

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2023/00325

In the matter between:

ZHONG MEI ENGINEERING GROUP (PTY) LTD

APPLICANT

and

NAMIBIA REVENUE AGENCY (NAMRA)

1ST RESPONDENT

COMMISSIONER: NAMIBIA REVENUE AGENCY

2ND RESPONDENT

STANDARD BANK OF NAMIBIA LTD

3RD RESPONDENT

BANK OF NAMIBIA

4TH RESPONDENT

MINISTER OF FINANCE

5TH RESPONDENT

ATTORNEY- GENERAL, NAMIBIA

6TH RESPONDENT

INTELLIGENCE STRATEGIC ENFORCEMENT UNIT, NAMRA **7TH RESPONDENT**

Neutral citation: *Zhong Mei Engineering Group (Pty) Ltd v Namibia Revenue Agency (NAMRA)* (HC-MD-CIV-MOT-REV-2023/00325) [2023] NAHCMD 513 (18 August 2023)

Coram: RAKOW J

Heard: 27 July 2023

Delivered: 18 August 2023

Flynote: Applications and Motion Proceedings – Urgent Applications – Interim Relief Sought – Section 91 of the Income Tax Act 24 of 1981 – Applicant launched an urgent application for interim relief seeking an order *inter alia* the repayment of money into his account – Chapter 3 part 1 of the Income Tax Act – Appointment of payment agent, Standard Bank held under its control money belonging to the applicant as the taxpayer – Standard Bank proceeded to make payment of the due tax payable to the first respondent – Concept of ‘pay now argue later’ – The application for the issue of interim orders is refused.

Summary: This is an urgent application that was set down for hearing on 27 July 2023. The applicant is registered as a taxpayer in Namibia and received a ‘per audit notification letter’ from the first respondent requesting an audit of the applicant’s tax affairs dated 15 June 2023. It further asked the applicant to provide certain documents to them on or before 29 June 2023. This notice informed the applicant that its tax return has been identified for a comprehensive audit in terms of s 67 and s 50 of the Value-Added Tax Act 10 of 2000. The applicant was then required to produce documents at an entrance interview that was to be conducted on 23 June 2023 and such documents were to be provided under oath.

The first respondent, having established that the applicant ought to have paid taxes, within the time prescribed by the Income Tax Act 24 of 1981 demanded payment of the tax due. This was then followed up by an appointment of a payment agent, Standard Bank, who held under its control money belonging to the applicant as the taxpayer. The bank was appointed as the representative taxpayer on 10 July 2023 who on the same date informed the applicant about the appointment and that it will comply with the appointment. On 12 July 2023 the agent then proceeded to make payment of the due tax payable to the first respondent. In essence the whole N\$33 031 543.04 was deducted at once from the bank account of the applicant.

Held that: the court finds no reason to come to the conclusion that the ‘pay now argue later’ concept should not be applicable in this matter and thus finds that the monies attached by the first respondent should remain with them for now as it is in the public interest.

ORDER

1. The applicant's non-compliance with the Rules of this court relating to the service of court papers and the time periods in terms of rule 73 is condoned and the matter is heard as one of urgency.
 2. The application for the issue of interim orders is refused.
 3. The costs of this application is to stand over for determination at the end of the hearing of the second part of the application.
 4. The matter is postponed to 5 September 2023 at 15:30 for a case management conference hearing and the parties are to file a joint case management report on or before 31 August 2023.
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JUDGMENT

RAKOW J:

Parties

[1] The parties in this urgent application is Zhong Mei Engineering Court (Pty) Ltd, a company registered in terms of the laws of the Republic of Namibia who is the applicant and the following respondents: The Namibia Revenue Agency, established in terms of the Namibia Revenue Agency Act 12 of 2017 and it's the Commissioner who is the second respondent; the third respondent is Standard Bank of Namibia Ltd a banking institution; the fourth respondent is the Bank of Namibia which is the Central Bank of Namibia established in terms of the Bank of Namibia Act 1 of 2020; the fifth respondent being the Minister of Finance and the six respondent being the Attorney-General of the Republic of Namibia. This application is not opposed by the third and fourth respondents.

Background

[2] The applicant is registered as a taxpayer in Namibia and received a 'per audit notification letter' from the first respondent requesting an audit of the applicant's tax affairs dated 15 June 2023. It further asked the applicant to provide certain documents to them on or before 29 June 2023. This notice informed the applicant that its tax return has been identified for a comprehensive audit in terms of s 67 and s 50 of the Value-Added Tax Act 10 of 2000. The applicant was then required to produce documents at an entrance interview that was to be conducted on 23 June 2023 and such documents were to be provided under oath.

[3] This notice was forwarded by a certain Ms Mahnaem Haidula who is the Manager for Audit and Compliance at NAMRA and so appointed by the Commissioner of NAMRA, Mr Samuel Shivute to deal with the matter. She explained that the applicant had registered as a tax paying entity as far back as 2013. The applicant filed numerous income tax returns during the periods 2013 – 2018 but these were what they term as zero returns, meaning that no tax was due and payable to NAMRA as per these returns. During the same period, the applicant also filed VAT returns. The applicant further filed annual financial statements for the same period. Ms Haidula further obtained information from the treasury department for the period under consideration being the period 2013 – 2018 and that showed that the applicant was actively and meaningfully engaged, and has a number of business projects that it was engaged in. These include projects like the upgrading to bitumen standard of the district road 3609 from Oshakati to Ongenga, construction of Omdel-Swakopmund pipeline replacement and ancillary works for the central Namib area water supply scheme, upgrading to bitumen standards of the Swkopmund-Hentiesbay-Uis road and the construction of the Oshoopala bridge over the Okatana river in Oshakati, to name but a few.

[4] The initial notice received by the applicant was for the period 1 October 2017 to 30 September 2022 but such period could be changed after the audit findings. The applicant was asked on the same day as the initial letter to provided annual financial

statements for the years ending 2019 – 2022, sales, revenue, general ledger for the years 2019 – 2022, s 64 declarations, list of foreign employees, offshore payroll if any and employee tax reconciliations for the years ending 2019 – 2022.

[5] On 23 June 2023, the applicant attended to the meeting with officials of the first respondent at the offices of the first respondent. During this meeting the officials of the respondents were told by the officials of the applicant that they started with operations only in 2015 and that a certain MMG Global Chartered Accounts and Auditors prepared their books and accounts, its financial statements as well as the returns and payments of taxes for the period 2013 – 2018. The financial statements for the said period were however prepared and available for NAMRA to rely on. The applicant's representatives were informed that the audit will focus on the financial statements, VAT returns and bank statements for the period 2013 – 2018 which were already in possession of NAMRA in order to assess the tax liability of the applicant.

[6] On 7 July 2023 the applicant's representatives attended to an exit audit meeting with the officials of the first respondent. The parties present were briefed by Ms Haidula regarding the adjustments made to the taxpayer's tax computation and provided reasons why such adjustments were made. The applicant had no records on any transactions recorded for the tax years 2013 – 2018 except for the financial statements and that their accountant disappeared with their financial records. It was decided during the initial meeting of 23 June 2023, that the audit scope will be conducted in two phases namely 2013 – 2018 and 2019 – 2022, because there was no documents for the initial phase NAMRA relied on the annual financial statements, VAT tax returns and VAT on import returns submitted by the applicant and other information in the possession of NAMRA.

[7] During the meeting, the applicant was informed that the total tax payable for the period 2013 – 2018 is N\$33 031 543.04. The representatives for the applicant indicated that they did not have the money in its bank account and offered to settle the amount in installments. This offer was rejected by the NAMRA officials because the applicant still had a pending assessment on employees' tax and although the managing director indicated that from the 2019 tax year, the applicant made profits but paid over no taxes to NAMRA for the years 2019 – 2022. The minutes of this

meeting was signed by both the officials from NAMRA together with the officials of the applicant. This was followed with a letter on 11 July 2023 which was received by the applicant on 19 July 2023. In this letter it was pointed out that the revenue from government projects were close to one billion Namibian Dollar during the period from 2013 to 2018.

[8] This outstanding tax amount is only the capital amount and does not include the amounts determined for interest and for penalties. Tax is payable for each respective year on the last day of the seventh month after the year of assessment in respect of juristic entities ends. This obligation is per s 56 of the Income Tax Act 24 of 1981. It is further not denied that the applicant did not pay these amounts and proceeded to file zero income tax returns for each of those respective years.

[9] The first respondent, having established that the applicant ought to have paid taxes, within the time prescribed by the Income tax Act 24 of 1981 demanded payment of the tax due. This was then followed up by an appointment of a payment agent, Standard Bank, who held under its control money belonging to the applicant as the taxpayer. The bank was appointed as the representative taxpayer on 10 July 2023 who on the same date informed the applicant about the appointment and that it will comply with the appointment. On 12 July 2023 the agent then proceeded to make payment of the due tax payable to the first respondent. In essence the whole N\$33 031 543.04 was deducted at once from the bank account of the applicant.

The application

[10] The relief sought in terms of the urgent application is as follows:

1. Condoning the Applicant's non-compliance with the Rules of this Court relating to service of Court process and time periods for exchanging papers, and granting leave for this Court to hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of this Court.

2. An order calling upon the Respondents to show cause on a date to be determined by the Managing Judge as to why the following orders should not be made:

(a) An order reviewing, correcting and setting aside the decision by the Seventh Respondent, alternatively the First and Second Respondents, to determine and appoint the Third Respondent as the Applicant's agent and directing it (Third Respondent) to transfer an amount of N\$33,031,543-04 out of the Applicant's account and pay it over to the Fifth Respondent.

(b) An order declaring the notices of assessment dated 7 July 2023 as being invalid and ultra vires section 67(2) of the Income Tax Act, 1981.

(c) An order declaring that the appointment of the Third Respondent and instructions to it to transfer the Applicant's money referred to under paragraph (a) above out of its bank account with the Third Respondent is unlawful, unfair, irrational and ultra vires section 67(2) read with section 64 and section 83(2) of the Income Tax Act, 24 of 1981. Section 67(2) read with section 64 and section 83(2) of the Income Tax Act, 24 of 1981.

(d) A declarator that the Seventh Respondent has no legal power, competence, capacity and right under section 91 of the Income Tax Act, 1981, to determine and appoint the Third Respondent as the Applicant's agent to transfer money out of the Applicant's banking account, and setting aside his decision and an order reversing the transfer effected by the Third Respondent in terms of such instructions.

(e) An order declaring that the First, Second and Fifth Respondent can only, in law, determine and appoint a person, including a banking institution, to be an agent of a taxpayer under section 91 of the Income Tax Act, 1981, in circumstances where they have a certificate/statement certified by a clerk or registrar of a competent Court under section 83(2) (b) of the Income Tax Act, 1981.

(f) An order declaring section 91 of the Income Tax Act, 1981 as unconstitutional, striking it down and setting aside all processes and decisions made in pursuance thereof in relation to the Applicant.

3. Pending the return date, the Applicant seeks on an urgent basis on 27 July 2023 the following orders:

(a) An order directing the First, Second, Fourth, Fifth and Seventh Respondents cause to be returned to the Applicant's bank account with the Third Respondent the amount of N\$33,031,543-04 transferred by the Third Respondent on the instruction of the Seventh Respondent, within two (2) days of this Court Order.

(b) Staying the implementation of all decisions and processes on the basis of the notices of assessment dated 7 July 2023 in respect of the Applicant.

(c) That the orders under paragraphs 3(1) and (2) above shall serve as interim interdict with immediate effect until the return date.'

[11] This order is structured in a manner that all the points under point 2 is to be determined at a future date with only the return of the money to the applicant's bank account and the staying of the implementation of all decisions and processes based on the notice of assessment dated 7 July 2023.

Urgency

[12] In order for the applicant to succeed, the applicant must make out a case that the application is indeed urgent. In *Nghiimbwasha and Another v Minister of Justice and Others*¹, the court dealt with the interpretation of the word 'must' contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent. Masuku J states at (11) and further:

'The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.

[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", in my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.'

[13] It was demonstrated that the application was indeed urgent. The applicant is in the construction business and was left with less than N\$4 000 000 in its bank account. It also lost a case in the Supreme Court and is required to pay an amount of about N\$4 000 000. The applicant further has monthly expenses of about N\$28 000 000 which needs to be made from the money taken by the first respondent. The

¹ *Nghiimbwasha and Another v Minister of Justice and Others* [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

applicant is therefore to suffer irreparable harm should the interim relief not be granted. On behalf of the applicant, it was further stated that there is no effective remedy to obtain interim relief on an urgent basis. The biggest fear of the applicant is that its business will collapse if it does not obtain the orders sought.

The legal framework

[14] The Supreme Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*² has laid down the approach to be followed in construction of statutory instruments or contracts. The court said the following:

[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ Wallis JA usefully summarised the approach to interpretation as follows - Page 8 of 22

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.”

[15] The relevant statutes are the NAMRA Act and the Income Tax act. The NAMRA Act came into force on 6 April 2021. The first respondent is established in terms of the Act, and the second respondent was appointed by the Minister of Finance. The officials of the Agency were appointed in terms of s 8 of the Act. The

² *Supreme Court in Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* (SA 9/2013) (30 April 2015).

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

Act provides that the Agency shall administer statutes listed in schedule to the NAMRA Act, which includes the Income Tax Act. The Income Tax act provides for, inter alia, the taxation of income.

[16] The NAMRA Act is the applicable starting point in this matter. Further, NAMRA's powers are provided for in s 3 of the Act. Those powers include, amongst others, the power to assess and collect taxes and duties on behalf of the State in terms of the laws set out in the Schedule of the Act. These laws, for purposes of this application include the Income Tax Act 24 of 1981, the Customs of Excise Act 20 of 1998 and the Value-Added Tax Act 10 of 2000.

[17] NAMRA is also mandated to receive and record revenue on behalf of the State and to enforce the revenue laws with respect to the collection of revenue and to levy penalties and interest on overdue accounts, collect unpaid taxes and to perform any other function in relation to revenue collection as the minister may direct in writing. The day-to-day functions of NAMRA are placed in the hands of the commissioner of the Revenue Agency who is its Chief Executive Officer per as s 18 of the Act. Moreover s 20 of that Act provides that the functions of the commissioner are to administer the activities of NAMRA to the Board and to administer, organise and control the staff members of NAMRA in accordance with the Revenue Agency Human Resources Policy and to properly, efficiently, and effectively perform the functions and execute the mandate of NAMRA.

[18] Section 21 facilities or provides for the staff of NAMRA. This section properly read, established a unitary administrative organisation headed by the Commissioner and whose sole purpose and objective is to implement the prescribed tax laws of the Republic of Namibia.

The Income Tax Act 24 of 1981

[19] At the onset it was pointed out that s 3 of the Income Tax Act provides that:

'Exercise of powers and performance of duties

3. (1) The powers conferred and the duties imposed upon the Minister by or under the provisions of this Act or any amendment thereof may be exercised or performed by the Minister personally, or by any officer or employee carrying out the said provisions under the control, direction or supervision of the Minister.

(2) Any decision made and any notice or communication issued or signed by any such officer or employee may be withdrawn or amended by the Minister or by the officer or employee concerned, and shall for the purposes of the said provisions, until it has been so withdrawn, be deemed to have been made, issued or signed by the Minister: Provided that a decision made by any such officer or employee in the exercise of any discretionary power under the provisions of this Act or of any previous income tax law shall not be withdrawn or amended after the expiration of two years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if all the material facts were known to the said officer or employee when he made his decision.

(3) Any written decision made by the Minister personally in the exercise of any discretionary power under the provisions of this Act or of any previous income tax law shall not be withdrawn or amended by the Minister if all the material facts were known to him when he made his decision.'

[20] The allegations that the officials of NAMRA were not authorised by the Minister to act in the manner they did under s 67 and S 91 of the Act are clear and unambiguously provided for in the provisions of the NAMRA Act and the Income Tax Act.

[21] Chapter 3 part 1 of the Income Tax Act governs the returns. Section 56 provides:

'Taxpayer responsible to furnish a return of income and a computation of the tax payable, and to pay the tax so payable, and the manner of furnishing returns and interim returns

56. (1) Subject to subsections (4), (5) and (16), every person who is personally or in a representative capacity liable to taxation under this Act in respect of a year of assessment, shall not later than the last day fixed by subsection (1A) –

....

(1A) The last day for the furnishing of a return of income and payment of the tax due in terms of subsection (1) is –

...

(b) in relation to a taxpayer –

(i) which is a company; or

the last day of the 7th month after the end of the year of assessment.’

[22] The requirement of this section is that a company, in this case the applicant, has a statutory duty to make payment of the income tax for the year under consideration on the last day of the seventh month after the end of the year of assessment. The applicant’s end of year is 30 September every year consequently the last day for the payment of the income tax by the applicant is seven months after September. The day for payment is also depended on the day the returns were furnished and assessed.

Payment and Recovery of Tax Appointment of day for payment of tax and interest on overdue payments

[23] Section 79 of the Act reads as follows:

‘ (1) Subject to the provisions of section 80 any tax chargeable shall be paid on the due date for such payment as specified in section 56 of this Act.

(2) If the taxpayer fails to pay any tax in full on or before the date for payment of such tax as specified in the Act or any extension of such due date which the Minister may grant in terms of paragraph (a) of subsection (3) of section 56, as the case may be, interest shall be paid by the taxpayer on the outstanding balance of such tax at the rate of 20 percent per annum calculated as from the day immediately following such due date for payment until the day of payment.’

[24] In terms of s 79, the payment of the income tax must be made in terms of the prescribed time in s 56. The applicant’s tax was due to be paid on the dates set out above for each year of assessment. Because the applicant failed to pay, the Minister accordingly levied interest and penalties as there was no extension sought by the applicant.

Power to appoint agent

[25] Section 91 of the Income Tax act reads as follows:

'The Minister may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax due from any moneys, including pensions, salary wages or any other remuneration, which may be held by him for or due by him to the person whose agent he has been declared to be.'

[26] The second respondent accordingly appointed and authorized an official from the Intelligence Strategic Enforcement Unit within NAMRA to appoint Standard Bank to make payment of the applicant's tax. The second respondent therefore has a discretion to appoint an agent if he deems it necessary.

Recovery of tax

[27] Section 83 of the Income Tax Act provides for the recovery of taxes and it was argued that this provision should have been invoked before the first respondent proceeded in terms of s 91. It reads as follows:

' (1) (a) Any tax or any interest payable in terms of section 79 shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the Government of Namibia and shall be payable to the Minister in the manner and at the place prescribed.

(b) If any person fails to pay any tax or any interest payable in terms of section 79 when such tax or interest becomes due or is payable by him, the Minister may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of the tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Minister for a liquid debt of the amount specified in the statement.'

[28] The purpose of this section is to provide that any tax due or payable shall be deemed as a debt due to the Government. Once it is deemed as a debt, and the person that owes the debt has failed to pay it, the Minister has a discretion to file a statement certified by him or her and setting forth the amount of tax or interest

payable with the clerk or registrar of court, after it has been so filed it becomes a civil judgment. This civil judgment is then relied upon by the Minister to recover the tax.

[29] Whilst s 91 empowers the second respondent, to declare any person to be an agent for the purposes of the Act to make payment of the tax due. This section is not subject to the provision of s 83 as contented for by the applicant. Section 91, merely concerns the declaring of an agent, who must thereafter make the payment of the due tax.

[30] The 'representative taxpayer' is defined to mean - (a) in respect of the income of a company, the public officer thereof; (b) in respect of the income under his management, disposition or control, the agent of any person, including an agent appointed as such under the provisions of section 91, and for the purposes of this paragraph the term 'agent' includes every person in Namibia having the receipt, management or control of income on behalf of any person permanently or temporarily absent from Namibia or remitting or paying income to or receiving moneys for such person.

The arguments by the parties

[31] On behalf of the applicant it was argued that NAMRA is afforded sweeping powers, including appointing any person and transforming such a person into an agent of a taxpayer, so as to require funds held by such a person to be paid by NAMRA's appointed person as an agent of a taxpayer. This, appointment or declaration, according to s 91 is done and applied if the Minister "thinks necessary". The Rule of Law doctrine – which is juridical, political, and foundational in nature – and its twin, the principle of accountability, require NAMRA's actions to be free of (i) arbitrariness; (ii) vagueness; (iii) uncertainty; (iv) unfairness; and (v) unreasonableness (See *Government Employees Medical Scheme and Others v Public Protector of RSA and Others*⁴).

[32] It was further argued that the applicant made out a case for interim relief. One of the reasons for this is that it is left to the Minister to declare any person "if he

⁴ *Government Employees Medical Scheme and Others v Public Protector of RSA and Others* 2021 (2) SA 114, paras. 1 and 2.

thinks necessary” as an agent of a taxpayer and it is left for him to decide whether or not to take the taxpayer’s total monies in the hands of the person appointed as an agent. There is absolutely no guidelines, limitations, restrictions, or other relevant considerations he could make both in respect of the decision to declare a person as an agent and consideration of how much should be paid over. This is more of a subjective criterion and discretion.

[33] It was submitted that because the instructions by the seventh respondent are coercive and recovery in nature, it was incumbent upon the seventh respondent to secure a judicial stamp of approval through simplified and uncomplicated procedure under s 83 of the Act. Accordingly, the s 91 power, given the original jurisdiction of the Judiciary to adjudicate civil disputes, must be interpreted to mean that a person appointed as an agent could only be coercively and compulsively (under threat of sanction) be forced to pay over money as a unilaterally appointed agent of a taxpayer, if the Minister or NAMRA has followed a simplified procedure under s 83 of the Act by obtaining a certified statement which is deemed to be a civil judgment.

[34] It is common cause that the determination and appointment under s 1 was not made by the Minister, nor by the Commissioner of NAMRA. Instead, it was made by the seventh respondent. It was submitted that given the specific nature of the power and the wide and subjective nature of a discretion, as evident from the phrase ‘if he thinks necessary’ the power under s 91 of the Act cannot be performed by any employee of the Minister or NAMRA. It can only be exercised by the Minister and/or the Commissioner of NAMRA.

[35] On behalf of the respondents, it was argued that the Applicant’s has self-assessed and submitted zero return and has declared to the Revenue Agency that it has made no taxable income. The applicants relies on the 7 July 2023 assessment as the original assessment date, such that it must be afforded a future date for the payment of the due tax is not correct. The applicant has misconstrued s 67 (2), in that it believes that payment of the tax is due and payable to the Fiscus on a future date after 7 July 2023. The date for payment is statutorily prescribed, for the applicant to be the last day of the seventh month after the end of the year of assessment.

[36] The other complaint of the applicant pertains to s 64. It is alleged against the NAMRA officials that violated the applicant's right to privacy. In that, there was an unlawful intrusion of the applicant's right to privacy and right of a fair, investigative process and on the basis of unlawfully obtained evidence. It is on record that the first respondent notified the applicant of the comprehensive audit, and requested for the necessary documents, to reassessment the applicant's tax liability, after discovering that the applicant has been submitting zero income tax, however it has submitted VAT return which showed the applicant was trading and was thus earning a taxable income. The allegations that the applicants' rights to privacy was violated is not true. The documents requested are the documents necessary for the assessment. The reason for the assessment were explained in the exit audit meeting of 7 July 2023, the letter of 17 July 2023 was a mere recordal of the meeting that took place on 7 July 2023 so the allegations that the reason were provide way after 12 July 2023 is inconsistent with the facts.

[37] As to the alleged unauthorized appointment of Mr Sheehama to appoint Standard Bank as an agent, this point has no merit. As already indicated the NAMRA provision authorizes the official appointed in terms of s 18 of the Act to administer the laws of the tax in the schedule to that Act, which includes the Income Tax Act. The provision of s 3 of the Income Tax Act are clear and unambiguous, thus the ordinary grammatical meaning is applicable. As the Income tax is one of the statutes governing tax in Namibia and its provision are applicable to the officials of NAMRA. The powers and duties conferred upon the Minister under the provision of this Act may be performed by the Minister personally or by any officer or employee carrying out the provisions of the Income Tax Act, under direction or supervision of the Minister.

Legal considerations

[38] As the current urgent application mainly deals with the return of the applicant's money pending a review of the decisions of some of the respondents, the court only has to determine that issue today.

[39] In the matter of *Mugimu v Minister of Finance and others*⁵ Angula DJP discussed the concept of ‘pay now argue later’. He said the following:

[77] Our taxation system is based on the concept of ‘pay now argue later’. Mr Justice Kriegler in the matter of *Metcash (supra)* observed that it is a concept applied in the taxation dispensations of many countries in the world. The concept was found by the Constitutional Court of South Africa in the matter of *Metcash*⁶, not to be unconstitutional in the context of the South Africans Value-Added Tax Act 89 of 1991. In that matter a taxpayer sought to impugn the legislation in terms of which it is applied contending that it was, incompatible with section 34 of the South African Constitution. Mr Justice Kriegler writing for the court summarised the import of those provision as follows:

[60] In considering justification it is important to remember that the limitation under section 40(5) is limited in its scope, temporary and subject to judicial review. There are three additional features. First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-evident. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose. As stated earlier, the scheme of VAT instituted by the Act is a complex one which relies for its efficacy on self-regulation by registered vendors and regular periodic payments of VAT. Requiring them to pay on assessment prior to disputing their liability is an essential part of this scheme. It reduces the number of frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality. Section 40(5) plays an important role in this scheme. In order for a “pay now, argue later” scheme to work, it is necessary that the Commissioner is able to obtain execution against a taxpayer without having first to air the subject matter of the objection which will be adjudicated upon by the Special Court in due course. There is therefore a close connection between the overall purpose of the “pay now, argue later” rule and the effect of section 40(5).

[61] Secondly, the principle “pay now, argue later” is one which is adopted in many open and democratic societies. In many of these jurisdictions, as well, some scheme for immediate execution against a taxpayer is provided to ensure that the rule is efficacious. Given its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted

⁵ *Mugimu v Minister of Finance and Others* (12 of 2017) [2017] NAHCMD 151 (19 May 2017).

⁶ *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001(1) SA 1109 (CC) paras 44 – 7.

as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.

[62] Thirdly, the effect of the rule on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation. The rule is not absolute but subject to suspension in circumstances where the Commissioner considers it appropriate. The exercise of this power by the Commissioner constitutes administrative action within the contemplation of section 33 of the Constitution and as such is reviewable as discussed above. The existence of this discretionary power therefore reduces the effect of the principle “pay now, argue later” in an appropriate manner. In all these circumstances, therefore, I am persuaded that even if the effect of section 40(5) constitutes a limitation on the right entrenched in section 34 of the Constitution, it is a limitation which is justifiable within the meaning of section 36.

[78] There has been no material difference between our Income Tax Act and the South African Income Tax Act, given the historic relationship prior to Namibia’s independence. Until about February 2011 our section 78 of the Act read the same as the corresponding section in the South African Income Tax Act. Therefore the judicial interpretation or pronouncements by the South African Courts on their Income Tax Act would be highly persuasive in the interpretation of our Income Tax Act. From 1 February 2011 the Income Tax Act of South Africa was however amended in terms of which the Commissioner for Inland Revenue has been vested with the discretion to suspend payment of tax taking into account consideration set and stipulated factors⁷.

[79] Our Act remains the same as it was before. Section 78 of the Act entrenches the concept of pay now argue later. It provides that the obligation to pay and the right to receive and recover any tax chargeable under the Act shall not, unless the Minister so directs, be suspended by any appeal or pending the decision of a court of law under section 76. Section 76 concerns the appeal to the Supreme Court against the decision of the Special Income Tax Court⁸. The effect of section 78 is that the noting of an appeal does not suspend the taxpayer’s obligation to pay the tax assessed. In other words any pending appeal by a taxpayer on his or her assessed tax liability does not suspend his or her liability to pay the assessed tax amount.

[80] In summary, at the heart of the concept ‘*pay now argue later*’ are the considerations of public interest in obtaining full and speedy payment of the tax amount due to the Fiscus. Furthermore it limits the ability of noncompliant taxpayers to use objection and appeal procedures as a strategy to delay payment of their tax.’

⁷ Subsection (1) of Section 13 of Act 18 of 2009.

⁸ Subsection (2) of Section 13 of Act 18 of 2009.

[40] In his article *Clean Hands*, G.K. Goldswain⁹ said the following about third party appointments to recover taxes:

‘ In *Hindry v Nedcor Bank Ltd and Another*¹⁰ the taxpayer had received an erroneous refund of taxes from SARS. When the taxpayer failed to respond to the request for repayment, SARS appointed a third party – a bank in this case – without informing the taxpayer, to recover the amount. The taxpayer asked the court to declare section 99 of the Income Tax Act (58 of 1962) unconstitutional on the basis that it violates his right not to be arbitrarily deprived of his property. In addition, the taxpayer questioned the constitutionality of the actions and conduct of SARS in appointing a third party to collect the monies.

On the question of whether section 99 of the Income Tax Act (58 of 1962) violated the right of the tax payer not to be arbitrarily deprived of his property, the court acknowledge that the provision was extra-judicial and summary in nature, but the provision did not violate the right not to be arbitrarily deprived of property. Thus this decision supports the appointment of a third party to collect a tax debt on behalf of SARS as constitutional. ‘

[41] In *Du Preez vs Minister of Finance*¹¹, the Supreme Court had to answer the question on whether it was unfair for the due date for the revised assessment to be set as the date the original tax payments should have been made, even though the revised assessments were made years later. It is clear from s 56(1A) of the Act, as set out above, that the Act stipulates that the day for the payment of tax due, is the last day of June following the end of the year of assessment. Section 79(1) then provides that interest runs from the due date as specified in s 56(1A). In determining the date upon which the original tax payments were due, the respondent therefore followed the statutory prescription that interest ran from the date upon which the tax was due. The date from which interest shall run is thus determined by the Act. Section 79 prescribes how and at what rate interest should be levied in the event the taxpayer defaults. Interest is charged 'as from the day immediately following such due date for payment until day of payment'. The deponent on behalf of the respondent states that interest was levied from the due date applicable to each tax year irrespective of when the fraudulent representations made by the appellant and/or his representative came to light. The statute prescribes that interest should be calculated in this way.

⁹ G.K. Goldswain "“Clean hands” – Is this or a similar concept used by the courts to determine a taxpayer’s right to just administrative action?" (2017) 1ISSN: 1998-8125 Volume 21 p 76.

¹⁰ *Hindry v Nedcor Bank Ltd and Another* 61SATC163.

¹¹ *Du Preez vs Minister of Finance* 2012 (2) NR 643 (SC).

[42] In the same *Du Preez* matter the court said the following regarding the nature of tax or taxation in that it is:

...

'compulsory and not an optional contribution; imposed by the legislature or other competent public authority; upon the public as a whole or a substantial sector thereof; and the revenue from which is to be utilised for the public benefit and to provide a service in the public interest.'

[43] It is important to note that the applicant is a registered taxpayer for income tax. Under chapter 3 part 1 of the Income Tax Act, the duty is placed on the taxpayer, to register for the various types of tax, submit timeous returns and computation of the tax payable, accurate and make and accurate and timeous payment. Moreover the nature of tax or taxation has been observed by the Supreme Court in the *Du Preez*¹², as compulsory and not an optional contribution; imposed by the legislature or other competent public authority; upon the public as a whole or a substantial sector thereof; and the revenue from which is to be utilised for the public benefit and to provide a service in the public interest.

Conclusion

[44] This court only has to decide as to whether a case was made out for the return of the money transferred out of the applicant's account by Standard Bank who was appointed as an agent by the first respondent pending the hearing of the remainder of the application. An applicant must establish a prima facie right before interim relief can be granted and therefore the court carefully took notice of the arguments put forward by Mr Namandje, on behalf of the applicant and his attempt to draw a distinction between the *Mugimu* case which dealt with slightly different issues but generally the same relief was sought. I find no reason to come to the conclusion that the 'pay now argue later' concept should not be applicable in this matter and thus find that the monies attached by the first respondent should remain with them for now as it is in public interest.

[45] In the result, I make the following order:

¹² Supra.

1. The applicant's non-compliance with the Rules of this court relating to the service of court papers and the time periods in terms of Rule 73 is condoned and the matter is heard as one of urgency.
2. The application for the issue of interim orders is refused.
3. The costs of this application is to stand over for determination at the end of the hearing of the second part of the application.
4. The matter is postponed to 5 September 2023 at 15:30 for a case management conference hearing and the parties are to file a joint case management report on or before 31 August 2023.

E RAKOW
Judge

APPEARANCES

Applicants: S Namandje (with Karel Gaeb)
Of Sisa Namandje & Co. Inc, Windhoek

Respondents: T C Phatela (SC) (with E. Shifotoka & F Da Silva)
Instructed by Office of the Attorney General, Windhoek