CASE NO:SA l/96

ARNOLD ERICH HINDJOU versus THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA (RECEIVER OF REVENUE) & THE REGISTRAR OF DEEDS

1997/06/10

MAHOMED, CJ et DUMBUSHENA. AJA et MTAMBANENGWE, J

GROUNDS OF APPEAL - Grounds upon which appeal is founded must be precise and to the point. Counsel must pay attention to areas of a judgment they are challenging; not in the best interest of justice to rumble through whole judgment in hope of finding something wrong or error which might lead to success of appeal.

INCOME TAX ACT - Determination of taxpayers liability - Secretary's assessment of income tax which is not disputed attracts the provisions of Section 83(l)(b) of the Act. Secretary's decision not a judicial decision.

CONSTITUTION - Article 12(l)(a) of Constitution does not refer to Secretary's determination Article 78 of Constitution and Section 83(1)(b) of Income Tax Act perform different functions.

EXECUTION - Court may declare immovable property executable if it has been shown the satisfaction of the Court that the debtor does not have sufficient movable property to satisfy the writ.

CASE NO. SA 1/96

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ARNOLD ERICH HINDJOU APPELLANT

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA (RECEIVER OF REVENUE) FIRST RESPONDENT

THE REGISTRAR OF DEEDS SECOND RESPONDENT

Coram: Mahomed, CJ; Dumbutshena, AJA et Mtambanengwe, AJA Heard on: 1996/10/07 Delivered on: 1997/06/10

APPEAL JUDGMENT

DUMBUTSHENA. AJA: This is an appeal against the whole judgment of Frank, J who wrote it on behalf of the Full Bench of the High Court. There are seventeen grounds of appeal.

Some of those grounds are voluminous and appear to be submissions in support of appellant's appeal. I mention this because grounds of appeal must specify findings of fact and/or rulings of law appealed against and the grounds upon which the appeal is founded. They must be precise and to the point so that that which is appealed against is clear not only to the appellant but more importantly to the respondent and the Court. I reproduce below a few of the seventeen grounds of appeal in this case.

Ground No. 4 reads:

> "The Court erred in giving its stamp to a * claim' which was in terms of the Income Tax Act made into a 'Judgment of the High Court' without any member of the High Court (neither a Judge nor the Registrar) having any say in the matter or being allowed (section 84) to bring to bear an 'independent impartial and competent' mind (Article 12 of the Constitution) to the claim made and brought to the Court. Such default 'judgment' is not granted in accordance with the Rules of the High Court, which prescribed the procedure to be adopted in all matters, but in accordance with a procedure formulated in another law (i.e. the Income Tax Act) and v/hich are (is) thus not made in accordance with the provisions of Article 78 of the Constitution. The Court thus erred in confirming a 'judgment' which was not granted in accordance with its procedures."

Ground number 5 says:

> "In its attempt to place the provisions of section 83 and 84 in the context of the overall proceedings prescribed by the Income Tax Act for the altermination and recover of Income Tax (Section 67, 70, 71, 73, 76, 78). The Court erred in not finding that the overall effect of this procedure is also in conflict with Article 12 (and Article 78) of the Constitution and the Court did not give due consideration in particular to the following:

> What follows are five arguments or submissions: Subparagraph (e) of ground illustrates what I referred to above as arguments or submissions. It reads as follows:
>
> > •The "Court of first instance" is the Secretary of Finance himself thus the same person which made the assessment and even if the taxpayer makes no objection, in the "determination" of the taxpayers civil obligation he is thus neither afforded a "fair and public" hearing nor an "independent impartial and competent court" to which he is entitled in terms of Article 12 of the Constitution. (The fact that the "Appeal" provisions of the Income Tax Act Company complies with the principles laid down in Article 12, cannot be used as a ground for requiring these principle(s) not also to apply to the "Court of first instance").[1]"

It appears from a reading of the judgment of the Court *a quo* that the matters raised in some of the seventeen grounds of appeal were adequately dealt with in the judgment of the Court *a quo.* The Court *a quo* paid particular attention to the submissions made by counsel. I refer below to a passage from the judgment:

> "Mr. Vaatz who appeared for the applicant contended that sections 83 and 84 of the Income Tax Act were unconstitutional as they conflicted with Article 12 of the Constitution. Article 12 of the Constitution insofar as it is relevant to this application reads as follows:
>
> > 'In the determination of their civil rights and obligations..., all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: . . . '
>
> As already indicated section 83 deems tax payable a debt to the Government and provides for the filing of a statement with the clerk or registrar of a competent court which will have the effect of a civil judgment and section 84 provides that the correctness of statement filed in terms of section 83 cannot be questioned in proceedings relating to the statement notwithstanding any pending objection or appeal to such statement.

> Mr. Vaatz contended that section 83 allows for a judgment to be taken in the absence of the party affected and without notice to such party and there is thus a determination of his obligation to the State in the form of taxes due without recourse to an 'independent, impartial and competent Court or Tribunal'. The error in this submission, in my view, is that it treats section 83 in isolation and does not see it in the context of the Income Tax Act set out above. The taxpayer was granted the opportunity to object to the assessment and it is the failure to do so which determined his/her obligation. In this sense each assessment is provisional until the taxpayer decides to object or not. If there is no objection he accepts the determination of his tax liability in the assessment and such liability is thus, as it were, determined by consent. As there is no dispute there is nothing to be determined by an independent, impartial and competent court. How such determination can be unfair or unconstitutional I cannot fathom. If there is an objection and a dispute arises the machinery of the act comes into operation which makes provision for a determination by a special court."

A reading of the above passage and some of the grounds of appeal draws one's attention to the time that would be served were counsel to pay attention to areas of a judgment they were challenging because of what they consider to be a misdirection or any other perceived wrong in the judgment. To rumble through the whole judgment in the hope of finding something wrong or an error which leads to the success of the appeal, is not in the best interest of justice. It tends to waste the time of the parties and the Court. It seems to me that no attention was paid to the contents of the judgment of the Court *a quo.* In an appeal it is important for appellant to point out where the Court went wrong.

One may ask: What was the attitude of the appellant to the many assessments that were sent to him before he decided to

take the Secretary to Court? It seems to me appellant accepted tax assessments sent to him. He did not challenge or object to the assessments until he, it can be assumed, was incapable of paying his taxes. Even, then the appellant did not attack in his heads of argument the assessments made by the Secretary.

There were not objections lodged against the Secretary's assessments, the assessments were therefore final and conclusive.

I narrate below appellant's reaction to the assessments made by the Secretary.

He did not send to the Receiver of Revenue his income tax returns for the tax years 1982, 1983, 1984, 1985 and 1986. The Receiver of Revenue carried out investigations. The Secretary assessed his assets and capital growth for the above years and came out with the following assessments which were forwarded to him. He did not object. In 1982 the tax assessed was N$16 194,53; 1983 - N$52 549,56; 1984 - N$12 115,53; 1985 - N$13 755,41; and 1986 - N$23 328,35. He proceeded to pay by instalments. He paid twice the amount of N$15 000,00. He paid the sum of N$l 000,00 three times. These payments were made during the months of February, March and April 1989.

He was reminded that he had not submitted his tax returns for tax years 1987 and 1988. He did not respond to the warning.

Summonses were issued against him. He submitted returns for the tax years 1987, 1988 and 1989. This time he was assisted by S.A. Walters & Co., a firm specialising in bookkeeping and tax consultancy. The assessments for 1987, 1988 and 1989 were respectively N$2 989,34; N$l 981,59 and N$22 317,18. There was no objection to the assessments.

He was once again reminded to pay his taxes. He was told that failure to pay tax and interest would result in a certified statement being filed with the Clerk of the Magistrate's Court and that the certified statement had the effect of a civil judgment. He paid N$5 000,00 and another N$5 000,00 in 1991, then N$10 000,00 on 7 April 1992 and two payments of N$15 000,00 and N$5 000,00 on 7 May 1992. Thereafter he did not make further payments. He was again assisted by the firm J.A. Walters & Co. His tax liability for 1991 was N$50 832,63. There was no tax due and payable for the tax year 1990.

By 1992 appellant's total income tax liability and interest was M$206 817,32. He was once more reminded of the consequences of not paying. He still did not pay.

From the above information it is clear that at one point or another appellant decided not to pay his accumulated tax liability. What I find surprising is that appellant seemed, during the hearing of his appeal, willing to satisfy his income tax liability by disposing of his movable properties.

For instance he was willing to have his 300 cattle sold by the Deputy Sheriff through auction. The only matter he seemed concerned about and to resist was the attaching of his immovable property. Why does he not sell the movable property he claims he owns and wipe out his tax liability?

I feel strongly that the appellant would not have appealed against the whole judgment of the Court *a quo* had he given serious thought to the matters decided upon by the Court *a quo.* Appellant rumbled through the whole record with the hope of tumbling upon some errors of fact or law made by the Court *a quo.* This type of approach to appeals is not in the best interest of justice.

Mr. Vaatz, for the appellant, attacked the constitutionality of sections 83(1)(b) and 84 of the Income Tax Act, Act 24 of 1981. He submitted that the rules of procedure laid down in these sections were contrary to the provisions of Article 78 and Article 12(1)(a) of the Constitution of Namibia.

Although Mr. Smuts, for the respondents, objected to the amendment sought by Mr. Vaatz the Court allowed Counsel to argue on the effect of Article 78 of the Constitution which had not been argued in the Court below. Counsel were granted the opportunity to supplement their heads of argument. In Gollach and Gomperts (1967) (Ptv) Ltd v Universal Mills and Produce Co. (Ptv) Ltd and Others 1978 (1) SA 914 (A) at 928 D Muller, J.A. said in this respect:

> "...a litigant who seeks to add new grounds for relief at the eleventh hour does not claim such amendment as a matter of right but rather seeks an indulgence. (See Van Den Heever, J. in Van Aswegen and Another v Fechter. 1939 OPD 78 at pp 88 - 89.)"

Mr. Vaatz did not include Article 78 in his pleadings. He applied to change or add section 78 to his original pleadings which dealt only with Article 12 of the Constitution. The reason he gave for the addition of Article 78 was not, I must admit, clearly understood, at least by me. The question for this Court is should he be allowed to harass the respondents by an amendment he did not lay a foundation for? In Trans-Drakensberg Bank Ltd. (Under Judicial Management) v Combined Engineering (Ptv) Ltd and Another, 1967(3) SA 632 (D) at 641 A the application was rejected.

This Court allowed Counsel to supplement their heads of argument so as to argue the factors which make or which do not make Article 78 relevant to the appellant's case. In any event the amendment proposed constitutes legal argument.

The question of the relevance of the conflict between section 83(1) (b) of the Act and Article 78 of the Constitution in this appeal is difficult to comprehend. However Mr. Vaatz submitted that section 83(1)(b) interfered with the independence of the judiciary specified in Article 78 of the Constitution because the Secretary files, in terms of section 83(1) (b) a statement which upon its mere filing has the effect of a judgment lawfully given by a Court. As pointed out above this Court gave leave to the parties to file

further written arguments on this specific issue. I have read appellant's supplementary heads of argument and have found no assistance from them because Mr. Vaatz chose to reply to the first respondent's supplementary heads of argument. As a result there was no further amplification of the submission originally made by him.

Mr. Smuts submitted that section 83(1)(b) was for the recovery or collection of an already determined tax liability within the context of the Act considered as a whole, and within the wider contest of the recovery of revenue by the State. He submitted rightly that section 83(1)(b) provides an easy method of facilitating the process of execution proceedings in order to recover the tax liability mentioned above. There was no way section 83(1) (b) could be said to interfere with Article 78 and Article 12(1)(a) of the Constitution.

Section 83(1)(b) provides:

> "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 payable by him the Secretary 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 effect of, and any proceedings may be taken thereon as if it were a civil judgment lawfully given in that court in favour of the Secretary for a liquid debt of the amount specified in the statement."

It was Mr. Vaatz contention that both section 83(1)(b) and

section 84 were in conflict with Article 12(1) (a) of the Constitution. Article 12(1)(a) reads:

> "In the determination of their civil rights and obligations . . . all persons shall be entitled to a fair and public hearing by an independent Court or Tribunal established by law . . . ".

Mr. Vaatz's submission in this regard is best understood from reading ground of appeal number 3 which says:

> "The Court erred in not finding that the requirements of a "fair and public hearing" in terms of Article 12 of the Constitution, includes as a corollary the requirement that the procedure which initiates the proceedings which lead to the judgment of the Court (i.e. the proper service of a proper summons telling the Defendant what his options are and that judgment will be granted against him, if he does not file a Notice of Intention to Defend within a specific time) must also be fair.".

Mr. Vaatz's contention that a judgment entered against a taxpayer or defendant without service of a summons issuing from the High Court is not fair, ignores the fact that the assessment has attached to it a notice advising the taxpayer that he can object the assessment, if he so desires, within 21 days from the making of the assessment. The lawgiver in framing and enacting Act 24 of 1931 must have realised that assessments of income tax are sent to many people, in fact thousands of people. Therefore a procedure that would serve those people expeditiously was more convenient than issuing and serving a High Court Summons with each assessment. Mr. Vaatz seems to attach great importance to procedures

prescribed by High Court Rules or Magistrate's Court Rules. The Income Tax Act was passed by the legislature whose duty it is to make laws. The Act is not a subsidiary legislation.

The appellant fails to appreciate that the Secretary is performing an administrative duty involving, as I said above, thousands of people. It is, as I see it, important that those taxpayers who do not object the Secretary's assessments are identified as accepting the assessments. They do not dispute the assessments. And if they fail to pay their taxes the section 83(1)(b) procedure is convenient for collecting taxes from them. The appellant falls within this category of taxpayers. He attracted the provisions of section 83(l)(b) because he failed to pay tax liabilities which he did not dispute. There is no comparison between serving a summons issued in the High Court and the Secretary's filing of a statement certified by him as correct and setting forth the amount of tax and interest appellant was not paying. The Secretary knows before he files his statement that the taxpayer did not dispute his tax liability. When the statement is entered in the judgment book that statement does not become a judgment. It has the <u>effect</u> of a civil judgment. What is important is that section 83(1) (b) is used by the Secretary as an income tax collecting mechanism.

Mr. Vaatz failed to distinguish between the Secretary's determination of a taxpayer's tax liability and the determination in terms of Article 12(1)(a) of the Constitution. The Secretary's determination has noting to do

with a fair trial. Determination here means calculating or ascertaining the exact amount of tax from taxable income. The Secretary decides the amount of tax to be paid in income tax. The Secretary is not involved in giving a judicial decision. The word "determination" in Article 12(1)(a) is concerned with a fair trial before an independent, impartial and competent Court or Tribunal. It does not refer to the Secretary's determination of a tax liability. In this case the opportunity to be tried by an independent, impartial and competent Court did not arise.

Section 83(1) (b) has nothing to do with Article 78 of the Constitution. The attack by the appellant on the income tax collecting mechanism in sections 83(1) (b) and 84 on the ground that these sections are unconstitutional is ill-conceived.

The appellant should have attacked the various assessments if he felt that they were wrong. The provisions of sections 83(1) (b) and 84 have nothing to do with the assessment of a tax payer's tax liability. If the appellant was dissatisfied with the manner the judgment was entered, it was open to him to apply to the Court to set aside the judgment on the ground that it was entered in his absence. See Kruaer v C I R 1996(1) 456 (C),

The Court *a quo* pinpointed what I consider important in deciding this appeal:

> "The^ attack on the manner in which the judgment is obtained seems to me not to distinguish between the determination of the obligation and the recovering mechanism once the obligation has been determined. Article 12 of the Constitution deals with the determination and cannot assist an attack on the recovery mechanism. Where the determination is fair and constitutional but the recovering mechanism is for some reason tainted one surely cannot attack the determination.... The grounds of such attack will not be Article 12.".

Mr. Smuts contended rightly that Article 78 and section 83(1) (b) perform different functions. Article 78 deals exclusively with the independence of the courts. Section 83(1) (b) provides the Receiver of Revenue with a convenient method of collecting taxes and interest from people who do not dispute their income tax liabilities but fail to pay. There can be no conflict between the two.

Article 78 in appropriate parts provides:

> "(2) The Courts shall be independent and subject only to the Constitution and the law.
>
> (3) No member of the Cabinet or Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their functions, and all organs of the State shall accord such assistance as the Courts require to protect their independence, dignity and effectiveness, subject to the terms of the Constitution or any other law.".

It is not correct to suggest that sections 83(1) (b) and 84 of the Act interfere with the independence of the Courts. Article 78 reinforces the independence of the judiciary and the separation of powers between the executive, the

legislature and the judiciary. Members of the executive and legislature are called upon to "accord such assistance as the Courts require to protect their independence, dignity and effectiveness...".

Mr. Vaatz further submitted that section 84 excludes the functions of the High Court and its officers. All that section 84 does is to stop the taxpayer from questioning the correctness of the assessment in any proceedings related to the statement filed with the registrar in terms of section 83(1) (b). The fact that the taxpayer has lodged an objection or appealed does not give him or her the right to question the statement. And the liability to pay the assessed tax is not suspended by the objection or the appeal. The important function of section 84 is to deal primarily with the collection of taxes.

Mr. Vaatz next attacked the judgment of the Court *a quo* on the ground that Rule 45 of the High Court Rules was ignored when the Deputy Sheriff attached appellant's immovable property when his movable property was not attached. This was contrary to Rule 45(1) of the Rules of the High Court. He asked that the attachment of appellant's immovable property be set aside.

Rule 45(1) reads as follows:

> "The party in whose favour any judgment of the court has been pronounced may, at his or her own risk, sue out of the office of the registrar one or more writs for execution...

> Provided that, except where by judgment of the court immovable property has been specifically declared executable, no such process shall be issued against the immovable property of any person until a return shall have been made of any process which may. have been issued against his or her movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ.".

From the evidence considered by the Court *a quo* the Deputy Sheriff did the proper thing. He discussed with appellant the sale of his cattle. circumstances did not permit the sale of the cattle.

Mr. Vaatz contended that although a writ against movable property was issued the Deputy Sheriff did not go to the dwelling house of the appellant or to his place of business and demand to be shown or to have movable and disposable property pointed out to him. He did not search for movable property and if he did he failed to write out an inventory of movables, and if he did he failed to hand out a copy of the inventory to the appellant and the respondent.

The Deputy Sheriff did, however, say the appellant mentioned cattle which were not in the kraal at that time. In spite of what he failed to do the Deputy Sheriff filed on 25 January 1995 a second "return of service" in which he stated on 23 January 1995 that he made a diligent search and could not find "sufficient disposable property to satisfy the writ". He therefore filed a *nulla bona* return. Mr. Vaatz argued that it was wrong for the Deputy Sheriff to issue a *nulla bona* return when in fact he did not search for movable property.

Rule 45 contains a mandatory provision which forbids the issuing of a writ against immovable property until there has

been execution against movable property. Mr. Vaatz argued that appellant has nine farms, a bottle store in Opuwa and a house. Then he said this:

> "Appellant must have a substantial number of domestic animals on those nine farms . .. Taking into account that there is no public transport in Kaokoland or in the Outjo district, the appellant must have more than one vehicle to service his farms and his bottle store. There must have been stock in the bottle store. There must have been furniture in the house.".

It is unfortunate that the above passage tends to suggest that the appellant did not know the movable property he had. Was it not the appellant's duty to point it out to the Deputy Sheriff?

The Deputy Sheriff was only aware of the contents of the bottle store and one motor vehicle. He did not think they were worth much. He was not shown any other movable property. According to the Deputy Sheriff their value would not cover the costs of attachment and the proceeds of sale would have been minimal and insignificant in relation to appellant's debt. He entered a *nulla bona* return.

The cattle were in accessible mountains of Kaokoland. They were not available to the Deputy Sheriff for auctioning. The appellant was not willing to bring the 300 cattle from Kaokoland. The Court *a quo* believed the version of the Deputy Sheriff and rejected appellant's version.

Further it is clear that a Court may declare immovable property executable if it has been shown to the satisfaction of the Court that the debtor does not have sufficient movable property to satisfy the writ. Cape Town Town Council v Estate Jaliel 1911, Vol 1, CPD 11; Landsdowne Concrete. Etc. Co v Davids 1927 CPD 132; Dorasamv v Messenger of the Court. Pinetown. and Others 1956(4) SA 286 (D) at 290 E - F. Per Conradie J in Ledlie v Erf 2235 Somerset West (Ptv) Ltd 1992(4) SA 600 at 601 H. In this case it is more than clear that the appellant did not have sufficient movable property whose proceeds could have settled in full his tax liability and the Deputy Sheriff seemed satisfied from what he had seen and observed that the appellant did not have sufficient movable property to satisfy the writ.

During the hearing of this appeal it seemed clear to me that appellant wanted to pay his taxes. It was therefore easy to assume that he would have gladly disposed of his movable property, cattle and all, in order to wipe out his tax liability. He did not. What surprises me is that he has had a long time to pay from January 1995 when the immovable property was attached to October 1996 when the appeal was heard. If he wanted to pay he would have sold some of his movables, if he has them, and brought his cattle from the mountains of Kaokoland to the auction floors.

The Court *a quo* preferred the evidence of the Deputy Sheriff to that of the appellant. The Deputy Sheriff saw one motor

vehicle and a bottle store belonging to the appellant. No other movable property was shown or pointed out to him. He consequently filed a *nulla bona* return. The Court *a quo* correctly, in my view, approached the evidence on the dispute of fact and preferred the Deputy Sheriff's version to that of the appellant. The Court *a quo* came to the conclusion that there would be no prejudice to the appellant if the attachment of immovable properties was not set aside. This is more so now that the appellant has had such a long time to sell his movables or to point them out to the Deputy Sheriff. The condonation of the non-compliance with Rule 45 was in my view justified. It is more justified now that the appellant has had much longer time to sell his disposables, if he has them, or to show them to the Deputy Sheriff. As the Court *a quo* said in its judgment: The appellant "declined to point out sufficient movables and he has only himself to blame that his immovables were attached...".

I repeat. If the appellant wanted to pay his tax through the proceeds of the sale of his movables he would have done so long ago. He has had ample time to organise and to sell his movables or to bring down his cattle from the mountains. Unfortunately he has not done so. There was, it seems to me, no reasonable grounds advanced during the hearing of this appeal which remotely suggested that appellant disputed his tax liability. He has not suggested that he is unable to pay. He has not solicited for a special arrangement for paying his arrears of taxes and interest.

It appears to me the appellant wants to delay the payment of the debt he knows to be owing and payable. Whatever reasons he has for delaying payment he cannot find solace in the courts.

In the result the appeal is dismissed with costs.

DUMBUTSHENA, AJA I

agree.

MAHOMED, C J

I agree.

MTAMBANENGWE, AJA

COUNSEL FOR THE APPELLANT: MR. A VAATZ
INSTRUCTED BY: A. VAATZ

COUNSEL FOR THE RESPONDENT: ADV. D.F. SMUTS
INSTRUCTED BY: THE GOVERNMENT ATTORNEY