of this Act and may then apply any amount remaining or any portion thereof to any unpaid amount due in terms of the Income Tax Act, 1981 (Act No. 24 of 1981)

...

(b) Any credit balance remaining on the tax account of any such person, mission, organisation or government shall be refunded to the person, mission, organisation or government claiming the refund not later than the end of the second calendar month following the date the credit balance arose on the relevant tax account.

(6) Where a registered person has failed to furnish a return for any tax period as required by this Act, the Commissioner may withhold payment of any amount refundable under this section until the registered person furnishes such return as required...

(8) The Commissioner shall serve on a person claiming a refund, a notice in writing of the decision in respect of the claim.

(9) A person claiming a refund under this section who is dissatisfied with a decision referred to in subsection (8) may challenge the decision only under Part VIII of this Act.¹

[12] Part VIII provides that a party who is dissatisfied with an appealable decision inclusive of an assessment by the Commissioner, may institute proceedings in the special court constituted under s 73 of the Income Tax Act or the tax tribunal constituted under s 73A. The proceedings available to an aggrieved party under these provisions are by way of objection and appeal.

[13] *Mr. Barnard* submitted that the wording expressed in s 38(9) of the VAT Act excludes the jurisdiction of the High Court in claims for VAT refund. The emphasis was on the word only under Part VIII of this Act. This, notwithstanding, *Mr. Barnard* acknowledged that the High Court has jurisdiction to review a decision, the granting of

interim relief and deciding a question of law in income tax matters. He concluded his argument by submitting that this court retains jurisdiction to entertain the review relief and collateral challenge claimed in prayer (c)(i) to (c)(iv) of the plaintiff's particulars of claim but not the main claim.

[14] *Mr. Heathcote* submitted that the defendants' challenge to this court's jurisdiction was already decided on by Justice *Prinsloo* in her ruling on the exception. By raising the same challenge under special plea (*ad verbatim*) constituted having a second bite at the cherry destined for the same results. He argued that the jurisdiction of this court is not ousted by the establishment of the Special Income Tax Court therefor the special plea raised lacks merit.

[15] It is critical to note that the judicial power is vested in the courts of Namibia inclusive of the High Court.⁴ The Constitution confers jurisdiction on the High Court to hear and adjudicate all civil disputes including cases involving interpretation, implementation and upholding the constitution with the fundamental rights and freedoms guaranteed in it.⁵ The High Court further retains jurisdiction over all cases and all matters permitted by the law and has authority to adjudicate over any right or obligation.⁶

[16] *Damaseb JP* in *Katjjuanjo and Others v Municipal Council of the Municipality of Windhoek*⁷ while discussing the unlimited jurisdiction of the High Court said the following:

'...for the High Court not to entertain a matter, it must be clear that the original and unlimited jurisdiction it enjoys under Article 80 of the Constitution and s 16 of the High Court Act has been excluded by the legislator in the clearest terms.'

[17] It is trite law that whenever the legislator intends to limit the jurisdiction of the

⁴ Article 78(1) of the Namibian Constitution.

⁵ Article 80(2); S 2 of the High Court Act 16 of 1990.

⁶ S 16 of the High Court Act.

⁷ Case No. I 2987/2013, Judgment of this Court delivered on 21 October 2014 at para [7] and [14].

High Court, it must express itself in the most unambiguous terms as such words will be accorded a narrow and strict interpretation. The clarity in words adopted by the legislature should be clearly revealing of the intention of the legislature without scratching the ground to get to the meaning of such intention.

[18] Our courts have endorsed the South African courts' position regarding the jurisdiction of ordinary courts over income tax matters. The position is that the establishment of special courts does not oust the jurisdiction of the high court to review a decision, grant interim relief and decide issues of law. The High Court therefor retains its review jurisdiction and may order declaratory relief where appropriate.⁸

[19] I did not understand *Mr. Barnard* to submit that the parties reside outside the jurisdiction of this court. To the contrary *Mr Barnard* launched a spirited argument based solely on s 38(9) of the VAT Act as the provision that allegedly ousted the jurisdiction of this court in tax matters. It was clear throughout the interlocutory proceedings before me that in their quest to challenge the jurisdiction of this court, the defendants stand or fall by the s 38(9) of the VAT Act.

[20] It is apparent from the evidence that the first defendant invoked the provisions of s 38(2)(a) of the VAT Act when a refund was not paid to the plaintiff. This is clear from a letter received into evidence⁹ where the Acting Director of Inland Revenue stated as follows in writing to the plaintiff's legal practitioners of record:

'... where the commissioner is satisfied that a refund is due to any person ... the Commissioner shall first apply the amount of the refund in reduction of any tax, levy, interest or penalty payable by that person ... in terms of this Act and may the apply any amount remaining or any portion thereof to any unpaid amount due in terms of the Income Tax Act, 1981 ...

The VAT refund will therefore first be applied to settle the following tax amounts owed by your

⁸ *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another 2001 (1) SA 1109* para 42-47. *Gideon Du Preez v The Minister of Finance, Case NO. A 74/2009*, Judgment of this court by Parker J delivered on 25 March 2011.

⁹ Exhibit "K".

client...'

[21] S 38(9) of the VAT Act makes reference to a person dissatisfied with a decision regarding a claim for refund. S 38(2)(a) on the other hand provides that where the commissioner is satisfied that the refund is due, he shall apply such amount in the reduction of any tax, levy, interest or penalty payable by that person and may then apply the remaining amount to unpaid amounts due in terms of tax. It is apparent from reading s 38(2)(a) that the Commissioner is compelled to first apply the amount of a refund in the reduction of any tax, levy, interest or penalty payable by that person in terms of the Act and then discretionally may apply any amount remaining or any portion thereof to any unpaid amount in terms of the Income Tax Act. It follows that once the Commissioner forms a decision that a refund is due, then he should act mechanically to apply such refund to the tax, levy, interest or penalty without any discretion. He however exercises discretion in applying the latter part of the provision regarding the remaining unpaid amount due in terms of the Income tax Act, Sales Tax or Additional Sales Levy Act.

[22] The difficulty that the defendants encounter is that according to the evidence led, the plaintiff's tax file with the defendants got lost. There was further no evidence that the minister dealt with the plaintiff's appeal. As a matter of fact, the Commissioner found that the amount of N\$ 3,820,385.57 was due to the plaintiff. What follows thereafter is that such funds were used to set off tax, levy, interest or penalty. This I find to be a matter of legality and not strictly falling under sec 38(9).

[23] Notwithstanding, when one has regard to the grounds on which the refund was withheld as explained in Annexure "K", it becomes clear that s 38(6) was relied upon in withholding part of the refund. This section as quoted above relates to a position where a refund is withheld due to the tax payer's failure to furnish the tax returns for a particular period. An examination of item 3 of the Exhibit "K" provides the following:

'3. Could you kindly provide us with copies of the following tax returns?

3.1 Income Tax: 2014 and 2016 tax returns;

3.2 Value Added Tax: 2011/10, 2014/02 and 2016/06;

3.3 Value Added Tax on Imports: 2015/05 and 2016/07.'

[24] Exhibit "K" does not state *ex facie* that the Commissioner decided to withhold the refund due to non-submission of the tax returns required. It, however, shows that there were tax returns submitted and the Acting Director requested for further tax returns. No notice as envisaged in terms of s 38(8) was served on the plaintiff in respect of the refund withheld. On this basis alone the plea of lack of jurisdiction cannot succeed.

[25] For what it's worth, it should be stated that the Commissioner did not comply with s 38 in withholding the refund. The Commissioner cannot selectively benefit from the same s 38 which he violated.

[26] There is further a close relation to all the relief sought by the plaintiff. The impugned decisions were taken by the Commissioner and the alternative claims by the plaintiff involve the interpretation of Article 18 of the Constitution in particular. It is difficult to envisage a situation where a public officer makes a determination after carrying out an assessment and still argue that such determination is not subject to Article 18 of the Constitution. Where a decision taken is alleged to offend a provision of the Constitution, this court will exercise its constitutional jurisdiction to adjudicate the matter unless such jurisdiction is ousted by the legislature in no uncertain terms.

[27] In light of the above I am of the considered view that the plea of lack jurisdiction lacks merit and falls to be dismissed.

Unreasonable delay

[28] The defendants raised a special plea of unreasonable delay in instituting review proceeding. The basis for this plea is:

28.1 The assessment of income tax on 23 August 2003 (prayer c(i));

28.2 The alleged omission by the defendants to consider the objection to the 2005 assessment (prayer c(iii));

28.3 The decision by the Commissioner taken in 2009 to claim payment for income tax from the plaintiff in the amount of N\$835,567.00 (prayer c(ii));

28.4 The Commissioner's decision in May 2016 not to condone and consider the plaintiff's objection against the 2004 assessment (prayer c(iv));

[29] *Mr. Barnard* submitted that proceedings were instituted through summons commencing action which were served on the defendants on 31 May 2017, thus over 12 years lapsed from the first impugned decision and over 12 months lapsed from the last impugned decision. Plaintiff sought no condonation for the delay.

[30] It is trite law that where a party delays the institution of review proceedings, such party should explain the delay. If the delay is unreasonable, such party should bring facts to the fore upon which a court may exercise its discretion to condone the delay.¹⁰

[31] *Mr. Heathcote* submitted that a collateral challenge regarding the invalidity of a defence cannot be ruled out on the basis of delay.

[32] A collateral challenge is raised to avoid the enforcement of an invalid decision. It is a fact, that more often than not, administrative decisions can be catastrophic to a person notwithstanding its invalidity in law. Unless such decision is challenged and set aside irrespective of its invalidity, it compels compliance thereof. The question to be determined is whether a challenge to an invalid decision can be time barred?

[33] *Cameron J* in *Merafong City v AngloGold Ashanti Ltd*,¹¹ while discussing the question whether a collateral challenge is subject to time bar said the following:

¹⁰ *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).

¹¹ 2017 (2) SA 211 (CC) para 93-96.

[93] As the Supreme Court of Appeal held in Hederberg Park Development, a collateral challenge may be raised only when the impugned act is invoked to coerce a party raising it into compliance. This is so because the target of the challenge is the compulsion to comply. This means that there is no time limit within which the defence may be invoked. The defendant may have been supine until an attempt to compel is made and only then she can contend that she should not be ordered to comply because the act is itself invalid. In Oudekraal the Supreme Court of Appeal stated that a person may mount a collateral challenge “because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question” [para 35].

[94] Later the court emphasised the point in these words:

“[T]he right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity.”

[95] This statement underscores the fact that, for an administrative act to be enforceable, it must be valid. And for it to be valid it must, among other requirements, be lawful. If it is illegal, an administrative act cannot be enforced because it would be inconsistent not only with the rule of law but also with s 33 of the Constitution which guarantees an “administrative action that is lawful, reasonable and procedurally fair”

[96] Therefore, a successful collateral challenge promotes the objects of the rights guaranteed by s 33 of the Bill of Rights and the rule of law by prohibiting enforcement of invalid and illegal decisions. Ordinarily our courts do not enforce illegal decisions because their duty is to uphold the Constitution and the law. Therefore, no court may close its eyes to a collateral challenge raised by a party with interest if there is substance in the defence. It is against this backdrop that the proposition that a collateral challenge is not available to the state must be evaluated...

[111] ... an unlawful administrative act is not an act contemplated in the Constitution. An act of that kind would be inconsistent with the Constitution and for that reason invalid...

[176] ...A collateral challenge is not subject to any time bar.’

[34] I endorse the above remarks as indicative of good law that finds equal application to our jurisdiction. Our Constitution requires that administrative bodies and officials should act fairly and reasonably and in accordance with the requirements imposed on them by common law and legislation.¹² It is therefore part of the court's duty, in its quest to deliver justice, not to close its doors to persons who raise collateral challenges to decisions, let alone on the basis of delay. As courts are courts of justice, it remains in the interest of the court to ensure that invalid decisions are not enforced. Collateral challenges are therefore not time barred, they must be examined by the court in order to make a determination on the merit or demerit of such challenge in the interest of justice.

[35] It follows that the plea of delay in instituting the review proceedings raised by the defendants has no merit.

No coercive action

[36] The defendants raised a plea that the plaintiff relies on the coercive action for its collateral challenge against set-offs by the Commissioner in the letter Annexure "K". The defendants contended that set offs occur automatically and are not dependent upon the decision of the Commissioner, nor do they constitute coercive action. Defendants further stated that on 24 January 2018, the Commissioner withdrew the three letters of demand dated 22 November 2007.¹³ Resultantly there is no coercive action warranting a collateral challenge.

[37] It was submitted for the defendants that the plaintiff conceded to the wrongfulness of the coercive action adopted and implemented by the Commissioner, hence the withdrawal of the said letter.

[38] In Oudekraal Esates (Pty) Ltd v City of Cape Town and others,¹⁴ the following

¹² Article 18.

¹³ Annexures "G1", "G2" and "G3" to the particulars of claim.

¹⁴ 2004 (6) SA 222 (SCA) para 35.

appears regarding coercive action:

[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings.' Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.'

[39] Summons were served on the defendants on 31 May 2017. The threatening letters are dated 22 November 2007 and they were withdrawn on 24 January 2018 after summons were already served on the defendants. It follows that the coercive action existed at the time of issuing summons. The plaintiff was entitled to raise all claims available to it at the time of issuing summons. To argue that the coercive action (threatening) letters were later withdrawn thus rendering the collateral challenge unnecessary lacks merit as such letters were live at the time of issuing summons and called for reaction from the plaintiff. I hasten to add that it would have been reckless of the plaintiff to ignore the said letters.

[40] Regarding the plaintiff's objection to the legality of the set off, evidence was led that the VAT assessment is a continuous self-assessment by the registered vendor for every two months. If the Commissioner is not satisfied with the assessment of the return then he shall be entitled to make an assessment.

[41] Where an assessment is made, the Commissioner is required to serve the Notice of Assessment to the person assessed. The said Notice shall include:

41.1 The tax payable;

41.2 The date on which the tax is due and payable;

41.3 The time, place and manner in which the assessment can be objected to.¹⁵

[42] It should be noted that the requirements of providing a Notice of Assessment to the assessed person and elements of such notice is a matter of law. *Ponnan JA in Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd*¹⁶ stated that the Commissioner

[11] ... Must provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.

[14] ... is under an obligation throughout the assessment process leading up to the appeal, and the appeal itself, to indicate clearly what matters and which documents are in dispute, so that the taxpayer knows what is needed to present its case.'

[43] Where the Commissioner assesses the taxpayer, the Commissioner is under strict obligations to comply with s 25 of the VAT Act regarding the Notice of Assessment or amended Notice.

[44] The evidence led revealed that the returns in paragraph 2,2 and 2,3 were filed with the Commissioner. The Commissioner cannot ignore the provisions of s 38(2)(b) in the process of assessment of returns. He cannot just withhold the payment of a credit balance over a period of more than 2 months with intent to reassess it later.

[45] It is worth mentioning that in respect of the 2004 assessment, the Notice of Assessment is confusing and thus very difficult to comprehend. It provides the date of assessment as 4 August 2004 and the due date as 31 January 2004. It further provides that:

'ANY OBJECTION to this assessment must be detailed in writing and must reach the office of the Receiver of Revenue, within 90 days after the due date'

¹⁵ S 25(6) of the VAT Act.

¹⁶ 2014 (5) SA 231 (SCA).

[46] The date of assessment is defined in the Income Tax Act¹⁷ as follows:

‘date of assessment, in relation to any assessment, means the date specified in the notice of such assessment as the due date or, where a due date is not so specified, the date of such notice.’

[47] The due date of 31 January 2003 on the assessment form in respect of the 2004 assessment makes the 90 days after the due date within which an objection may be made impossible. *Mr De Khoe*, a witness for the defendants, conceded in evidence and stated that the assessment form utilised was wrong. He proceeded to state that the due date should have been 31/01/2005 and not 31/01/2003. If *Mr. De Khoe* is correct then it will follow that the objection of 10 February 2005 was delivered in time, *albeit* not considered.

[48] The failure by the defendants to consider the plaintiff’s objection in my view breathes justification in the plaintiff’s collateral challenge. Failing which, how then would the assessment process (if it can be elevated to that level) be scrutinized for reasonableness and fairness. In fact, it was testified by *Mr. De Khoe* that he had no knowledge of how the amounts in annexure “K” were arrived at as he just accepted the computer printout without verification.

[49] As a consequence, I find that the plea of the defendants of no coercive action lacks merit.

Collateral challenge not to be permitted.

[50] The defendants raised a plea that the collateral challenge should not be permitted. The basis for this plea is that:

50.1 The plaintiff instituted action for refund of VAT;

¹⁷ S 1.

50.2 The relief prayed for in prayers a and b depend on the review relief in prayer c being successful;

50.3 the collateral challenge is raised as part of the cause of action and not as a coercive action;

50.4 The assessment of 23 August 2004 is the basis of the relief in prayer c(i) to c(iv) and was a decision aimed at the plaintiff only;

50.5 The plaintiff failed to utilise the remedies available in the Income Tax Act for over 10 years.

50.6 An assessment which is a valid administrative act cannot be challenged and set aside through a collateral challenge.

[51] *Scott J in National Industrial Council for Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others*¹⁸ stated the following:

‘But the validity of administrative acts ... can be challenged not only directly in review proceedings, but also indirectly or, as is sometimes said, collaterally, i.e. in “proceedings which are not themselves designed to impeach the validity of some administrative act or order” ... the need for judicial scrutiny of an administrative act ... arises not for the purpose of affording a discretionary remedy ... but for the purpose of determining entitlement of the party seeking enforcement...’

[52] The defendants approach this matter from a weaker side commencing with a statement that the Commissioner is satisfied that the refund is due. The Commissioner thereafter appears to attempt to justify withholding of the refund by relying on computer print outs without verification of whatsoever nature. It was established in evidence that there was no accountability for the calculation of the total figures allegedly due to the Receiver of Revenue. How the Commissioner arrived at the amount which was set off

¹⁸ 1993 (2) SA 245 (C).

remains a mystery.

[53] It is important to further take note that *Mr. De Khoe* conceded in evidence that his calculations of the tax amount which was set off was wrong and required time to carry out a recalculation. It also became apparent during the hearing that the plaintiff's missing file (lost or misplaced but same result) left a lot of questions unanswered about the correctness of the calculations; what was considered during such calculations; who exactly carried the calculations; to what extent was the assessment carried out in attempt to comply with the obligations in the Act, the list is endless.

Conclusion

[54] Considering the above factors and findings arrived at, this court is left with the considered view that the special pleas raised by the defendants lack merit. Consequently, the special pleas fall to be dismissed.

[55] In the result, the following order is issued:

1. The special pleas are dismissed with costs, such costs to include costs of one instructing and two instructed counsel.
2. The matter is postponed to 17 September 2020 for case management.

O SIBEYA
ACTING JUDGE

APPEARANCES:

PLAINTIFF:

R. HEATHCOTE SC (with J. SCHICKERLING)

Instructed by Koep & Partners

Windhoek

1ST & 2ND DEFENDANTS:

P. BARNARD (with M. BOONZAAIER)
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