REPORTABLE

CASE NO.: SA 20/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GIDEON JACOBUS DU PREEZ **APPELLANT**

and

MINISTER OF FINANCE **RESPONDENT**

Coram: MAINGA JA, STRYDOM AJA *et* O'REGAN AJA

Heard on: 04/11/2011

Delivered on: 21/06/2012

APPEAL JUDGMENT

MAINGA JA:

[1] This is an appeal against the decision of Parker J in the High Court.[1] Appellant, Mr G J Du Preez, had brought a review application in that Court in terms of Article 18 of

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1See *Gideon Jacobus Du Preez v The Minister of Finance*, Case No A 74/2009, judgment of the High Court, delivered on 25 March 2011 (per Parker J)

the Constitution of the Republic of Namibia,[2] seeking to review and correct or set aside the decision by the respondent, the Minister of Finance, against the appellant in respect of the income tax years of assessment 2000 to 2008 claiming an amount of N$100 769,09 in respect of interest and N$51 339,22 in respect of arrear tax. Such a high claim of arrear interest is unfair and unreasonable, so maintained the appellant, and thus subject to review in terms of Article 18.

Factual background

[2] Appellant is a qualified fitter who now lives in Windhoek. The case concerns a dispute he has with the Ministry of Finance that relates primarily to revised tax assessments issue for the years 2000 – 2005.

[3] The dispute arose partly from the fact that in about 2004 the appellant's tax adviser reopened his assessments for earlier years, and submitted fraudulent information that resulted in a revision of the assessments for those years. In about 2007/2008, the Ministry discovered that the appellant and/or his tax advisor had been defrauding the tax authorities and in April 2008, held a meeting with the appellant where according to the Ministry the appellant admitted the fraud, although in his replying affidavit the appellant denies he was aware of the fraud.

[4] Subsequent to the meeting of April 2008, revised assessments were produced and additional tax was charged in respect of each year in terms of section 66 of the Income Tax Act. That section provides for 200% additional tax in the event of the filing of misleading information. Revised tax assessments were issued in respect of the 2000, 2001, 2002, 2004 and 2005 tax years. Interest was calculated in terms of section 79(2) of the Act at a rate of 20% per annum from the due date on the revised

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2Article 18 provides: "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

assessments. In each case, the due date had been stipulated in the revised assessment. The total amount of interest was N$111,492,97 which exceeded the principal amount due. At the time, section 79(4) of the Act expressly provided that the interest could exceed the principal debt.

[5] The appellant then asked the Minister to reconsider the additional tax levied in terms of section 66 which the Minister did in terms of section 66(2)(a) of the Act and the additional tax levied for the years 2000, 2001, 2004 and 2005 was reduced from 200% of the tax originally payable to 20% of the tax originally payable. The tax assessments were then revised again. According to respondent, as at 21 April 2009, the cumulative amount outstanding was N$45 572, 34 plus interest in an amount of N$111 492,97.

[6] The appellant did not lodge an objection or appeal in terms of section 71 or 73 of the Act. Instead, on 3 March 2009, the appellant launched proceedings in the High Court to review and set aside the decision by the Respondent claiming N$100 769,09 in interest, as well as N$51 339,22 in arrear tax. The basis for the review, according to the appellant, is the fact that the claim for arrear interest was unfair and unreasonable within the meaning of Article 18 of the Constitution.

High Court Judgment

[7] The High Court dismissed the application with costs. In reaching this conclusion, it reasoned that there was no legal basis on which it was alleged that the respondent's decision was unfair and unreasonable within the meaning of Article 18. The High Court found that the appellant did not even contend that the respondent

was not authorised to make the decision complained of and neither did the appellant prove that in taking the decision complained of, the respondent acted outside the authority conferred by the Income Tax Act, 1981 (Act No. 24 of 1981) as amended (the Act). It then held that the appellant failed to discharge the *onus* cast on him to satisfy the Court that good grounds existed to review the decision of the respondent.

Relevant provisions

[8] In order to appreciate the appellant's complaint, one must have some understanding how the tax system works. By its nature "tax" or "taxation" can be understood as:

(i) a 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.[3]

[9] Section 2 of the Act provides that the Minister shall be responsible for the carrying out the Act's provisions. Section 3 provides that the powers conferred and the duties imposed by or under the Act, 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.

[10] Section 56 obliges a taxpayer to furnish an income tax return by 30 June in the year following the year of assessment and to pay any due tax. It reads as follows:

3*Nyambirai v National Social Security and Another* 1996(1) SA 636 ZSC at 643C-D; 1995 (9) BLLR 1221 at 1227J-1228B; *Carlson Investments Share Block v Commissioner, South Africa Revenue Service* 2001(3) SA 210 WLD at 231A-B.

"**56 Notice by Minister requiring returns for assessment of taxes and manner of furnishing returns and interim returns**

(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)-

(a) furnish a return of income in the prescribed form, which shall –

(i) be signed by the person or the duly authorized agent of the person; and

(ii) include a computation of the taxable income of the person and of the amount of tax payable on that income, calculated in accordance with the rates of normal tax set out in Schedule 4; and

(b) subject to subsection (3), pay the amount of the tax due in accordance with that computation.

[Subsec (1) amended by sec 9(1)(a) of Act 21 of 1999 and substituted sec 9(1)(a) of Act 7 of 2002.]

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

(a) in relation to a taxpayer other than a person referred to in paragraph (b), the last day of June following the end of the year of assessment;

(b) in relation to a taxpayer-

(i) which is a company; or

who derives income wholly or partially from business, any profession or farming carried on by the taxpayer,

the last day of the 7th month after the end of the year of assessment. [Subsec (1A) inserted by sec 9(1)(b) of Act 7 of 2002.]

[11] Section 66(1) provides as follows:

"66 Additional tax in the event of default or omission

(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income-

(a) If he or she defaults in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his or her taxable income for that year of assessment, less any amount already paid in respect of such tax at the time when an assessment for that year of assessment issued; or [Para (a) substituted by sec 11(1) of Act 21 of 1999.]

(b) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income return by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted;

(c) if he makes an incorrect statement in any return rendered by him which results or would if accepted result in the assessment of the normal tax at an amount which is less than the tax properly chargeable, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax would have been properly chargeable."

[12] Section 79 provided at all relevant times for this case:

"**79 Appointment of day for payment of tax and interest on overdue payments**

(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. [subsec (1) substituted

by sec 12(12)(a) of Act 21 of 1999.]

(2) If the taxpayer fails to pay any tax in full on or before the due 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 daily as from such due date for payment and compounded monthly during the period which any portion of the tax remains unpaid.

[Subsec (2) amended by sec 12(b) of Proc 10 of 1985 and substituted by sec 9(a) of Act 22 of 1995, and sec 12(1)(b) of Act 21 of 1999.) [4]

(3) Any amount which on 1 February 1996 is owing by any taxpayer in respect of any tax, penalties or interest levied or accrued in terms of this Act before such a date, shall with effect from that date bear interest at the rate of 20 percent per annum, calculated daily and compounded monthly; and

[Subsec (3) added by sec 9(b) of act 22 of 1995 and substituted by sec 23(a) of Act 12 of 1996.]

(4) Notwithstanding anything to the contrary contained in any law or the common law, the amount that may be accumulated and be recovered in respect of interest levied in accordance with any provision of this section shall not be limited to, and may exceed, the amount of the principal debt due, whether such principal debt represents tax, penalties or interest, or a combination thereof. [Subsec (4) added by sec 23(b) of Act 12 of 1996.]

[13] Section 71 and 73 provides for objections and appeals that may be lodged against the decision of the Minister. The relevant provisions read as follows:

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4 The subsection was further amended by sec 7(a) of Act 5 of 2007 which came into operation on 1 April 2009. As this amendment was not operable at the time the dispute in this case arose, the section is reproduced in its form prior to the 2009 amendment.

"**71 Time and manner of lodging objections**

(1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.
[Subsec (1) substituted by sec 7 of Act 5 of 1997.]

(2) No objection shall be entertained by the Minister which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Minister is satisfied that reasonable grounds exist for delay in lodging the objection.

(3) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.

(4) On receipt of a notice of objection to an assessment the Minister may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

(5) Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive."

[14] Section 73:

"73 Appeal to special court against Minister's decision

(1) Any person entitled to make an objection who is dissatisfied with any decision of the Minister as notified to him or her in terms of section 71(4) may, subject to the provisions of section 73A, appeal therefrom to a special court for hearing income

tax appeals, constituted in accordance with the provisions of this section.

[Subsec (1) substituted by sec 5 of Act 4 of 2005.]

(2) Every court so constituted shall consist of a judge of the High Court of Namibia, who shall be the President of the court, an accountant of not less than ten years' standing, and a representative of the commercial community: Provided that in all cases relating to the business of mining, if the appellant so prefers, such third member shall be a qualified mining engineer.
[Subsec (2) amended by sec 10 of Act 8 of 1987 and substituted by sec 20(a) of Act 12 of 1996.]

(3) …

(4) Any court constituted or deemed to the constituted under the provisions of this Act may, subject to the regulations, hear and determine any appeal lodged under the provisions of this Act or any previous income tax law.

(5) …

(6) …

(7)(a) Every notice of appeal shall be in writing and shall be lodged with the Minister within a period of thirty days after the date of the notice mentioned in section 71(4), and no such notice, of appeal shall be of any force or effect whatsoever unless it is lodged within the said period.

(b) …

(8) If an assessment has been altered or reduced, the assessment as altered or reduced shall be deemed to be the assessment against which the appeal is made.

(9) …

(10) …

(11) …

(12) The Minister or any other person authorized by him may appear in support of the assessment on the hearing of any appeal, and the appellant and any person who is interested in such appeal may appear in person or by his counsel, attorney or agent.

(13) Subject to the provisions of this Act, the court may-

(a) in the case of any assessment under appeal, order such assessment to be amended, reduced or confirmed, or may if it thinks fit refer the assessment back to the Minister for further investigation and assessment;

(b) in the case of any appeal against the amount of the additional charge imposed by the Minister under section 66(1), reduce, confirm or increase the amount of the additional charge so imposed;

(c) in the case of any other decision of the Minister which is subject to appeal, confirm or amend such decision.

(14) …

(15) Any matter of law arising for decision before the court, and any question as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the President of the court, and the other members shall have no voice in such decision.

(16) ...

(17) ...

(18) Any decision of the court under this section shall, subject to the provisions of section 76, be final."

The submissions

[15] Counsel for the appellant submitted that the outcome of the respondent's administrative action to levy interest and backdate the same to the years 2000 – 2005 when the correct assessments were only done during 2008/2009 amounts to harsh, arbitrary and unjust consequences of a financial nature for the appellant.

Counsel submitted further that the consequence is that the appellant is being required to pay exorbitant and excessive interest which is unreasonable and in conflict with Article 18 of the Constitution. Counsel also submitted that to the extent the interest levied exceeded the principal amount of tax due, it was in conflict with the *in duplum* rule and should be set aside. A further submission was that the quantum of additional tax imposed was unreasonable, though during the hearing counsel abandoned this argument. Counsel further submitted that a reasonable person would not advocate such exorbitant interest that far exceeds the actual tax due to the respondent and that the administrative action should be reviewed and set aside. Counsel further submitted that the Court *a quo* erred when it dismissed the application for review and that the respondent's decision to impose additional tax and interest should have been set aside for being unreasonable.

[16] Counsel for the respondent submitted that the appellant made out no case of the respondent failing to apply her mind when she decided to reduce the additional tax, neither did appellant make out a case that the said decision was arbitrary, capricious, bias or *mala fide* or that the respondent did not comply with the requirements imposed upon her by the relevant legislation or that the decision was *ultra vires* as she fully complied with the provision of section 66(2) (a). Counsel further submitted that there was no evidence that the respondent's decision was unfair and grossly unreasonable and therefore in conflict with Article 18 of the Constitution. Counsel further submitted that interest and additional tax are charged by operation of law and not as a result of a decision taken by the respondent or any of his or her officials. Counsel also submitted that the Act specifically permitted the quantum of interest to exceed the principal debt. Finally, counsel submitted that appellant should have filed an objection against the revised assessments or appealed the respondent's decision not to remit the whole of the additional charge, which assessments became final and conclusive in terms of section 71(5).

The issues in this appeal

[17] Four questions arise for determination, namely:

1. Was appellant entitled to seek relief from the High Court without first exhausting the procedures under sections 71 and 73 of the Act?

Was it unreasonable or unlawful for the due date for the revised assessment to be set as at the date of the original tax payment should have been made even though the revised assessments were made many years later?

Was the Minister's decision in respect of the additional tax reviewable?

Can the appellant rely on the *in duplum* rule to reduce the interest payment due?

[18] The four issues will be considered in the order they appear above, the first question to be decided being, was appellant entitled to seek relief from the High Court without first exhausting the procedures under sections 71 and 73 of the Act. Section 71 provides for an objection procedure and section 73 for an appeal to a Special Income Tax Court, where an objector is dissatisfied with the outcome of an objection.

[19] The Special Income Tax Court is an independent and impartial tribunal established to deal with disputed tax cases.[5] It operates like an ordinary court and has extensive powers to amend, reduce or confirm or refer the assessment back to the Minister for further investigation and assessment or it may reduce, confirm or

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5Section 73 (1) of the Act. The reasoning in this paragraph draws on the desciprtion of the Income Tax Court given by the South African Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001(1) SA 1109 (CC) at 1137A-E. There is no material difference in legislative design between the South African Special Income Tax Court and the Namibian Special Income Tax Court.

increase the amount of the additional charge imposed under section 66(1).[6] Although the Act describes the proceedings before the Special Court as an appeal, it is a full re-hearing of the issues.[7] The Court is presided over by a Judge of the High Court who sits with an accountant of ten and more years standing and a representative of the commercial community or in matters relating to a business of mining if the appellant so wishes, a qualified mining engineer.[8] There is a right to legal representation, to adduce evidence and to challenge or rebut adverse evidence on the issues raised in the taxpayer's notice of appeal.[9] There is a right of appeal from that Court to the Supreme Court.[10]

[20] The Special Court has been created to adjudicate upon objections and has been empowered to ventilate factual disputes relating to tax assessments, interest and additional tax that may be charged thereon. Disputes about the correctness of assessments made by the Minister are likely to involve complicated and contentious issues of fact. It is no doubt for this reason that Parliament established the Special Court to determine these difficult issues.

6Section 73(13)

7 Section 73 in general read together with ss 72 and 74

8Section 73 (2)

9Section 73 (12) read together with ss 72 and 74

10Section 76

[21] In relation to the question of whether this dispute should have been pursued in the Special Income Tax Court, Counsel for the appellant argued that the calculation of interest was a decision that could not be the subject of an objection within the meaning of section 71. Counsel argued that since the interest levied on the overdue payments is charged after the assessment has been made the appellant's complaint does not fall within the purview of section 73(1) and could not be dealt with by the Special Income Tax Court which deals with assessments.

[22] It is a misunderstanding of the Act to interpret the interest charged on arrear tax as not falling within the mechanism created by the Act. The definition of "tax" or "the tax" or "taxation" means any levy or tax leviable under this Act … and includes interest. (The underlining is mine.)

[23] Any Court constituted or deemed to be constituted under the provisions of the Act, may hear and determine any appeal lodged under the provisions of the Act or the predecessor of this Act.[11] (The underlining is mine.) The interest charged on the arrear tax or the backdating thereof squarely falls under the income tax complaint or appeal. Any matter of fact or a matter of law that may arise for decision before the Court shall be decided by the President of the Court who happens to be a Judge to the exclusion of the other two members of the Court.[12] Therefore, to the extent that the appellant's complaint is directed at the interest levied, that decision is subject to an objection within the meaning of section 71.

[24] The establishment of the Special Income Tax Court does not entirely oust the jurisdiction of the ordinary Courts. The South African Courts have held that the

11Section 73(4)

12Section 73(15)

ordinary courts retain their right of review, as well as the jurisdiction to issue declaratory orders in appropriate cases.[13] In particular, courts retain the jurisdiction to determine legal issues connected to the question of taxation where no questions of fact arise.[14] The primary issue raised in this case is whether the imposition of interest and additional tax was "unfair and unreasonable" administrative action. I am prepared to accept for the purposes of this case, that this is a legal question that the High Court may determine. Given the outcome of this case, however, it is not necessary to decide this question finally in this appeal.

[25] The second question is, was it 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. In this regard Counsel for the appellant argued that the Act makes no provision for charging interest retrospectively and that to back date to a date when the self-assessment was submitted and should have been paid is nonsensical.

[26] It is clear from section 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 section 56(1A). In determining the date upon which the original tax payments were due, the respondent therefore followed the statutory

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13 See *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001(1) SA 1109 (CC) at paras 44 – 7 and authorities cited therein.

14 See *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A).

prescription that interest ran from the date upon which the tax was due.

[27] 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."[15] 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.

[28] Thus,to attack the interest figures as being unreasonable and thus reviewable is misplaced. The appellant has failed to show, as the Court below correctly pointed out, that the respondent acted outside the scope of the Act. The Act does not afford any discretion in the determination of interest. So the respondent had no lawful right to do anything other than what the Act stipulates. Nothing unusual is prescribed by the Act in regard to the levying of interest that defeats the standard practices of charging interest; it runs a day immediately following the due date. That is the practice; after all, "to-day interest is the life-blood of finance".[16]

[29] It is common sense that the fraud having been detected long after the tax

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15Section 79(2)

16 *Linton v Corser* 1952 (3) SA 685 (A) at 695G; *LTA Construction Bpk v Administrateur, Transvaal* 1992(1) SA 437 (A) at 482G-H

years in question, interest was correctly charged from the due date of the tax year in question in accordance with the behests of the statute and the respondent was entitled to the interest notwithstanding whatever explanation was offered. To have levied interest at the time the fraud was discovered would have been contrary to the provisions of the Act and defeated the purpose of the Act, which is to avoid delays in collection of tax as far as possible. It must also be remembered that appellant benefited from the refunds for the fraud to which he would ordinarily not have been entitled. Appellant's indebtedness does not originate at the time the fraud was detected it has its origins in the years of assessments he should have submitted correct tax returns and he should not be heard to complain about the interest charged retrospectively more so that he admits to have been correctly assessed. To hold otherwise would be to interpret the law to benefit dishonest or recalcitrant taxpayers. That was never the intention of the Legislature and I refuse to be misled by counsel's argument.

[30] The third question that arises is whether the decision to impose additional tax was unreasonable within the meaning of Article 18 and therefore reviewable. Section 66(1) stipulates that a taxpayer who fails to render a return shall be liable to additional tax in an amount of twice the amount of tax payable in that year. That was the basis of the original imposition of additional tax. Section 66(2) provides that the Minister may remit the additional charge or any of part of it if "he thinks fit". Upon application, the Minister reduced the amount of additional tax imposed from 200% of the actual tax due, to 20%. This clearly was an administrative decision but the appellant did not provide any basis for an assertion that this decision by the Minister constituted unreasonable administrative action. The appellant rightly

abandoned the argument at the hearing. Nothing further need be said in this regard.

[31] I now turn to consider the final argument whether the appellant can rely on the *in duplum* rule to reduce the interest payment due. Simply put, the *in duplum* rule is a rule which originated in the Roman law that provided that the interest paid on a debt may never exceed the capital sum. The appellant submitted that the Act must be read subject to this rule as it was set out in the matter of *Commercial Bank of Zimbabwe Ltd v M M Builders and Supplies (Pvt) Ltd and Others and Three Similar Cases.*[17]

[32] At the time that this dispute arose, the provisions of section 79(4) provided as follows:

> "Notwithstanding anything to the contrary contained in any law or the common law, the amount that may be accumulated and be recovered in respect of interest levied in accordance with any provision of this section shall not be limited to, and may exceed, the amount of the principal debt due, whether such principal debt represents tax, penalties or interest, or a combination thereof."[18]

This provision expressly contemplates that the interest charged may exceed the capital amount.

[33] Section 79(4) has since been replaced by a rule which gives effect to the *in*

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17 1997(2) SA 285 (ZH)

18 This provision was repealed with effect from 1 April 2009, by section 7(b) of Act 5 of 2007. It was replaced with the following provision: "The amount that may be accumulated and be recovered in respect of interest levied in accordance with any provision of this section may not exceed the amount of the original tax".

duplum rule. The new provision came into effect on 1 April 2009, after the relevant events in this case. Counsel noted that at the time of the revised assessments, the amendment had been enacted but not yet operative. Counsel argued that "it must have been the intention of the Legislature not to charge interest over and above the capital to apply the *in duplum* rule and that one can only accept that the amendment was brought about because obviously there was a lacuna in the Act insofar as the *in duplum* rule was applicable." This submission is undoubtedly correct, but it cannot help Counsel as the new provision had not yet come into force at the relevant time. Given the clear language of section 79(4) as it existed at the time of the relevant facts in this case, it is not possible to interpret the statute in any way other than as a statutory exception to the *in duplum* rule. Nor did the appellant launch any constitutional challenge to the validity of section 79(4) as it read before the 2009 amendment.

[34] Counsel referred to a South African case of *Nedbank Ltd and Others v National Credit Regulator and Another*[19] where the Supreme Court of Appeal stated the following:

> "The following two aspects of the common-law *in duplum* rule are relevant: first, where the total amount of arrear and unpaid interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the debtor thereafter will lead to the amount of interest decreasing after which interest again starts to accrue to an amount equal to the outstanding capital amount. The purpose of the rule is to 'ensure that debtors are not endlessly consumed by charges and also to ensure that debtors whose affairs are declining should not be entirely drained dry.'

192011(3) SA 581 SCA at 600A-C and 601E-602A

> Secondly, the *in duplum* rule is suspended *pendente lite*, and the *lis* is said to commence upon service of the initial process, whereafter interest runs again. … The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication…"

From the point where counsel halted the quotation it continues to read:

"[I]t is a sound rule to construe a statute in conformity with the common-law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common law."[20]

Section 79(2) when read together with subsection 4 as added by s 23(b) of Act 12 of 1996, *supra*, evidences a plain intention on the part of the Legislature to alter the *in duplum* rule in regard to the payment of tax and interest in overdue payments.

[35] There is a legion of authorities that the Legislature does not intend to alter[21] the existing law more than is necessary and it has been applied in innumerable cases. In *Cornelissen NO v Universal Caravan Sales (Pty) Ltd*[22] Holmes JA referred to this presumption as a "sound rule". Its application facilitates legal certainty and the effective administration of justice.[23] But as was stated in ***Kruger v Santam***

20Id at 602A

21*Grgin v Grgin* 1960(1) SA 824 (W) 827; *Reek NO v Registrateur van Aktes, Transvaal* 1969(1) SA 589 (T) 594-595; *Joubert v Joubert* 1966(3) SA 734 (O) 736; *Mader v Mallin Diamond Mines Ltd* 1964(1) 572 (T) 576; *Vrede Koöp Landboumaatskappy Bpk v Uys* 1964(2) SA 283 (O) 286

22 1971(3) SA 158 (A) at 175

23 G.E. Devenish, *Interpretation of Statutes*, 1996 at 159

Versekeringmaatskappy Bpk[24] the common law does not constitute "impenetrable obstacles," there are numerous instances in which Courts (South Africa) have interpreted statutes in which common law principles and precepts had to yield to the enacted provisions.[25] The presumption is rebuttable. As the authors Lourens du Plessis and G E Devenish correctly points out, the common law has had to bend a knee to literalist-cum-intentionalist considerations.[26]

[36] In *Glen Anil Finance v Joint Liquidators, Glen Anil Dev*,[27] Trengove JA cited with approval the principle above and went on to say:

"Now it is clear from the authorities that in our law, as in English law, the presumption that a statute alters the common law as little as possible is to be relied on only in the case of ambiguity in the statute and even then it may have to compete with our secondary canons of construction…"[28]

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24 1977(3) SA 314 (O) at 320G-H per Steyn J

25 *Casely NO v Minister of Defence* 1973(1) SA 630 (AD); *Gordon NO. v Standard Merchant Bank Ltd* 1983(3) SA 68 (AD); *Glen Anil Finance (Pty) v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981(1) SA 171 (AD); *Mphosi v Central Board for Co-operative Insurance Ltd* 1974(4) SA 633 (AD)

26 Lourens du Plessis, *Re-Interpretation of Statutes*, 2nd ed, 2002 at 177-179; G.E. Devenish, *supra* at 159-161

27 See note 25, *supra* at 181H

28 Id at 182A, see also *Gordon, NO v Standard Bank Merchant Bank Ltd*, note 25, *supra*, at 91G-H where Corbertt JA, after referring to the rule of construction above stated, "In my opinion, the language of s 14(2) is, in this respect, plain and there is no warrant for resorting to this rule of construction."

[37] In *Seluka v Suskin and Salkow* Wessels J said the following with reference to this principle:[29]

> "It is true that it is a canon of construction that an Act must not be presumed to alter the common law, but directly it is clear from the language of statute that the very object of the Act is to alter or modify the common law, then full effect must be given to this object."

[38] In the *Glen Anil Finance* case above, Trengove JA referred to the above extract in the *Seluka v Suskin and Salkow* case with approval and consequently, the learned Judge of Appeal held that "looking at the Sale of Land on Instalment Act 72 of 1971 as a whole, it is quite evident from its terms that Parliament intended altering the existing law…"[30]

[39] In *Casely, NO v Minister of Defence*,[31] the Court in reference to the presumption above stated:

"But here that presumption is rebutted by the manifest object and plain intention of the Legislature in enacting the War Pensions Statutes in 1942 and 1967."

[40] Applying the above principles to the circumstances of this case, Ms van der Westhuizen's contention is untenable. Sections 79(2) and 79(4) (before the 2009 amendment which provides for the interest not exceeding the capital amount) they

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29Id letter "C"

30At 183H

31See note 25 above, at 640A

are clear and unambiguous and they should be accorded their literal meaning. Counsel did not even attempt to cite any absurdities that might exist in the provisions that may warrant departure from the natural and ordinary meaning of the provisions. The Act does not expressly state that the *in duplum* rule is excluded, but the provisions of s 79(2) and subsection (4), as added by s 23(b) of Act 12 of 1996 were undoubtedly enacted with the intention of excluding or altering the *in duplum* rule insofar as the amount that may be accumulated and be recovered in respect of interest levied. As counsel correctly pointed out that the *in duplum* rule is clear and well-known, and given the provisions of s 79(4) (Act 12 of 1996) the Legislature must have passed s 79(2) and (4) with "the blast of the rule blowing in their ears". The reading of s 79 particularly the charging of interest at 20% together with sections 80 to 86, 56 and 66 there can be no doubt that the Legislature intended to create an effective taxation regime which enhances voluntary compliance in the collection of taxes. That must be seen in the light of the fact that tax is productive of some revenue which is of the utmost for the performance of State functions and the Act creates its own procedures including Courts and Tribunals to recover tax. The fact that the Act or s 79(4) has been amended to provide for interest charged not exceeding the original tax does not mean there was a lacuna in the Act. The amendment could be attributed to various reasons. The Act has its origins during the apartheid South African Government when the Legislature was supreme. The current Government could have reconsidered the then provisions of s 79(4) to bring them in line with the current practices in charging interest.

[41] It seems that, viewing the Act as a whole the Legislature by making such formidable provisions in the Act for payment of tax and interest on overdue payments must have intended to part from the common law principle unless the contrary intention clearly appears. No such other intention is apparent. Therefore, Ms van der

Westhuizen's argument altogether overlooks the true function and effect of s 79(2) and it sins against the evidence and plain meaning of s 79(2) and (4). I refuse to be persuaded by counsel's arguments and it follows that they should be rejected.

[42] It is thus concluded that this appeal has no merit and should be dismissed with costs.

[43] The following order is made:

1. The appeal is dismissed.

The appellant is ordered to pay the legal costs of the respondent, such costs to include the costs of one instructed and one instructing counsel.

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MAINGA JA

I agree.

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STRYDOM AJA

I agree.

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O'REGAN AJA

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