



**REPORTABLE**

**CASE NO: SA 38/2016**

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ROAD FUND ADMINISTRATION**

**Appellant**

and

**SKORPION MINING COMPANY (PTY) LTD**

**Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and HOFF JA

**Heard:** 7 June 2018

**Delivered:** 13 July 2018

**Summary:** The preliminary issue in this appeal is an application for condonation for late prosecution and reinstatement of appeal. The condonation application is opposed on the basis that the appeal is deemed to have been withdrawn and that the inordinate delay has not been satisfactorily explained.

Court on appeal *held* that public importance of the issues on appeal and the overwhelming prospects of success on appeal tilt the balance in favour of considering prospects of success and not summarily dismissing the appeal.

Road Fund Administration (RFA) is created under the Road Fund Administration Act 18 of 1999 (the Act) to ensure safety of Namibia's public roads network and to see to it they are safe and economically efficient. To achieve that object, RFA is empowered under s 18(1) of the Act to impose a range of road user charges, including a levy on every litre of petrol and every litre of diesel sold by wholesalers at any point in Namibia and included in the selling price of such product. RFA is also given power under s 18(1) (d) to refund consumers who do not use a petroleum product on public roads.

RFA published a Notice setting out the requirements to be satisfied by those consumers seeking refund for fuel purchased but not used on public roads. The requirements to be fulfilled in terms of the Notice require that claims must be submitted within three calendar months from the date of purchase of the petroleum product and must be accompanied by such further information or documents as RFA may request. Pursuant to the Notice, RFA issued a claim form 'RFA/R3' requiring

that all claims for refunds be accompanied by original VAT invoices, and further that claims submitted after three calendar months will not be considered.

The respondent (Skorpion) submitted two separate claims on RFA/R3. Both claims were rejected by RFA. Claim 1 was rejected because the claim was not accompanied by original invoices and claim 2 on the basis that it was submitted after three months. Skorpion instituted action proceedings for the payment of the amounts represented by the claims alleging that claim 1 was accompanied by original invoices contrary to RFA's assertion otherwise and that although claim 2 was submitted late, it was unfair and unreasonable and further contrary to Art 18 of the Constitution, to reject the claim without affording the Skorpion an opportunity to satisfy RFA that claim was proper and that there was good reason why that claim was submitted late. In response, RFA pleaded in the court *a quo* that the requirements for claims were mandatory and that it could not relax them.

The court *a quo* held that it was not necessary to decide the factual disputes that had arisen as the matter could be disposed of on RFA's admitted policy and practice not to entertain any non-compliant claim regardless of the circumstances. The court *a quo*'s reasoning is that the levies collected for non-on-road use belonged to the consumers, such as Skorpion, entitling it to claim and consequently creating a right in such a claimant to be given a hearing before a claim is rejected. The court *a quo* thus held that RFA has power under paragraph 7(8) of the Notice to make inquiries and to ask for documents to test the authenticity of a claim and to lean more in favour of honouring a claim than rejecting it. It is on this basis that the court *a quo* decided that RFA's inflexible enforcement of the requirements of the subordinate

legislative scheme is in breach of Art 18 of the Constitution and that since referring the matter back to RFA to reconsider the claims afresh will not be proper in the circumstances of the case, Skorpion would be entitled to the refunds claimed. Accordingly, Skorpion made out the case for the award of compensation under Art 25(4) of the Constitution.

*Held* on appeal that it is a misdirection for the court *a quo* to have resort to the Constitution without considering if the matter could be resolved by applying the common law; that the two claims had to be considered separately in order to establish if Skorpion had discharged the onus in respect of each claim.

In respect of claim 1, court on appeal *held* that since claim 1 involved mutually destructive versions, the court *a quo* should have made credibility findings to consider where the probabilities lie, and that since Skorpion's version that the claim was submitted with original invoices was not proved, the claim should have been dismissed on that basis.

In respect of claim 2, court on appeal reiterates that the general principle is that an administrative authority has no inherent power to condone failure to comply with peremptory requirements, unless such power has been granted to them. Court *held* that as an administrative actor, RFA could only relax the three months deadline if the legislative scheme made allowance for that. That since the subordinate legislative scheme was couched in mandatory language and spelled out that non-compliant claims will not be considered, it would be beyond RFA's competence to relax the three month's deadline or to investigate the reasons why claim was submitted late.

Court on appeal *held* that it was a misdirection to hold that moneys subject to refund claims was the property of claimants, and that the High Court's justification for *audi* was therefore premised on an incorrect foundation. That, in any event, Skorpion failed to prove that it had a good reason for the late submission of the claim and that RFA, in rejecting the claims, breached Art 18 of the Constitution.

Appeal allowed, and judgment and order of High Court set aside and both claims dismissed, with costs, *a quo* and in the appeal.

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## APPEAL JUDGMENT

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DAMASEB, DCJ (SMUTS JA AND HOFF JA concurring):

### Introduction and condonation application

[1] This is an appeal from a judgment of the High Court (Main Division<sup>1</sup>) in which the appellant was ordered to pay certain amounts of money to the respondent with interest and costs. It is common cause that the appeal was prosecuted under the old rules of court.<sup>2</sup>

[2] When the appeal was called the first order of business was consideration of a condonation application by the appellant which is opposed by the respondent. The application seeks condonation for the late prosecution and reinstatement of the appeal because, as it became common cause during the hearing of the appeal, the

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<sup>1</sup> Reported as *Skorpion Mining Co. (Pty) Ltd v Road Fund Administration* 2016 (3) NR 864 (HC).

<sup>2</sup> Replaced by the current Supreme Court Rules which came into force on 15 November 2017.

appellant's instructing counsel failed to comply with several<sup>3</sup> of the court's old rules which resulted in the appeal being deemed withdrawn.<sup>4</sup> It took the instructing counsel nine months after being advised by the registrar that the appeal was deemed withdrawn, to bring the present application. It is not surprising that the respondent takes the view, based on trite dicta of this court, that the application should be dismissed and the appeal be struck without consideration of the prospects of success because the non-compliance with the stated rules was glaring, flagrant and not satisfactorily explained.<sup>5</sup>

[3] In the light of the concession made by the respondent's counsel at the hearing that the great public importance of the issues involved could tilt the balance in favour of condonation, the condonation application need not occupy us long. I need to stress however that had it not been for the great public importance of the issues raised and the overwhelming prospects of success of the appeal, this would have been a proper case to strike the appeal without considering the prospects of success in view of the unacceptable conduct of the appellant's instructing counsel about which nothing further needs to be said.

[4] As will become apparent from the summary of the pleadings below, the High Court had allowed Art 18 of the Namibian Constitution (administrative justice) to be used as a cause of action and to grant constitutional damages in respect of what is otherwise a private law action for damages. It found a violation of Art 18 of the

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<sup>3</sup> Rule 8(2) and (3): respectively requiring provision of security for costs by the appellant for the respondent's costs before lodging the record of appeal; and at the time of lodging the record of appeal advising the registrar if it has entered into security or been released from such security by the respondent.

<sup>4</sup> If regard is had to old rule 5(6)(b).

<sup>5</sup> *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC), *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC), *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC).

Constitution by the appellant (an administrative body) and instead of referring the matter back to that body to reconsider the matter as would ordinarily be the case<sup>6</sup>, it granted compensation to the aggrieved claimant under the Constitution. That is a significant development in our law. If the High Court's judgement is allowed to stand it will set a precedent. Mr Coleman for the respondent accepted as much during oral argument. For that reason, we are of the view that this is not a proper case to refuse condonation out of hand without considering the prospects of success.

### The merits

[5] Section 2 of the Road Fund Administration Act 18 of 1999 (the Act) establishes the Road Fund Administration (RFA) as a juristic person. RFA's object is to manage Namibia's road user charging system in order to achieve a safe and economically efficient road sector. It is enacted in the definitions section of the Act that the purpose of the road user charging system is to create an independent regulation of road funding in accordance with economic efficiency criteria and full cost recovery from road users.

[6] RFA has the power under s 18(1) of the Act to impose a range of road user charges after consulting the Minister for Finance. One such charge (in terms of s 18 (1) (d) of the Act) is a levy on every litre of petrol or diesel (petroleum products) sold by a supplier of those products at any point in Namibia, and which is included in the selling price. It is common ground that the Act makes a distinction between petroleum products purchased for on-road use and for non-on-road use on

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<sup>6</sup> *Waterberg Big Game Hunting Lodge v Minister of Environment* 2010 (1) NR 1 (SC) at 31F-G; *Minister of Education & others v Free Namibia Caterers (Pty) Ltd* 2013 (4) NR 1061 (SC) at 1083C-J and 1084A-E.

Namibia's public roads network. The Act makes provision for consumers who purchase petroleum products but do not use it on public roads (such as farmers and mining companies), to claim a refund from RFA. To give effect to that, s 18(4)(f) of the Act empowers RFA to determine and publish subordinate legislation spelling out procedures to either exempt or refund consumers entitled to a refund in respect of the levy.

#### The applicable subordinate legislative framework

[7] RFA elected to adopt a refund system as opposed to exemption. That framework is contained in a notice (the Notice<sup>7</sup>) issued by RFA on the authority of s 18(1)(d) of the Act.

#### *The Notice*

[8] Paragraph 7 of the Notice concerns 'Refunds claimable in respect of levy paid on petrol or diesel purchased' by a 'qualified business' and it is common cause that Skorpion qualifies as such. Paragraph 7(6) of the Notice sets out the claims procedure as follows:

'A claim for a refund must-

- (a) be made in the form and manner determined by the Road Fund administration;
- (b) be accompanied by such further information or documents as the Road Fund Administration may request; and
- (c) be submitted within three calendar months after the date of purchase of the petrol or diesel'.

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<sup>7</sup> GN No. 183 'Imposition of levy on petrol and diesel' published in GG No. 2608 of 6 September 2001.



[9] Paragraph 7(8) of the Notice states that:

‘The Road Fund Administration may in connection with claims for refund conduct such enquiries or require from a purchaser or supplier of petrol or diesel such information as may be reasonably necessary in the circumstances’.

### *Policy*

[10] Acting on the authority of paragraph 7(6)(b) of the Notice, RFA determined a claim form ‘RFA/R3’ (the Policy) titled ‘Claim for Refund of Fuel Levy’ which incorporates the following instruction to those claiming refunds:

**‘Claim submission:** Only claims from registered users will be considered. Claims must be submitted on Form RFA/R3 and must be accompanied by the original purchase invoice(s), made out in the name of the refund claimant. Only invoices from wholesalers registered i.t.o. the Petroleum Products and Energy Act will be accepted. Invoices from only retailers will be considered on merit. Claims supported by invoices older than 3 months will not be considered. Only claims for fuel purchases of 200 litres or more will be considered.’ (My emphasis)

[11] It is the inflexible manner in which RFA enforced the highlighted requirements in respect of Skorpion’s claims which is at the heart of this appeal.

### Common cause facts

[12] As a ‘qualified business’ Skorpion was entitled to claim a refund in respect of petroleum products purchased for non-on-road use. Any claims it lodged were subject to the Notice and the Policy. The *vires* (constitutional or statutory) of the subordinate legislative framework governing claims for refund as set out above has

not been set aside by a competent court and is not being challenged and therefore not in issue in these proceedings.<sup>8</sup>

[13] Skorpion lodged claims on RFA/R3 for refund with the RFA as follows:

- (a) Claim number: 66740 (15 July 2012): N\$ 743 054 (Claim 1)
- (b) Claim No: 66746 (19 February 2013): N\$ 322 599 (Claim 2)

[14] Both claims were rejected by RFA. Claim 1 because, according to RFA, it was not accompanied by original VAT invoices. Claim 2 was rejected on the ground that it was not lodged within three calendar months from the date of the purchase of the petroleum products. Skorpion attempted but failed to persuade RFA to reconsider the rejection of the two claims. After its efforts to persuade RFA failed, Skorpion (no doubt anticipating a dispute on the facts) launched action proceedings in the High Court to enforce payment of the two rejected claims.

### The pleadings

#### *Plaintiff's particulars of claim*

[15] It is alleged that in respect of Claim 1, Skorpion complied with the Notice and the Policy, alternatively substantially complied with them. Skorpion positively asserts that the invoices submitted in respect of Claim 1 were originals. According to Skorpion, the rejection of that claim constitutes unreasonable administrative action contrary to Art 18 of the Constitution<sup>9</sup> because the invoices it submitted are originals;

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<sup>8</sup> Although curiously at the trial Skorpion's counsel in cross-examination of RFA's witnesses sought to question the fairness or reasonableness of the requirements of 'original invoices' and the deadline of three calendar months. That was not open to Skorpion to raise on the pleadings as they stood.

<sup>9</sup> Article 18 of the Namibian Constitution enjoins administrative bodies to act fairly and reasonably, and to comply with the requirements imposed upon them by the common law and any relevant legislation.

that they contain the information necessary to validate a claim; and that their accuracy is indisputable. Further, RFA's rejection of Claim 1 is alleged to be unreasonable because RFA refuses or did not apply its mind to Skorpion's representations as to why the claim is valid.

[16] Although Skorpion concedes that Claim 2 was submitted three days late<sup>10</sup>, it asserts that it complied or substantially complied with the Notice and the Policy. According to Skorpion, the requirement that claims be submitted within three calendar months is *ultra vires* the Act and in breach of Article 12 of the Constitution in so far as it has the effect (or is applied so as) to extinguish a claim filed after three calendar months. It is said that RFA is unreasonable in rejecting out of hand Skorpion's explanation on why the claim was lodged late.

#### *The relief*

[17] The relief Skorpion sought is payment of the amounts reflected under the two claims; and in the alternative the reviewing and setting aside of RFA's rejection of the claims<sup>11</sup> (not the applicable subordinate legislative framework contained in the Notice and the Policy); and then ordering RFA to pay the amounts representing the two claims, with interest and costs.

[18] At the trial, Skorpion amended its particulars of claim to include in the alternative a prayer for damages in terms of Art 25 (2) and (4) of the Namibian Constitution. Those provisions (a) empower persons aggrieved by a breach of a fundamental right or freedom guaranteed under the Constitution to approach a court

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<sup>10</sup> During the presentation of the evidence it became clear that Claim 2 was submitted 14 days after the deadline of three calendar months as required by RFA/R3.

<sup>11</sup> The High Court did not in substance deal with this relief.

of competent jurisdiction, and (b) grant such court the power to award monetary compensation in respect of any damage suffered as a result of the violation of the fundamental right or freedom. The rider is that in awarding such damages, the court must consider such an award to be appropriate in the circumstances of the particular case.

### *The plea*

[19] RFA pleads that it was not obliged to honour Claim 1 because it was not accompanied by original VAT invoices; and Claim 2 was rejected because it was lodged out of time. According to RFA, the prescripts of the claims procedure are 'mandatory' and do not allow deviation; that Skorpion's entitlement to claim a refund 'is not absolute but subject to the laid down rules which the Plaintiff was bound to follow when its registration with the Defendant in terms of s 7(2) of the refund rules was approved'. Accordingly, the amounts claimed are not due and payable.

### Admissions in Skorpion's particulars of claim

[20] In its particulars of claim Skorpion incorporates correspondence written on its behalf to RFA in its attempt to persuade the latter to honour its claims. Those letters contain admissions which are to Skorpion's prejudice. I make reference to these admissions at this early stage because they are inconsistent with material parts of Skorpion's pleadings and the posture it adopted during the trial.

[21] The first letter is dated 4 July 2013 and is addressed to Mr A Botha, then Chief Executive Officer of RFA, and is signed by a Ms Pulani Maritz as acting

Financial Manager of a company called Vedanta Resources PLC which appears to be Skorpion's holding company. In an apparent reference to Claim 1 the letter states:

'We did not receive the original invoices from the fuel distributor for the month of May 2012 and as a result we only submitted the copy that was provided to us. We did however request the original invoice from the distributor but it was never provided to us'.

The letter concludes:

'We hereby humbly request your good office to re-consider approving our claims submitted. We have taken the necessary measures to ensure that claims will not be submitted late in future.'

[22] The next correspondence was on 13 February 2014. The same author stated therein as follows as regards Claim 1:

'We wish to record the following: The first claim for May 2012. . . was submitted in the form and manner as stipulated for. . .

However, we were informed that due to the fact that the Engen invoice submitted was not an original invoice, our claim was not properly considered. The submission of the claim, was however submitted within the timeframe provided for in the Regulations to the Act.'

[23] As regards Claim 2 the letter records the following:

'The second claim, for November 2012 in the amount of N\$ 322 599 was submitted after the three month period, due to logistical reasons, being that Skorpion Zinc is located far outside Windhoek and original documents have to be submitted, which can sometimes be troublesome, as well as the resignation of our Financial Accountant which handled these matters'. (Sic)

### Admissions by RFA

[24] RFA's admitted policy is not to honour any claim made after three months or any claim which is not accompanied by original VAT invoices. It maintains that it is bound by the Notice and the Policy and cannot deviate therefrom. The evidence shows that in rejecting the two claims no allowance was made by RFA for representations by Skorpion after the rejection of the claims and, in any event, would not have been entertained because RFA would under no circumstances deviate from the practice of not entertaining any claim lodged out of time or not supported by original VAT invoices. As RFA's witnesses confirmed at the trial, that policy is inflexible and no deviation from it had been countenanced in the past.

### Rationale of the subordinate legislative framework

[25] The witnesses for RFA were asked, both in-chief and under cross examination, to explain what the rationale was for the twin requirements that refund claims must be submitted within three calendar months and be supported by original VAT invoices. I will briefly set out their explanations.

#### *Three calendar months*

[26] The debate concerning this requirement focussed more on why a claimant could not be refunded even if the period lapsed if such claimant had a good reason for the claim being submitted late. That there is good reason for a three-month cut-off period was never seriously questioned, although, as I previously indicated, some attempt was made to question it on cross-examination of RFA's witnesses. What became very apparent from RFA's witnesses is that the requirement is

communicated to all potential claimants upon being registered as a qualified business and is enforced even-handedly without exception.

#### *Original VAT invoices*

[27] An RFA witness stated that in this age of technology anybody can fake an invoice and that the risk is magnified if copies were allowed. According to RFA's evidence at the trial, the requirement of original VAT invoices is a legitimate one aimed at guarding against fraudulent claims, particularly the tampering with invoices as it is easy to manipulate copies. That requirement is also designed to avoid the possibility of double submissions and potential double payments of refund claims.

#### The High Court's approach

[28] The High Court sustained Skorpion's claims on the basis that the rejection of the claims and the manner in which it was done violated Art 18 of the Constitution. The court *a quo* held that RFA is an administrative body and obligated by Art 18 to take steps that were reasonable and fair in considering claims for refunds. The High Court held that the mandatory language employed in the subordinate legislative scheme establishing the claims procedure did not preclude Skorpion's right to a fair hearing prior to rejection of its claims (*audi*).

[29] The High Court reasoned that funds received by RFA as levies but unrelated to on-road use did not belong to it but to the purchaser such as Skorpion. It maintained that it was that factor that created an expectation for a claimant such as Skorpion to be afforded the opportunity to make representations to RFA if the latter thought a claim did not meet the published refund claim requirements. The court *a*

*quo* further stated that it was hard to accept that a refund could be forfeited to RFA without *audi* when it actually belonged to a claimant such as Skorpion.

[30] The court *a quo* accepted the *raison d'être* of the requirement for the original invoices: To avoid fraud. However, the court was of the view that RFA was empowered by paragraph 7(8) of the Notice to make independent enquiries in instances where original invoices have not been produced, rather than having a claimant forgo a refund entirely. The court *a quo* thus concluded that RFA's rejection of the two claims was in contravention of Art 18 and that it should have conducted some kind of process to evaluate the reasons why the two claims were non-compliant and lean more in favour of honouring claims than rejecting them.

[31] It is apparent that the judge *a quo* laid great store by the fact that the evidence led at the trial demonstrated that the rigid application of the claims procedure had actually resulted in RFA retaining for its benefit funds unsuccessfully claimed by those entitled to claim. The out of hand rejection of non-compliant claims, in the court's view, amounted to expropriation. Before I proceed to consider the competing versions of the parties in the appeal, I wish to dispose of this issue that seems to be a critical justification for the outcome arrived at by the learned judge *a quo*.

#### Ownership of money subject to refund claims

[32] The High Court's finding that RFA was obliged to entertain claims which did not meet the requirements of the claims procedure was actuated by its belief that money collected as levies under s 18 (4)(f) from non-on-road use was not RFA's property but Skorpion's, as a consumer entitled to the refund of the levy. With the



greatest respect, I am not in agreement with this reasoning. It equates a right to claim something to a perfected property right. The better view is that Skorpion has the right to claim a refund and only becomes entitled to the money once it has met all the conditions for consummating the proprietary right in the funds.

[33] Levies collected under s 18 of the Act are public funds and it is an idle debate if it is the property of RFA. The funds come under RFA's control in terms of a procedure and for a public purpose determined by the Act. The public purpose here being to keep Namibia's roads safe and economically efficient. RFA holds the funds collected in trust for the public and can only part with them in a manner allowed by the Act and the subordinate legislation made under it. Those who seek to lay claim to it must do so under the terms of the Act and the subordinate legislation. If those terms are not met, qualifying claimants for refunds have no ownership right to the money.

[34] Mr Coleman for Skorpion supported the High Court's approach and argued that funds attributable to non-on-road use do not belong to RFA and cannot be paid into the pool of RFA funds. The complete answer to that proposition is that until validly claimed those funds are levies duly collected and cannot be separated from those related to on-road use. According to the definitions section of the Act, 'road user charge means any charge, fee or levy imposed under section 18.' Section 16 of the Act, in turn, creates the 'Road Fund' 'into which shall be paid – (a) all moneys collected in respect of road user charges. . . .' Contrary to Mr Coleman's suggestion otherwise, there is only one pool of funds created by s 16 into which all funds receivable by RFA, including the levies, are paid to be utilised by RFA under s 17 to

achieve the objects of RFA. It bears mention that in terms of s 17(5) of the Act 'Notwithstanding this Act or any other law, the assets of the Fund shall not be subject to attachment or sale in execution'.

[35] It must follow therefore that the High Court's justification for *audi* was premised on an incorrect foundation.

#### Arguments on appeal

##### *RFA*

[36] According to Mr Maleka, SC for RFA, the High Court incorrectly found that RFA officials had a discretion to entertain the non-compliant claims by affording Skorpion *audi* before disallowing them. The argument is that the legislative framework allowing for refund claims is couched in peremptory language which denuded RFA of any discretion and that, for that reason, the rejection of the claims was not administrative action as contemplated by Art 18 of the Constitution. It is further argued that it would have been *ultra vires* for RFA officials to entertain claims which did not comply with the requirements of the Notice and the Policy.

[37] According to RFA, even if its rejection of the claims were found to be administrative action, it was on the facts not unfair or unreasonable. To that end, Mr Maleka SC for RFA argued that the legislative scheme allowing for refunds was not challenged and, consequently, binding on it as 'the requirements of the law and legislation' as contemplated in Art 18. RFA's counsel argues further that the High Court in its assessment of the fairness of the rejection of the claims over-emphasised Skorpion's right to a refund without any regard to the RFA's and the

public's interest. That interest being the prevention of fraudulent claims and treating all claimants equally by applying a policy that did not allow for deviation.

*Skorpion*

[38] On behalf of Skorpion, Mr Coleman supports the High Court's reasoning and order in so far as that court premised its conclusion on RFA's admitted policy and practice not to consider any non-compliant claim and not to entertain representations in that regard. Counsel however maintained that in any event, as regards Claim 1, Skorpion had established that original VAT invoices were provided and that the claim could be upheld on that basis alone. He added that the requirement for original invoices is not part of the Notice and therefore allowed for some flexibility on RFA's part which it refused to exercise, especially because paragraph 7(8) of the Notice empowered it to make inquiries.

[39] As regards the three calendar months' deadline for the submission of claims, Mr Coleman argued that it cannot be treated by RFA as if it were a prescription period and that, relying on paragraph 7(8) of the Notice, it can ask for documents and information to validate a claim even after the lapse of the deadline. Mr Coleman added that RFA is not being asked to depart from its policies but to 'infuse it with constitutional imperatives in Art 18' before a decision is made to reject a claim. He concluded that the duty to act fairly by an administrative body is to be presumed in the Act.

Does Art 18 apply to the claims procedure?

[40] In its particulars of claim Skorpion stated that it relies on Articles 12<sup>12</sup> and 18 of the Namibian Constitution to invalidate the rejection of its claims. RFA did not dispute in its plea that Art 18 was applicable, although in the written heads of argument it states that it does not. As the pleadings stood before the High Court, it has to be assumed that a case could be made, all things being equal, that Article 18 of the Constitution applied to the manner in which RFA dealt with Skorpion's claims. Whether or not Skorpion made out the case that RFA had the discretion to relax the three-month period (or the dispute was capable of resolution without reliance on the Article) is, of course, a separate question which I shall address in the course of this judgment. Not every decision of an administrative body bound by Art 18 is to be preceded by *audi alteram partem*.<sup>13</sup>

Discussion

[41] The High Court opted to approach the matter on RFA's admitted policy and practice not to allow any deviation for non-compliant claims. According to the learned judge, although in respect of Claim 1 Skorpion persisted that it had submitted original VAT invoices while RFA was adamant that it was copies, it was 'possible to come to a conclusion on the first claim without having to deal with and making a factual finding' as to whether Skorpion submitted original VAT invoices. As regards Claim 2, the learned judge said that because there was no dispute that the claim was submitted out of time he also did not find it necessary to make any factual findings.

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<sup>12</sup> Guaranteeing the right to fair trial by a competent court within a reasonable time and to be afforded all the facilities to prepare and to be legally represented. How the right was breached is not stated in the pleadings.

<sup>13</sup> *Waterberg Big Game Hunting Lodge* supra at 12C-D.

[42] In respect of the manner both claims were dealt with by RFA, the learned judge was of the view that the matter fell to be determined on the basis of Art 18 of the Constitution. That approach is a misdirection. The court *a quo* should have considered each claim separately in the light of the pleadings and the evidence led at the trial and be satisfied that Skorpion (as plaintiff) discharged the onus in respect of each.

[43] Besides, and most importantly, when mutually destructive versions emerge in action proceedings, it is important for the court to apply the trite test for resolving material facts in dispute<sup>14</sup>, because the version that is accepted could well determine whether a case was made out to justify the relief the plaintiff seeks; especially in the present case where the plaintiff adopted the extraordinary approach of relying on Art 18 as a cause of action and to seek constitutional damages. The court had to be satisfied that the proven facts justified the constitutional relief sought.

[44] I will therefore deal with the two claims separately for reasons that will become apparent as I deal with each.

#### Claim 1

[45] The Constitution must be the last and not the first resort in the resolution of disputes that come before the courts. In the present case, the exact opposite happened. The High Court preferred to have recourse to the Constitution instead of first considering if the claim and the competing allegations could be resolved applying the common law. Given that the court was faced with two mutually

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<sup>14</sup> *Sakusheka v Minister for Home Affairs* 2009 (2) NR 524 (HC) at 541C-H.

destructive versions in an action proceeding, the dispute was capable of and was one which had to be resolved by the application of tried and tested techniques known to the common law. We have warned in the past that the court must first try to resolve a dispute by the application of ordinary legal principles before resorting to the Constitution.<sup>15</sup>

[46] In respect of Claim 1 there were two irreconcilable versions (both on the pleadings and at the trial) whether the claim was supported by original VAT invoices. Skorpion was entitled to claim a refund on the strength of an original VAT invoice; and not a copy. The RFA/R3 which was executed on the authority of the Notice and its terms were promptly communicated to Skorpion upon its registration as a qualified business. Skorpion therefore knew that it had to submit original VAT invoices for a valid claim and what the consequences will be if it did not. Mr Coleman suggested in argument that the requirement for originals does not appear in the Notice and only in the RFA/R3 and therefore allows a greater measure of flexibility to RFA. That is not a good point. That requirement is sanctioned by paragraph 7(6) (b) of the Notice and is an integral part of the subordinate legislative scheme. The true test is whether the subordinate legislative scheme, considered as the whole of its constituent parts, accorded a discretion to RFA to relax the relevant requirement.

[47] In any event, the significance of originals is demonstrated by Skorpion's own version through its witnesses at the trial that it would not pay a consumer of

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<sup>15</sup> *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (SC); and compare from South Africa, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) para 21: '[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the cause which should be followed'. And from America: *Zobrest v Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993), the so-called 'prudential rule of avoiding constitutional questions'.

petroleum products without an original VAT invoice. Ms Michelle Steenkamp, a former employee of Skorpion with first-hand knowledge of the claims procedure, testified on behalf of Skorpion. She stated that Claim 1 could only have been supported by originals, because Skorpion would never accept copies of VAT invoices from their supplier, Engen, and that they would not pay Engen on the strength of copies. Mr Lucien Mouton, an employee of Engen who also testified on behalf of Skorpion, corroborated that version and stated that they only provided purchasers of petroleum products with original VAT invoices and did not expect to be paid if they did not.

[48] Ms Beulah Garises, an employee of RFA who dealt with the claims submitted by Skorpion, testified that Claim 1 was rejected because it was non-compliant in that it was not accompanied by original VAT invoices. She had requested an employee of Skorpion to submit the originals because only copies were submitted as part of the claim. Another employee of RFA who also assessed the claims (Mr Billy Katsaho) confirmed Ms Garises' version that Claim 1 was supported by copies.

[49] There are thus mutually destructive versions on whether indeed Claim 1 was supported by original VAT invoices. The court therefore had to make credibility findings and to determine where the probabilities lay.<sup>16</sup> It did not. Instead, it approached the matter on the basis that the conflict in the two versions did not matter. It did. At the trial, one of Skorpion's witnesses (Ms Michelle Steenkamp), in an attempt to disavow the admissions made in the contemporaneous

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<sup>16</sup> *SFW Group Ltd & another v Martell ET CIE & others* 2003 (1) SA 11.

correspondence, contended that the author of that correspondence (Paulina Maritz) did not have personal knowledge of the claims submission processes of Skorpion.

[50] The probabilities clearly do not support such a denial. The statements in Ms Paulina Maritz's letter to RFA, tendered by Skorpion itself, are clearly admissions negating such denial and support RFA's version that originals were not submitted before expiry of the deadline. RFA's Ms Garises made extensive reference at the trial to email correspondence she sent to an employee of Skorpion informing her that Skorpion had submitted copies of VAT invoices in support of Claim 1 and urging that employee to ensure that original invoices were submitted.

[51] Skorpion's protestation to the contrary is not supported even by its own contemporaneous correspondence and the High Court ought to have made such a finding considering that Skorpion alleged in its particulars of claim that Claim 1 was accompanied by original VAT invoices. Skorpion could not eat its proverbial cake and have it: Either it submitted a claim with original VAT invoices, or it did not. It alleged in the particulars of claim that it did. Its factual witnesses made no pretence otherwise. They swore at the trial that they submitted original claims; yet the probabilities point in the opposite direction.

[52] It is no less significant that Skorpion's witnesses who dealt directly with claims confirmed at the trial that this was the first time that claims submitted by Skorpion were rejected by RFA. In other words, RFA does not capriciously and whimsically reject claims. That fact, seen in conjunction with the contemporaneous correspondence by an employee of Skorpion admitting that the claim was supported



by copies, overwhelmingly tilt the probabilities in favour of a conclusion that Claim 1 was not supported by original VAT invoices.

[53] Substantial compliance does not arise because it was never Skorpion's case that it was perforce unable (for whatever reason) to obtain original invoices for Claim 1 from Engen and therefore had to submit copies. In fact, its case is the very opposite, both in the pleadings and the evidence.

[54] The submission of original VAT invoices instead of copies is a serious matter for RFA. That the potential for fraud looms large was clearly recognised by Parliament. In s 18(5) of the Act it is stated as follows:

'Any system relating to exemptions or refunds ...shall be designed in concurrence with the Minister and the Ministers responsible for Transport and Energy and, such exemption or refund shall only be granted to the extent that it is practicable and will not lead to evasion of the road user charge'. (My emphasis)

[55] It seems a stretch to suggest that there is some obligation on RFA to go about doing inquiries and looking for documents to establish if a claim is genuine. I certainly do not think that paragraph 7(8) of the Notice imposes such an obligation on RFA. It could just as well be a safeguard it is given to reinforce its fiduciary duty over public funds to, if necessary, test the genuineness of what on the face of it is a compliant claim in all respects.

[56] In the circumstances, it was not open for the court *a quo* to approach Claim 1 on the basis that *audi* was required before RFA could reject a claim supported by

copies. Skorpion did not discharge the onus in respect of that claim and that should have sufficed to dismiss it.

## Claim 2

[57] The gravamen of the complaint in respect of Claim 2 is that it was unfair and or unreasonable for RFA to reject that claim without considering the reasons why it was submitted late. The particulars of claim allege that it was three days late, while from the oral evidence it is clear that it was 14 days late.

[58] Mr Coleman for Skorpion's questioning of RFA witnesses suggested that the unfairness and or the unreasonableness exist in the fact that RFA's uncompromising attitude does not take into account the fact that a claimant might have good reasons for submitting a claim late. Counsel suggested in that context that Skorpion's operations are about 800 km in the south of Namibia and that logistical difficulties were experienced in forwarding the claims to its office in Windhoek to on time submit it to RFA. According to Skorpion's Michelle Steenkamp, the claim was submitted late because of (a) delay on Engen's part and (b) the remissness of Skorpion's Windhoek office. In fact, during her examination in-chief she stated that Engen's site manager at Rosh Pinah, Mr Tokkie Schutte who was not called to testify, informed her of the delay. According to her:

*'This is what he told me because I got upset because I had to wait so long.'*

[59] As to just what Mr Schutte informed Ms Steenkamp remains an enigma. Ms Steenkamp did not say how long Engen delayed and whether by the time she received the invoice from Engen the three-month deadline had passed. Mr Schutte was not called to verify the allegation<sup>17</sup> and Mr Lucien Mouton of Engen who was

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<sup>17</sup> Unless an explanation is given why the witness is not called, an adverse inference is normally drawn for failing to call an available witness: *Waterberg Big Game Hunting Lodge* supra at 9C-E.

called by Skorpion only stated that in November 2012 Engen had changed its invoicing system. There was no suggestion that the change in the invoicing system caused the delay. No-one from Skorpion's Windhoek office also testified. So, we do not know on the evidence whether the delay was caused by Engen alone or was the result of the conduct of both Engen and Skorpion's Windhoek office and if so, how?

[60] It thus remains unclear just what fact RFA ought to have considered as justifying the late submission. Was the claim already late when it reached the Windhoek office, or did it expire at the Windhoek office? Either one of these scenarios in my view could have a bearing on whether a case was made out that RFA acted unfairly or unreasonably assuming it had the discretion to relax the three-month deadline.

Was it open to RFA to relax the deadline?

[61] The Notice requires in peremptory terms that a claim must be submitted within three calendar months of the purchase of a petroleum product. The Policy in turn states that a claim submitted later than three calendar months will not be considered – thus spelling out the consequences of non-compliance. The general rule is that requirements laid down in legislation (primary or subordinate) must be complied with. A court will not readily assume that the law-giver used words without reason.<sup>18</sup> That presumption is stronger where adverse consequences are attached to non-compliance.

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<sup>18</sup>du Plessis L.2002. *The Interpretation of Statutes*. (Durban: Lexis Nexus Butterworths), p 187

[62] Mr Maleka SC for RFA, invited us to apply the ratio in *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA). He also referred us to *South African Co-operative Citrus Exchange Ltd v Director General Trade and Industry and Another* 1997 (3) SA 236 (SCA).

### *Pepper Bay Fishing*

[63] The respondents in that appeal (Pepper Bay Fishing & Mr. Smith) were unsuccessful applicants for fishing rights advertised by the appellants under delegated legislation. Their applications were rejected because they were defective in form (i.e. late payment of application fees in respect of Pepper Bay and not submitting the original with two copies by Mr. Smith as required by the applicable regulations). The respondents successfully challenged the Chief Director's decision to reject their applications because of that non-compliance and succeeded in the court *a quo*.

[64] On appeal to the Supreme Court of Appeal, Brand JA, writing for the court, found that the Chief Director (who was acting under subordinate legislation which was couched in peremptory terms) had no discretion to condone non-compliance with the requirements as they did not allow for it. That reasoning was based on the general principle that an administrative authority has no inherent power to condone failure to comply with peremptory requirements, unless such power has been granted to them.

[65] According to Brand JA in *Pepper Bay* (at para 32) formalities are normally imperative where the legislation allows for the acquisition of rights or privileges rather than the infringement of an existing right or privilege.

#### *Co-operative Citrus Exchange*

[66] In this case, the Department of Trade & Industries introduced an incentive programme (through subordinate legislation) for exporters, where the latter would claim financial rewards and tax concessions if they exported more products. The appellant, an exporter, lodged its claim for the incentives to the Department out of time and the latter rejected it. The Director General (DG) adopted the attitude that he was bound to reject all late claims since he had no discretion to condone the failure to lodge such claims in good time. The appellant challenged the DG's denial of jurisdiction.

[67] Harms JA upheld the court *a quo's* decision that supported the DG's stance, holding that he had no discretion to entertain late claims and could also not waive the time limitation.

#### Relevance of the South African cases

[68] Both cases were decided in South Africa's post - 1994 constitutional order against the backdrop of a culture of justification and a guarantee of fair and reasonable administrative justice similar to our own Art 18. In both cases the legislative scheme under consideration was not dissimilar to our own: The requirements to be complied with being contained in subordinate legislation made on the authority of an enabling Act. In both a privilege is promised to the public - to be

taken advantage of - if they comply with certain requirements which are expressed in mandatory language. In both, those seeking to take advantage of the privilege failed to meet the mandatory requirements to the letter. And in both the subordinate legislative scheme which was couched in mandatory language was not challenged as being against the Constitution or the enabling Act. Yet an effort was made to urge the administrative actor to relax or deviate from the requirements on the implied premise that it was invested with a discretion because of a duty to act fairly and reasonably.

[69] In *Pepper Bay* the administrative officials, just like our RFA, interpreted the mandatory language of the requirements to be complied with as denuding them of a discretion to waive the prescriptions or to grant an indulgence. In *Pepper Bay* (like in our case), the constitutional guarantee of fair and reasonable administrative action was in part relied on to suggest an implied discretion existed to grant an indulgence for non-compliant applications.

[70] An important take-away from the *Pepper Bay* ratio is that two things must not be confused. It is one thing to say that the subordinate legislative scheme is not constitutionally compliant in so far as it fails to empower the administrative actor to exercise a discretion to grant an indulgence on a case by case basis (thus causing hardship). It is another to suggest that an administrative actor becomes the villain of the piece for not assuming a jurisdiction (granting an indulgence) it is not given by the subordinate legislation. In regard to the first, the answer is to attack the legislative scheme and to afford its maker the opportunity to justify it on the basis of

the Constitution or the Act. If it has not been assailed it is binding on the administrative actor who must enforce it to the letter.

[71] The notion that an administrative actor must arrogate to itself 'in the interest of fairness' a discretion not granted it by the empowering provision does not find support in the law reports. The administrative actor's mandate and power is located in the subordinate legislative framework. It cannot turn itself into an *ad hoc* legislature in the 'interest of fairness'. If it does, it acts outside its competence and its actions are *ultra vires*. In other words, once a discretion is not given or cannot be implied in the subordinate legislative scheme empowering the administrative actor, it is not to the actor one looks for an answer, but the scheme. That is the essence of the ratio of *Pepper Bay*. Mr Coleman suggested that the case has been distinguished in subsequent cases. That is to be expected, but that does not mean that it does not represent good law and therefore not of persuasive value.

[72] Mr Coleman cited three cases which he appears to suggest are contrary to *Pepper Bay*: *Director General, Department of Trade and Industry and Another v Shurlock International (Pty) Ltd* 2005 (2) SA 1 and *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481(SCA). He also cited this court's decision in *Torbit and Others v International University of Management* 2017 (2) NR 323 (SC).

[73] I have considered the cases and suffice it say that they do not support Mr Coleman. In *Millennium Waste Management*, Jafta JA agreed with the *Pepper Bay* principle but did not apply it to the case before him because he found that the



administrative body was afforded the necessary discretion to condone non-compliance by the relevant regulation. In *Shurlock International* Farlam JA found that on a proper construction of the subordinate legislative scheme in question, the administrative body had a discretion to honour or disallow a non-compliant claim.

[74] The judgment of this court in *Torbit* concerned the interpretation of s 86(18) of the Labour Act 11 of 2007, which states that the arbitrator 'must' issue an award within 30 days after conclusion of an arbitration. The issue was whether the use of the noun *must* mean that an award given after thirty days is a nullity, meaning that the proceedings would start all over again. Hoff JA found that a strict and inflexible interpretation of the section would lead to gross injustice to the successful litigant and that the provision had to be interpreted in a manner that accords with the object and purpose of the legislation in question. The context is therefore very different. There was no issue in that case about the exercise of a discretion.

[75] In each of the South African cases cited, the court found that the subordinate legislative scheme granted discretion to relax the requirements. It was never a question about the 'constitutional imperative' of fair and reasonable administrative action being used to read a discretion into the scheme which did not provide for it.

[76] Similar considerations apply in the present case. If we uphold the complaint that there must be circumstances in which the three calendar months can be relaxed or be deviated from, we will be re-writing the Notice and in effect grant relief which was not sought and in circumstances where RFA had not been afforded the

opportunity to justify the vires (constitutional or statutory) of the requirement that claims be submitted within three calendar months.

[77] The obvious difficulty which arises from the way in which Skorpion's litigation was conceived and formulated is that the subordinate legislative scheme creating the claims procedure has not been challenged as being *ultra vires* the Constitution or the Act. Therefore, it remains valid and binding, both on RFA and claimants such as Skorpion.

[78] The High Court's conclusion that RFA had a duty to put in place mechanisms for appeal against rejection of refunds and to institute an independent body to adjudicate rejection of claims cannot be sustained in the absence of a challenge to the subordinate legislative framework and a finding by a court that the scheme created for refund claims is *ultra vires* the Constitution or the Act.

[79] It is not hard to imagine that there is a huge volume of claims RFA must contend with at any given time. The need for consistency in how those claims are processed and guarding against unequal treatment of claimants must therefore be paramount. In any event, on what basis would RFA decide what length of delay is acceptable and which not? How does it decide which reasons are good to justify relaxation and which ones not? The dangers associated with that are apparent from Skorpion's less than satisfactory explanations for why Claim 2 was submitted late.

[80] Skorpion came to court on the back of the allegation that Claim 2 was submitted late for 'logistical reasons'. It bore the evidential burden to support that

allegation. The allegation that Engen delayed issuing the VAT invoices is the mere say-so of Skorpion's Steenkamp. It is not confirmed by Engen. The allegation that Skorpion's Windhoek office delayed submitting the documents is also Steenkamp's mere say-so. No-one from the Windhoek office was called to confirm that fact. Even on Skorpion's own version, the person who was remiss at Skorpion's Windhoek head office is no longer in its employ and was not even named at the trial. On what basis would RFA be expected to make inquiries about the role he or she played?

[81] Ms Garises of RFA who played a part in the processing of Claim 2 testified that when that claim was first submitted it was non-compliant. She then took it upon herself, although not obliged, to send an email to Ms Michelle Steenkamp of Skorpion, informing her that the claim had been rejected and that they should furnish the original invoices for Claim 2 to be honoured. That was before the three-month period ran out. Skorpion did not immediately act on that invitation. In fact, no evidence was introduced at the trial to show that Skorpion advised Ms Garises that they were experiencing difficulties in providing the original invoices. In the event, documents were submitted 14 days after the three-month period ran out.

[82] That, in the circumstances, it can be said that RFA acted unreasonably is not supported by the evidence and does not give credit to the effort made to assist Skorpion in having the claim honoured before the deadline kicked in.

[83] Skorpion had not made out the case that the rejection of Claim 2 which admittedly was lodged after the three calendar months, was a breach of Art 18 of the

Constitution. The contrary finding by the High Court cannot be allowed to stand and the appeal must succeed.

### Costs

[84] It was not suggested that costs should not follow the event. I will accordingly make such an order, both *a quo* and in the appeal.

### Order

[85] I make the following order:

1. Condonation is granted for appellant's failure to comply with the rules of court.
  2. The appeal is reinstated.
  3. The appeal succeeds and the judgment and order of the High Court is set aside and replaced by the following order:
    - '(a) Plaintiff's Claim 1 and Claim 2 are dismissed;
    - (b) The defendant is awarded its costs of opposition on party and party scale.'
  4. The appellant is awarded the cost of appeal, to include the costs of two instructed counsel.
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**DAMASEB, DCJ**

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**SMUTS, JA**

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**HOFF, JA**

APPEARANCES

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RESPONDENT:

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