



REPORTABLE

CASE NO: SCR 1 /2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

OHORONGO CEMENT (PTY) LTD

Applicant

and

JACK'S TRADING CLOSE CORPORATION

First Respondent

MINISTER OF FINANCE

Second Respondent

HEAD OF THE OFFICE OF THE COMMISSIONER

FOR CUSTOMS AND EXCISE

Third Respondent

and

Ex Parte:

ATTORNEY-GENERAL

Petitioner

IN RE:

High Court matter (Case No.: A316/2012) between

JACK'S TRADING CLOSE CORPORATION

Applicant

and

MINISTER OF FINANCE

First Respondent

THE COMMISSIONER, HEAD OF THE OFFICE OF

THE COMMISSIONER FOR CUSTOMS AND

EXCISE

Second Respondent

OHORONGO CEMENT (PTY) LTD

Third Respondent

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard: 09 July 2013

Delivered: 20 May 2020

Summary: This case concerns two consolidated matters. The first is the review of proceedings of the High Court conducted on 23 January 2013. The second is the interpretation of section 65 of the Customs and Excise Act. In the review matter, Ohorongo Cement (Pty) Ltd, has requested the court to review the proceedings of the High Court in which it says it was unfairly treated when it wanted to intervene in the case brought by Jack's Trading CC, a rival of Ohorongo in the cement distribution business at the time, against the Minister of Finance and the Commissioner for Customs and Excise. Ohorongo argued that it was not given an opportunity to present its case fully before the High Court converted an agreement made by the parties in Jack's Trading application into an order of court.

In the second matter, the Attorney-General approached the Supreme Court to interpret the provisions of section 65 of the Customs and Excise Act as a court of first and last instance. The Attorney-General asserted that the interpretation of the

Customs and Excise Act raised a constitutional question relating to the rule of law and may be referred by the Attorney-General to the Supreme Court for adjudication under the powers vested in the Attorney-General by Articles 87(c) and 79(2) of the Namibian Constitution.

In Ohorongo's application, the Supreme Court had to decide whether there was an irregularity in the proceedings of the High Court requiring it to review those proceedings. The court held that instances constituting an irregularity in the proceedings had been established and the concerned proceedings of the High Court therefore had to be reviewed and set aside.

In the petition of the Attorney-General, the court had to decide whether the interpretation of the legislation in question could be linked to the protection and the upholding of the Constitution so as to clothe the court with the power to decide the matter as a court of first instance as opposed to a court of appeal.

Having found that the issues relating to the interpretation of the law in question raised constitutional, urgent and essential matters that should be decided by the court as a court of first instance, the court found that the interpretation of section 65 of the Customs and Excise Act proffered by Jack's Trading and upheld by the High Court was incorrect. The court held further that the correct interpretation was that subsections (1) and (8) of section 65 of the Act in question are two separate mechanisms that may be used by the Minister of Finance to introduce new duty or tax on specific imported goods.

REVIEW JUDGMENT

SHIVUTE CJ (MAINGA JA concurring):

Background

[1] There were two petitions in this matter. In the first, the petitioner, Ohorongo Cement (Pty) Ltd (Ohorongo), approached this Court with the request for the Court

to invoke its review powers as envisaged in section 16 of the Supreme Court Act 15 of 1990 (the Supreme Court Act). To that end, it lodged an affidavit deposed to by its Managing Director to bring to the Court's attention an alleged irregularity in the High Court proceedings of 23 January 2013 in an application between Jack's Trading CC (Jack's Trading) and the Minister of Finance (the Minister) as well as the Head of the Office of the Commissioner for Customs and Excise (the Commissioner).

[2] The alleged irregularity relates to an application by Ohorongo to intervene as a respondent in the application by Jack's Trading. The irregularity and the consequences thereof, it claims, warrant this Court's *mero moto* invocation of its review jurisdiction. In light of the information disclosed in the petition, the Chief Justice decided that sufficient grounds for an irregularity in the proceedings had been established justifying the exercise of the court's jurisdiction as contemplated in section 16 of the Supreme Court Act. Accordingly, several procedural directions regulating the conduct of the review proceedings were issued. Pursuant to those directions, Ohorongo initiated an application calling upon the respondents to show cause why the proceedings and order of the High Court (including the settlement agreement) under case number A316/2012 made on 23 January 2013 in the application between Jack's Trading and the Minister as well as the Commissioner (the main application); and the application brought by Ohorongo against the litigants in the main application, under the same case number, for leave to intervene as a respondent in the main application and for ancillary relief, should not be reviewed and corrected or set aside.

[3] Ohorongo's application is opposed by Jack's Trading only. In its answering affidavit, Jack's Trading denied that the High Court committed an irregularity in the proceedings. It further disputed the allegations on which Ohorongo relies for the contention of irregularity. I will advert to Jack's Trading's other arguments later in the judgment. Ohorongo lodged a replying affidavit in which it took issue with the allegations made on behalf of Jack's Trading, contending in effect that the essential facts giving rise to the alleged irregularity had not been traversed by the submission of any contradictory facts.

[4] The other petition was lodged by the Attorney-General. In it, the Attorney-General sought that the Supreme Court exercise its jurisdiction as a court of first instance as contemplated in Article 79(2) of the Namibian Constitution (the Constitution) read with the provisions of section 15(2) of the Supreme Court Act to hear and determine the primary legal issue in the proceedings that took place in the High Court referred to in the application of Ohorongo. He asserted that the issue raises a constitutional question relating to the rule of law and may be referred by him to the Supreme Court for adjudication under the powers vested in him by Articles 87(c) and 79(2) of the Constitution. In what follows, I shall refer to this petition as the 'Attorney-General's petition' and to the application by Ohorongo as 'Ohorongo's application'. The Attorney-General's petition was not opposed.

[5] In light of the consideration that the Attorney-General's petition and Ohorongo's application arose from similar proceedings in the High Court, this court has decided to consolidate them and to deliver a judgment which deals with both of them at once. In delivering this judgment, I find it convenient to deal with

Ohorongo's application first before proceeding to consider and decide the Attorney-General's petition. Before I do so, however, I wish to place on record the unfortunate and regrettable circumstances for the delay to hand down the judgment in these matters that were heard on an urgent basis. The petition and the application were heard on 9 July 2013 by me, Maritz JA and Mainga JA. Maritz JA was assigned the responsibility of preparing the draft judgment for the court's consideration. Regrettably, he did not present any draft despite repeated undertakings to do so. After an inordinately long period, it emerged that due to indisposition our colleague could not deliver the judgment and has since become unavailable to perform further judicial work. Due to this deeply regrettable circumstance, being one of the three judges who presided over the matters, I became seized with the responsibility of preparing the judgment.

[6] In terms of section 13(4) of the Supreme Court Act, two judges forming the majority, can still give a valid judgment provided that they agree on the outcome. Provided that Mainga JA and I agree on the judgment in these matters, the petition and the application may validly be finalised. I will now proceed to consider and decide the application and the petition. Before I do so, however, it is important and fair that I disclose that the proceedings giving rise to Ohorongo's application and the Attorney-General's petition were presided over by two different judges.

Ohorongo's Application

Was there an irregularity in the proceedings of Ohorongo's application to intervene?

[7] Ohorongo's case was that its right to be heard, guaranteed in Article 12 of the Constitution, was violated. This occurred, according to Ohorongo, when the presiding judge who was seized with the application for intervention, without providing Ohorongo with an opportunity to be heard converted the settlement agreement made between Jack's Trading, the Minister and the Commissioner into an order of court. Ohorongo contended that it was entitled to be heard, not only on the intervention application, but also on the effect the terms of the settlement agreement may have had on it. It is important to present certain background facts in order to provide context to Ohorongo's contention.

[8] The more immediate proceedings which gave rise to the petition by Ohorongo, briefly stated, occurred as follows. Jack's Trading brought an urgent application in the High Court against the Minister and the Commissioner to challenge the validity of the infancy industry protection legislation relating to the importation of Portland cement into Namibia promulgated by the Minister under the powers vested in her by section 65 of the Customs and Excise Act 20 of 1998 (the Customs and Excise Act). The basis for the introduction of the infant industry protection measure was Article 26 of the Southern African Customs Union (SACU) Agreement, which provided that the governments of certain member states of SACU, including that of Namibia 'may as a temporary measure levy additional duties on goods imported in [their] area[s] to enable infant industries in [their] area[s] to meet competition from other producers or manufacturers in the common customs areas. . . '.

[9] Although the protection measure was not introduced for the benefit of a specific manufacturing firm, at that time Ohorongo was the only entity in the cement manufacturing industry in Namibia. It had spent more than two billion Namibia Dollars to erect a cement manufacturing plant in the country. It was thus common cause that Ohorongo was essentially the beneficiary of the infancy industry protection legislation introduced by the Minister.

[10] Aggrieved that Jack's Trading had failed to join it as a respondent in the main application despite Ohorongo's conviction that it was a necessary and interested party, on 14 January 2013 Ohorongo made application for leave to intervene in the proceedings. The main application and the intervention application were postponed by agreement to 23 January 2013. Unbeknown to Ohorongo, the legal representatives of Jack's Trading, the Minister and the Commissioner negotiated a settlement during the late night hours of 22 January 2013. After the terms of the settlement had been executed, the agreement was disclosed to Ohorongo's legal representatives shortly before the commencement of the hearing the next day. The salient terms of the settlement agreement were as follows:

- (a) The main application would be withdrawn by Jack's Trading on the terms and conditions agreed upon by the parties as recorded in the agreement;
- (b) It was recorded that the Attorney-General had taken a decision to refer the issues surrounding the interpretation of section 65(1) of the Customs and Excise Act to the Supreme Court as contemplated in Article 79(2) of

the Constitution and that the record of proceedings in the main application and those of the application which previously served in the High Court before a different judge would also serve as the record of proceedings in the Supreme Court;

(c) Although the Government would continue to levy the duties to Portland cement imported by Jack's Trading at the additional 60% rate prescribed by the infancy protection legislation promulgated pursuant to section 65(1) of the Act, such duties would not be collected pending the outcome of the Supreme Court's determination of the referred issues;

(d) The duties levied needed only be paid by Jack's Trading in the event of the Supreme Court upholding the legality of the additional infancy protection legislation but, in the event that the Supreme Court finds against the Minister and the Commissioner, these two parties undertook to refund Jack's Trading levies in the sum of N\$9,718,893.00 previously collected and paid under protest by Jack's Trading, and

(e) Jack's Trading recorded that it would not object to Ohorongo seeking to intervene in the proceedings before the Supreme Court, but reserved its rights to contend at such hearing that Ohorongo has no legal interest in the dispute.

[11] Having received the settlement agreement so shortly before the commencement of the hearing, the legal representatives of Ohorongo requested the presiding judge to stand the matter down for a short period of time to allow

them an opportunity to consider Ohorongo's position and to address the Court on the effect of the settlement agreement on Ohorongo. The presiding judge declined the request, reasoning that Ohorongo was not a party to the proceedings. Ohorongo then sought to move the application for intervention, with counsel for Ohorongo contending that he had been 'marginalised in the negotiation proceedings' and that the court could 'also not marginalise us'. Counsel urged the court 'to stand down for me to collect my papers so that I can argue the intervention application and then we can address this issue'. The court refused to entertain the request on the basis, it would appear, that the main application in which Ohorongo sought to intervene had been withdrawn following the conclusion of the settlement agreement. As to the costs of Ohorongo's bid for intervention, counsel for Jack's Trading submitted that the costs of the application should be in the cause of the hearing in the Supreme Court. Agreeing with the position taken by Jack's Trading on the costs of the would-be intervening party, counsel for the Minister and the Commissioner also submitted that the costs be argued in the Supreme Court. The High Court proceeded to make the settlement agreement an order of court and ordered that the costs of the intended intervening party be determined at the hearing of the matter in the Supreme Court.

[12] It is during these proceedings in the High Court that Ohorongo contended the Presiding Judge committed an irregularity by -

- (a) Not allowing Ohorongo a reasonable time to properly consider the terms and conditions of the settlement agreement and an opportunity to address the court on the legality of certain terms of the agreement and

generally as to whether the agreement could lawfully be made an order of court;

(b) Not first hearing and adjudicating upon the intervention application before considering whether or not to make the settlement agreement an order of court;

(c) Not granting Ohorongo an opportunity to address the Court on its rights to intervene in the main application.

[13] Jack's Trading countered that in light of the settlement agreement and the withdrawal of its application, there was no legal basis for the intervention application. Moreover, so Jack's Trading contended, there was another order of the High Court made by another judge to the effect that Ohorongo was not a necessary party, which order the presiding judge could not possibly review. As to the content of the settlement agreement, Jack's Trading argued that as the dispute giving rise to the settlement agreement did not involve Ohorongo, counsel for Ohorongo 'had no right' to consider the settlement agreement. Regarding the contention that the settlement agreement was ultra vires the Customs and Excise Act, Jack's Trading disputed this, arguing that the settlement agreement did not contemplate releasing Jack's Trading from paying additional tax as the agreement only contemplated deferring the payment thereof pending the determination of the dispute whether the additional duty was imposed lawfully or not.

[14] In its supplementary heads of argument, Jack's Trading argued that Ohorongo was not a party to the process that it complains was unfair to it. Jack's Trading further submitted that Ohorongo had not established that the irregularity in the proceedings complained of resulted or is likely to result in an injustice or other form of prejudice being suffered by it. Should the Attorney-General's petition be entertained, Ohorongo's rights, 'if any', would be determined in the petition and as such the application by Ohorongo 'is misconceived', so Jack's Trading countered.

Analysis

[15] In deciding the issue whether or not Ohorongo's intervention application should have been decided before the settlement agreement was made an order of court, this court is guided by its earlier decision in *Trustco Insurance Limited v Deeds Registries Regulation Board*¹ where it was held that;

'In a constitutional state, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights....'

[16] By launching its application to join the main application, Ohorongo expressed its intention to intervene in those proceedings and to defend its vested rights which it believed were threatened. By converting the settlement agreement into a court order, the High Court irregularly disposed of the main application without determining whether or not Ohorongo had *locus standi* to join in the main application. As the beneficiary of the relevant infant industry protection, Ohorongo

¹ 2011 (2) NR 726 para 18

undoubtedly was a necessary and interested party in the proceedings. As such, it should have been cited by Jack's Trading as a respondent.

[17] Had the High Court granted Ohorongo the opportunity to consider the effect of the settlement agreement upon it and to address the court thereon, Ohorongo could have endeavoured to persuade the court that its intervention application should be heard prior to the settlement agreement being made an order of court. If Ohorongo had a right to be joined, it is doubtful whether the settlement agreement could be made an order of court without Ohorongo agreeing to it. The relevant consideration is not whether Ohorongo's application fell away because the main application had been withdrawn. The real questions are in the first place, whether the Minister and the Commissioner could settle the matter in the absence of Ohorongo if the latter had a sufficient interest to be joined in the main proceedings and secondly whether the settlement agreement could be made an order of court if Ohorongo had a sufficient interest in the settlement agreement itself.

[18] As to the decision of the Attorney-General to refer the interpretation of the relevant provisions of the Customs and Excise Act to the Supreme Court for interpretation, it was not given that the Supreme Court would accept the referral by the Attorney-General – who was not a party to the settlement agreement - to it in terms of Article 79(2) of the Constitution.² In light of the factors that the application by Jack's Trading was aimed at declaring the infancy protection legislation null and void and Ohorongo stood to benefit from the impugned legislation, it was

² The parties could not have been certain that the interpretation of the Customs and Exercise Act is a matter contemplated in Article 79(2) of the Constitution. Moreover, it is for the Chief Justice or a judge designated by the Chief Justice to decide whether the referral meets the threshold set for admission in line with the Supreme Court's jurisprudence as set out; amongst others, in *S v Bushebi* 1998 NR 239 (SC) and *Schroeder and another v Solomon and others* 2009 (1) NR 1 (SC).

necessary for the High Court to have heard and determined the application to intervene before the settlement agreement was made an order of court.

[19] The question of costs in the application to intervene should also have been determined by the High Court. As the decision as to costs is a matter in the discretion of the presiding judge³, it was not open to the High Court to defer the exercise of its discretion to the Supreme Court. It is not apparent from the record why the issue of costs was referred to the Supreme Court for decision.

[20] The irregularity in the proceedings is inextricably linked to the issues raised in the Attorney-General's petition. Furthermore, as Ohorongo is a party in the Attorney-General's petition, the irregularity does not warrant the matter to be referred back to the High Court. This court will proceed to dispose of the matter. I now turn to deal with the lawfulness of the settlement agreement.

Is the settlement agreement lawful?

[21] It has been argued by Ohorongo that the settlement agreement concluded by the Minister, the Commissioner and Jack's Trading is unlawful. As noted above, clause 3 of the settlement agreement provided, amongst other things that although the Government would continue to levy the duties to Portland cement imported by Jack's Trading at the additional 60% rate prescribed by the infancy protection legislation promulgated in terms of section 65(1) of the Customs and Excise Act, such duties would not be collected pending the outcome of the Supreme Court's determination of the referred issues. The legality of this clause of the agreement

³ *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69

should be examined against section 51(1) of the Customs and Excise Act which provides that:

‘Subject to this Act, duty shall be paid for the benefit of the State Revenue Fund on all imported goods, all excisable goods, all surcharge goods and all fuel levy goods in accordance with Schedule 1 *at the time of entry* for home consumption of such goods.’ (Emphasis supplied)

[22] Thus the Act prescribes that once duty has been imposed against goods, the duty must be paid at the time the goods enter the country. Section 51(2) (a) to (c) provides circumstances under which the Commissioner may condone underpayment of duty payable on goods being imported into Namibia. It appears none of those provisions authorises an arrangement as contemplated in the settlement agreement. Furthermore, section 41(1)(a) of the Customs and Excise Act provides that a person entering any imported goods for any purpose must deliver to the Controller a bill of entry specifying the purpose for which the goods are being entered. Additionally, the person must sign a declaration as to the correctness of the particulars and purpose for which the goods are being entered. Section 41(1)(b) in peremptory terms requires the person referred to in section 41(1)(a) to pay all duties due on the imported goods.

[23] Section 41(2) of the Customs and Excise Act provides as follows:

‘(2) Notwithstanding paragraph (b) of subsection (1), the Commissioner may for such period and on such conditions, including conditions relating to security, as he or she may determine, in writing allow the deferment of payment of duties in terms of that paragraph in respect of the relevant bills of entry.’

[24] As noted above, Jack's Trading contended that it was not given an exemption from paying the additional tax levied on the importation of its cement in the settlement agreement. According to Jack's Trading, all that the settlement agreement contemplated in this respect was the deferment of the payment of tax until the correctness or otherwise of the judgment of the High Court has been determined in the Supreme Court. It may well be so that the agreement contemplated the deferment of the payment of tax by Jack's Trading, but that still does not make the agreement lawful, because section 41(2) of the Customs and Excise Act does not empower the Commissioner to grant a blanket deferment for an indefinite period.

[25] The section contemplates deferment in respect of relevant bills of entry and in respect of a definite period. The section also contemplates the imposition of conditions, including those relating to security. No such conditions have been imposed in the settlement agreement. The Commissioner himself did not rely on or even refer to section 41(2). To the extent reliance is impliedly placed on that section by Jack's Trading, the Commissioner acted ultra vires in agreeing to clause 3 of the settlement agreement. The agreement is thus ultra vires the relevant provisions of the Customs and Excise Act and is therefore unlawful to that extent.

[26] To sum up on Ohorongo's application, it was a mistaken action to refuse to decide the application to intervene and not to give Ohorongo an opportunity to be heard and to make representations regarding the terms and conditions of the

settlement agreement prior to making the agreement an order of court. This mistaken action prevented Ohorongo from having its case fully and fairly heard.⁴ The action thus constitutes an irregularity in the proceedings. Moreover, the High Court committed an irregularity in making the settlement agreement its order when the settlement agreement is ultra vires the Customs and Excise Act. The proceedings of the High Court of 23 January 2013, in case number A316/2012, are accordingly reviewed and are to be corrected.

[27] Having disposed of Ohorongo's application, I should turn next to the Attorney-General's petition, beginning with the inquiry into whether this Court has jurisdiction to hear the petition.

Attorney-General's Petition

Jurisdiction of this Court to hear the Attorney General's petition

[28] The first issue which falls for determination in the Attorney-General's petition is whether the matter which the Attorney-General has placed before this Court for determination falls under the category of matters which the Attorney-General may properly bring directly to this Court for decision as a court of first and final instance. We invited all the parties concerned to make submissions on this question and this court has greatly benefited from those submissions and has duly considered them.

[29] The Attorney-General's right to directly bring a matter for determination by the Supreme Court is provided for in Article 79(2) of the Constitution as follows:

⁴ Cf. *S v Bushebi; Ellis v Morgan, Ellis v Dessai* 1909 TS 576 at 581

‘...The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by an Act of Parliament.’

[30] This provision must be read together with section 15(1) of the Supreme Court Act which reads:

‘Whenever any matter may be referred for a decision to the Supreme Court by the Attorney-General under the Namibian Constitution, the Attorney-General shall be entitled to approach the Supreme Court directly on application to it, to hear and determine the matter in question.’

Thus the import of Article 79(2) and section 15(1) of the Supreme Court Act is to give the Attorney-General the right to directly bring matters before the Supreme Court. This right, as is the case with every other right provided in the Constitution, is subject to lawful and reasonable limitation.⁵

[31] The provisions of section 15(2) and (3) of the Supreme Court Act appear to provide limitations to this right by imposing certain procedural requirements which the Attorney-General must comply with when exercising this right. Section 15(2) of the Supreme Court Act requires that, when exercising this right, the Attorney-General must submit the application by petition to the Chief Justice and must further comply with procedures set out in the rules of the court. In addition, section 15(3) provides as follows:

⁵ *Kauesa v Minister of Home Affairs and others* 1995 NR 175 at 185H.

'The Chief Justice or any judge designated for that purpose by the Chief Justice shall decide whether such application is, by virtue of its urgency or otherwise, of such a nature as to justify the exercise of the Court's jurisdiction in terms of this section.'

[32] Thus section 15(3) of the Supreme Court Act qualifies the Attorney-General's right to petition the Chief Justice in terms of Article 79 (2) of the Constitution. The qualification is that the matters brought by the Attorney-General must either be of urgent nature or of any nature which justifies the need for the Attorney-General to invoke Article 79(2) of the Constitution and approach this Court directly. The justification provided by the Attorney-General must be reasonable and sound enough to persuade this Court to sit as a court of first and final instance.

[33] Jack's Trading has made an oblique reference to the restrictions imposed by section 15(3) of the Supreme Court Act as being 'in conflict' with Article 79(2) of the Constitution. This Jack's Trading argued, is because despite the Attorney-General's 'constitutional entitlement' to refer a matter to the Supreme Court, section 15(3) requires that this alleged entitlement is depended on whether the matter is urgent or not, the determination of which is to be made by the Chief Justice or a judge designated by him or her. This filter process, so Jack's Trading contended, could not have been intended by the founders of the Constitution. Unfortunately, Jack's Trading did not elaborately canvass its argument beyond merely protesting that the restrictions could not have been intended by the framers of the Constitution given the language used in formulating Article 79(2) of the Constitution. As the issue of the alleged unconstitutionality of the provisions of

section 15(3) of the Supreme Court Act has not been pertinently and squarely raised or argued in these proceedings, it is not necessary to decide it.

[34] It is, however, important to emphasise that the Attorney-General's right in terms of Article 79(2) of the Constitution is circumscribed by the limitations imposed by section 15 of the Supreme Court Act. Those limitations serve the critical purpose of ensuring that the right provided in Article 79(2) is not susceptible to possible abuse. Furthermore, it should never be a usual practice for this Court to hear matters as a court of first and last instance. Such practice may be detrimental to access to justice because this Court would be making important determinations without the benefit of the views of the High Court, and without the aggrieved party having an opportunity to appeal against the judgment should they be aggrieved by it.⁶ Therefore, the qualifications set out in section 15 of the Supreme Court Act are valid and are applicable in determining whether the Attorney-General has, in the present case, fully complied with them.

[35] It will be recalled that section 15(3) of the Supreme Court Act requires that matters brought by the Attorney-General must either be of urgent nature or of any such other nature which justifies the need for the Attorney-General to approach this Court directly. I find the matter to be appropriate for this Court to hear it and make a determination on it. In arriving at this conclusion, I have been guided by the jurisprudence of this court as set out in a number of decisions including *Attorney-General of Namibia v Minister of Justice and others*⁷ and *Schroeder and*

⁶ Cf. *Bruce v Fleecytex Johannesburg* CC 1998 (2) SA 1143 (CC), para 8

⁷ 2013 (3) NR 806 (SC), paras 1 and 2

*another v Solomon and 48 others*⁸ that this Court will accept to hear and determine the matter when petitioned by the Attorney General only if the matter is of constitutional and public importance in terms of the questions raised, to the extent that failure to bring finality to it would seriously undermine the interests of justice.

[36] Thus the test laid down by this Court is that it will only accept to hear a matter brought directly by the Attorney-General in terms of Article 79(2) of the Constitution and section 15 of the Supreme Court Act if the matter raises a constitutional question relating to the interpretation, protection and or enforcement of the Constitution. Secondly, the matter must be of significant constitutional importance and thirdly, it must be in the interests of justice for this Court to accept to hear and determine the matter as a court of first and final instance.

[37] The matter brought by the Attorney-General raises a host of questions that have implications on the enforcement of the Constitution. It raises a question relating to the enforcement of the constitutional function of Government to collect revenue. It also raises the question regarding the implementation of the constitutional power to formulate foreign trade policy⁹-a function that is enforced, amongst others, through the Customs and Excise Act which empowers the Minister to designate certain trade imports as attracting the payment of additional duty. The matter also raises questions regarding the enforcement of the right to practice freedom of trade because the power to levy additional duty on certain imports may interfere with the freedom to trade in certain affected goods.

⁸Cited in fn. 2 above, para 22

⁹ As contemplated in Article 40(h) of the Constitution

[38] But as noted earlier, the fact that this matter raises constitutional questions does not, on its own, warrant this court to decide to hear the matter. The constitutional questions must be so important and/or urgent to the extent that there is a real need for the Supreme Court to bring finality to the matter in order to avert an impending or ensuing crisis regarding the implementation of the Constitution.

[39] This matter involves the power of the Minister to levy and collect duty on behalf of the State in the public interest. It is trite that Government needs to raise revenue in order to perform its functions. Of course the revenue must be collected lawfully. The uncertainty regarding the interpretation of the relevant provisions of the Customs and Excise Act (as evinced by the multiple applications and counter applications in the High Court) has created a cloud and some confusion around the appropriate steps which the law requires Government to take in order to introduce duty. This uncertainty and confusion has potential to hamstring Government from collecting public revenue and that will surely attract multiple repercussions on the ability of Government to perform many other constitutional functions.

[40] It is also in the interests of justice for this court to hear the matter and to determine it so as to avoid the possibility of a multiplication of appeals to this court, which could clog this court and divert its attention and scarce resources from other equally important cases where parties await justice.

[41] It has been contended by Ohorongo that whilst it is desirable to bring this matter to finality, that must be done properly, lawfully and within the remit of the

Namibian Constitution and the applicable law, including the Supreme Court Act. Ohorongo argued further that the use of the phrase 'under this Constitution' in Article 79(2) shows that the Attorney-General may only invoke Article 79(2) powers when the matter concerns the protection and upholding of the Constitution which are the primary powers of the Attorney-General in the context of the petition. As the present matter concerns the interpretation of legislation and not of the Constitution, so Ohorongo contended, unless the relief sought in the Attorney-General's petition is or can be linked to the protection and upholding of the Constitution, the Attorney-General acts ultra vires his powers to invoke Article 79(2) of the Constitution.

[42] In agreeing with the position taken by Ohorongo detailed in the preceding paragraph, I am of view that there can never be any doubt that the collection of duties and public revenue is a matter that goes to the heart of the proper functioning of government in the country. The uncertainty regarding the interpretation of the Customs and Excise Act and the ensuing multiple litigations in the High Court have the potential to tie Government down, preventing it from collecting the intended duties and that could have ramifications on the ability of Government to function. Certainly it is in the interests of the Constitution to have a properly functioning Government.

[43] In addition, as I found above, this matter has potential ramifications on the enjoyment of the freedom to practice any trade or business, as enunciated in Article 21(1)(j) of the Constitution. The uncertainty regarding the interpretation of the Customs and Excise Act as well as the ensuing series of litigation and counter

litigations could undermine the freedom to import the goods targeted by the imposed duty. There is no doubt that this matter may jeopardize the enjoyment and enforcement of a fundamental constitutional right. This matter, therefore, raises questions that have a direct and substantial impact on the application and/or enforcement of the Constitution.

[44] But as observed earlier, the matter is of such a nature that it requires the Supreme Court to hear it and finalize it in order to mitigate a crisis that is already ensuing regarding the implementation of the constitutional function of Government to collect revenue as well as the exercise of the right to trade by the members of the public. The matter therefore, falls squarely within the ambit of matters contemplated under Article 79(2) of the Constitution. The court therefore accepts to hear the matter and I proceed to deal with the substantive issues raised in the Attorney-General's petition.

Interpretation of section 65(1) and (8) of the Customs and Excise Act

Relevant rules of interpretation

[45] The Attorney-General has requested this Court to provide an interpretation of section 65(1) and (8) of the Customs and Excise Act. The court *a quo's* interpretation of the two subsections may be summarized as follows: Section 65(1) confers on the Minister the power to amend or impose new duties by tabling taxation proposals. It also provides for the timing as to when such amendment comes into operation. Section 65(2) deals with the consequences of the proposal and its timing as well as its impact upon those holding stock of affected goods. Subsection (8) deals with the procedure to be followed by the Minister when amending a schedule to impose a new duty or increased duties upon goods.

[46] The subsection is subject to a notice in the Gazette by means of which the Minister amends a schedule. That would appear to include the power to amend under section 65(1) even though a notice is not referred to in that subsection. Once the Minister invokes the power to amend a duty by giving notice in the Gazette, the Minister is required to follow the procedure set out in section 65(8). The procedure set out in the subsection contemplates and requires that the promulgation of the notice is to precede the tabling in the National Assembly. The purpose of such procedure would be to inform those affected by the imminent change in the duty. Publication of legislation is a vital element of enacting any legislation so that those affected by the legislation are informed. The court then concluded with the following key finding:

‘It would accordingly follow that the wording of section 65 construed as a whole requires that the promulgation of the notice is to precede the tabling of the proposal.’

[47] Jack’s Trading supports the interpretation of section 65 proffered by it and upheld by the court *a quo*. It argued that section 65(8) contemplated that the publication of the notice in the Gazette was intended to inform the public and affected parties of the Minister’s intention and must thus precede the tabling of the proposal in the National Assembly. The Attorney-General, the Minister, the Commissioner and Ohorongo all argued for the proposition that the court *a quo*’s interpretation is incorrect. The court is indebted to counsel for their research and submissions that greatly assisted it to decide this intricate matter. I may mention in

passing that the legislative provisions in question are not a model for lucid legal draftsmanship. The legislature could certainly do better.

[48] In interpreting the provisions of section 65(1) and (8) of the Customs and Excise Act, this Court is guided by the existing rules and principles of statutory interpretation. The relevant principles are discussed in the paragraphs below.

[49] The provisions of an Act must be interpreted together. This approach is known as the *ex visceribus actus* approach, which emphasizes that a particular provision of a statute must be understood as part of the more encompassing legislative instrument in which it has been included.¹⁰ This approach assists the court to harmonise ostensibly conflicting provisions of one and the same statute.¹¹ Therefore, section 65(1) and (8) of the Customs and Excise Act must be interpreted in the context of the entire Act.

[50] When interpreting legislation, this court must take a different approach than the one it takes when interpreting the Constitution.¹² In interpreting legislation the court must give effect to the ordinary meaning of the words used to formulate the provisions being interpreted. The court will only go beyond the ordinary grammatical meaning of the words in the event that the ordinary meaning of those words generates an absurd or repugnant interpretation which undermines the intention of the legislature or which is unconstitutional. In the event of such absurdity or repugnancy, the court will then have to consider the purpose of the provision as well as its textual and contextual background. This approach was

¹⁰ Du Plessis. *Re-Interpretation of Statutes* (2002) at 112.

¹¹ *Principal Immigration Officer v Bhula* 1931 AD 323 at 335; *S v Dlamini*, *S v Dladla and others*, *S v Joubert*, *S v Schietekat* 1999 (4) SA 623 para 84.

¹² *Attorney-General of Namibia v Minister of Justice and others*, cited fn. 7 above, para 7.

approved by this court in *S v Strowitzki*¹³, where the court endorsed the following dictum by Park B in *Beck v Smith* (1836) 2 M & W 191 at 195:

‘The rule (ie the golden rule) is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.’

[51] Furthermore, when interpreting legislation, the court must assume that the legislature is consistent with itself and therefore, the provisions of the same Act are concurrently operational unless there is an irreconcilable conflict between the two provisions.¹⁴ An irreconcilable conflict exists when the two provisions prescribe antagonistic requirements which cannot be enforced concurrently without considering the other provision to be invalid. Thus, after determining the ordinary meaning of the provision, the court must establish if there is an irreconcilable conflict between the two provisions. If the conflict is reconcilable, the court must adopt an interpretation which upholds that the two provisions are concurrently operational.

Application of rules of statute interpretation to construe section 65(1) and (8) of the Customs and Excise Act

[52] The above described rules of statutory interpretation will now be applied to determine the meaning of section 65(1) and (8) of the Act. I begin with section 65(1) which provides as follows:

¹³ 2003 NR 145 (SC) at 157.

¹⁴ *S v Dlamini et al*, para 84

'Time when new or increased duties become payable

(1) The Minister may at any time in the National Assembly table a taxation proposal *imposing any new duty* under this Act, *or increasing the rate of duty* payable upon any goods specified in the proposal, or any amendment, withdrawal or insertion made under this Act, and such new duty or increased rate of duty shall, subject to subsection (2), from the time when the proposal was so tabled be payable on all goods which have not at such time been entered for home consumption.' (Emphasis added).'

[53] The words used in the above provisions must be given their ordinary meaning. Applying this rule, the ordinary meaning of section 65(1) is as follows:

- (a) the Minister may at any time;
- (b) table before the National Assembly;
- (c) a proposal to impose or introduce new duty upon any specified goods, and
- (d) subject to the requirements of section 65(2) of the Customs and Excise Act, the new duty shall become payable from the time the taxation proposal was tabled before the National Assembly, unless the National Assembly rejects the proposal.

[54] Section 65(2) provides that goods specified in a taxation proposal tabled under section 65(1) will become liable to new duty or to the difference between the rate of duty at the time of the tabling of the proposal even though such goods had

been entered for home consumption prior to the time of tabling of such proposal and despite such goods having passed out of customs and excise control at the time of the tabling of the proposal. Although subsection (2) is not of much relevance to the interpretation of section 65(1), for completeness and in light of the consideration that section 65(1) is 'subject' to subsection (2), the subsection is reproduced hereunder:

'(2) When the Minister, under subsection (1) tables a taxation proposal relating to imported or exported goods, any goods which the Minister may specify in that proposal for the purpose of the subsection, shall, though entered for home consumption prior to time of such proposal and notwithstanding that such goods have passed out of customs and excise control, become liable to the new duty imposed or to the difference between the rate of duty at the time of the tabling of, and the increased rate provided for in such proposal, if such goods have at the time of the tabling of such proposal not being delivered from the stock of an importer, manufacturer or such class of dealer as the Minister may, in such proposal specify.'(sic)

[55] The real question is whether the ordinary meaning of the words used in s 65(1) and summarized in para [53] above is absurd and/or undermines the intention of the legislature? This question calls for this court to weigh the above ordinary meaning of the words used in section 65(1) against the intention of the legislature. The learned author Christo Botha,¹⁵ correctly points out that the intention of the legislature may be established from the long title to the Act, which explains the purpose of the Act. The long title of the Customs and Excise Act reads as follows:

¹⁵ Christo Botha. *Statutory Interpretation: An introduction for students*. 4th Ed (2005) at 79

‘To provide for the levying, imposition, payment and collection of customs and excise duties, of a surcharge and of a fuel levy; to prohibit and control the import, export or manufacture of certain goods; and to provide for matters incidental thereto.’

[56] It is clear from the long title that the apparent overall intention for enacting the Customs and Excise Act is, amongst other things, to provide for powers to introduce customs and excise duties and related levies. There seems to be no absurdity with regards to the ordinary meaning of section 65(1) which I set out above, because it merely describes the process which may be followed in the implementation of the above legislative intention. The ordinary meaning of section 65(1) suggests that the Minister is mandated to introduce new duty or tax and this power must be exercised in accordance with a defined process which involves tabling, before the National Assembly, a proposal for the introduction of new duty or levy against specific goods. This court accepts the Attorney-General’s submission that the provision seeks to give the Minister some degree of flexibility which allows Government to secure the strategic economic and taxation interests of the country as and when it becomes necessary to do so. This is why section 65(1) provides that the Minister may exercise this power ‘at any time.’

[57] There has not been any contention advanced regarding the unconstitutionality of section 65(1) and therefore, this Court will assume that the ordinary meaning of the provision conforms to the Constitution. In the absence of any absurdity or repugnancy, the ordinary interpretation of section 65(1) must stand and be given effect to. I now turn to interpreting section 65(8).

[58] Section 65(8) of the Customs and Excise Act provides as follows:

'(8) A notice in the Gazette *by means of which* the Minister under any provision of this Act amends any Schedule, *imposes any new duty*, or amends or withdraws any existing duty, shall, notwithstanding subsection (1), be tabled by the Minister in the National Assembly within a period of 21 days after the promulgation of such notice, if the National Assembly is then in ordinary session, or if the National Assembly is not then in ordinary session, within a period of 21 days after the commencement of its next ensuing ordinary session, and shall remain on the Table of the National Assembly for a period of not less than 28 consecutive days, and if that session is terminated before such period of 28 days has lapsed, such notice shall again be tabled in the National Assembly within a period of 21 days after the commencement of its next ensuing ordinary session.' (Emphasis is mine)

[59] Applying the same rule that the ordinary grammatical meaning ought to be established and upheld unless it is absurd or repugnant, the ordinary interpretation of section 65(8) is as follows:

- (a) By way of a Government Notice, the Minister may promulgate regulations;
- (b) To amend any Schedule or to impose new duty or amend an existing duty on certain goods;
- (c) Notwithstanding the process set out in section 65(1), the notice containing the regulations must be tabled before the National Assembly within 21 days after it has been promulgated if the National Assembly is in ordinary session; or

- (d) Where the notice has been promulgated at a time when the National Assembly is not in ordinary session, the notice must be tabled within the first 21 days after the next ordinary session of the National Assembly.

[60] It is important to note that when tabling the notice in the National Assembly, the Minister is not submitting a *proposal* for the introduction of additional duty. Rather, the Minister is informing the National Assembly of his or her regulations that have been promulgated through the Government Notice. If the National Assembly is unhappy with the regulations, it can pass a resolution within 28 days (after the tabling of the notice) to terminate, vary or suspend the operation of the new duty. This is confirmed in section 65(9) which reads:

‘(9) If the National Assembly, during the period of 28 days referred to in subsection (8), passes a resolution relating to the notice on the Table as contemplated in that subsection, such resolution shall not affect the validity of anything done in terms of such notice until the date immediately prior to the date upon which such resolution was passed, or to any right, privilege, obligation or liability acquired, accrued or incurred at such date in terms of such notice.’

[61] Therefore, the Minister may promulgate a regulation through a Government Notice which introduces new duty, payable with immediate effect. Upon tabling the notice, the National Assembly may (if it so wishes) suspend, vary or terminate the operation of the new duty but such termination, variation or suspension will not have a retrospective effect on the obligations and liabilities already accrued or incurred in terms of the notice.

[62] The above ordinary meaning must be weighed against the intention of the legislature in order to establish if it causes any absurdity or repugnancy. It seems to me that there is no absurdity or repugnancy which ensues from the above interpretation as it sets out a process through which the legislative intention may be achieved. It does not undermine the legislative intention to empower the Minister with flexible means of introducing additional duty. Rather, it promotes the implementation of this intention by the legislature. There is no constitutional attack that has been launched against it and therefore there is no reason for this Court to doubt its conformity with the Constitution. In the absence of any absurdity or repugnancy, the above ordinary interpretation must be ascribed to section 65(8).

The relationship between section 65(1) and (8) of the Customs and Excise Act

[63] I have mentioned that as a rule of statutory interpretation, a statute must be interpreted as a whole. This means that the various provisions must be interpreted together or in relation to each other. Both subsections (1) and (8) are obviously part of section 65 of the Act. It appears (from the title and subject matter of the provisions) that the purpose of section 65 as a whole is to provide for steps which the Minister may take in order to introduce, amongst others, new duty and determine when the new duty becomes payable in order to achieve the objectives of the Customs and Excise Act.

[64] It will be recalled that as a rule of statutory interpretation, this court has to assume (unless established otherwise) that there is no conflict between section 65(1) and (8). If there is a conflict, the court must establish if the conflict is irreconcilable. The conflict would be irreconcilable if section 65(1) and (8) are

antagonistic to each other to the extent that it is impossible to enforce one of them without the other being deemed invalid or repealed.

[65] The court has to adopt an interpretation which harmonizes the two provisions, to the extent permitted by their grammatical construction and in a manner which promotes the legislative intention. Put differently, the preferred harmonious interpretation must be one that is guided by the grammar used to formulate the two subsections and the legislative intention stated in the long title of the Act.

[66] It seems to me that subsections (1) and (8) of section 65 seek to provide the Minister with two different processes or mechanisms through which he or she may introduce new duty or levy. Depending on the prevailing circumstances, the Minister has discretion to act either in terms of subsection (1) or (8). The Minister may decide to introduce new duty or increase duty in terms of section 65(1), in which case he or she will be required to table, before the National Assembly, a taxation proposal and the new duty shall become payable from the date the proposal is so tabled. Alternatively, the Minister may act in terms of section 65(8) in which case he or she will be required to promulgate a regulation through a Government Notice and follow the process outlined in the subsection.

[67] In arriving at this interpretation, I have taken the following inherent features and differences between subsections 65(1) and (8) into consideration. Section 65(8) of the Customs and Excise Act provides in part that:

'A notice in the Gazette by means of which the Minister...amends any Schedule, imposes any new duty, or amends or withdraws any existing duty shall *notwithstanding* subsection (1), be tabled by the Minister in the National Assembly.' (Emphasis supplied)

[68] The dictionary meaning of 'notwithstanding' in this context is 'in spite of'¹⁶ or its equivalent 'despite'¹⁷. The use of the word 'notwithstanding' therefore suggests that the process set out in section 65(8) may be invoked despite the fact that section 65(1) exists as another avenue through which the Minister may introduce new duty. It means that the process set out in section 65(8) is introduced as a separate mechanism through which the legislative intention (of introducing new duty) may be carried out.

[69] Furthermore, section 65(1) and (8) prescribe different stages which the Minister must follow when introducing new duty. When acting in terms of section 65(1), the Minister only tables a proposal before the National Assembly, whereas if he or she decides to act in terms of section 65(8), he or she has to promulgate the notice in the *Government Gazette* and then table the same notice in the National Assembly within the prescribed timeframes. It is important to note that whereas section 65(8) specifically stipulates that the Minister must table, before the National Assembly, *the promulgated notice*; section 65(1) expressly stipulates that the Minister must table a *taxation proposal* before the National Assembly. A notice and a taxation proposal are two different things. As I will endeavour to explain later on, a notice is a formal public notification made by the Minister of the regulation which introduces new duty; while a taxation proposal is a proposal by the Minister

¹⁶ The Concise Oxford Dictionary 9th Ed., p. 931.

¹⁷ *Ibid.*, p. 367

to the National Assembly, to approve his or her proposed or recommended introduction of new duty or increase of taxation on certain goods.

[70] Moreover, whereas section 65(8) requires the notice tabled in the National Assembly to remain on the Table of the National Assembly for a minimum of 28 consecutive days, there is no such requirement for a taxation proposal tabled in terms of section 65(1). This distinction additionally shows that the two sections impose different requirements and set out two different processes or mechanisms which the Minister may invoke in order to introduce new duty.

[71] Section 65(1) and (8) prescribe different times at which the new duty becomes payable. Once the taxation proposal has been tabled in the National Assembly, it activates any new duty or increased rate immediately upon tabling. As noted earlier, this is stated in section 65(1) itself. On the other hand, the duty imposed via a notice contemplated in section 65(8) of the Act is payable from the date fixed by the Minister through that notice. This is evident in section 65(9) of the Customs and Excise Act which reads:

‘(9) If the National Assembly, during the period of 28 days referred to in subsection (8), passes a resolution relating to the notice on the Table as contemplated in that subsection, such resolution shall not affect the validity of anything done in terms of such notice until the date immediately prior to the date upon which such resolution was passed, or to any right, privilege, obligation or liability acquired, accrued or incurred at such date in terms of such notice.’

[72] Thus in terms of section 65(9), if the National Assembly passes a resolution which is adverse to the tabled notice, such a resolution will not affect the

obligations or liabilities already acquired as a result of that notice. Put differently, the resolution of the National Assembly will not have a retrospective effect on the obligations or liabilities which arise from the notice. It seems therefore that, the notice is not a proposal, to the National Assembly, by the Minister to introduce new duty. It would appear that the purpose of tabling this notice is to allow the National Assembly the opportunity to exercise its oversight to confirm or terminate or suspend the regulations. This would be entirely consistent with Article 63(2)(b) of the Constitution.¹⁸

[73] That the legislature contemplated two distinct procedures in terms of which a rate of duty may be imposed, namely one by tabling a taxation proposal and the other by publication in the *Government Gazette*, is evident from section 65(10) which provides:

‘If in any legal proceedings any question arises as to whether the Minister has in fact *tabled a taxation proposal or a copy of a notice* as described in this section, or as to the time when *such proposal or notice* was tabled, or as to the particulars contained in *such proposal or notice*, a copy of such proposal or notice, certified by the Secretary of the National Assembly to be a true copy, shall be prima facie evidence that such proposal or notice was tabled, of the date upon which it was tabled and of the particulars contained therein.’ (Emphasis is mine)

[74] On the facts of the Attorney-General’s petition, when the Minister employed the section 65(1) procedure, she was not obliged to publish the tabling of the proposal by the Customs and Excise Act in the *Government Gazette*. She

¹⁸ Which provides:

‘The National Assembly shall further have the power and function, subject to this Constitution:

(b) to provide for revenue and taxation.’

however gave notice to the public at large that she had tabled a taxation proposal. She did this in the *Government Gazette* dated 15 August 2012. This was evidently done to give effect to Article 22(a) of the Constitution¹⁹, read with section 13 of the Interpretation of Laws Proclamation 37 of 1920.²⁰ The notice specifically says it was published pursuant to section 13 of the Interpretation of Laws Proclamation. The notice also informed the public that the Minister exercised her powers by tabling a taxation proposal on 18 April 2012 in terms of section 65(1); not section 65(8). The notice did not impose the duty retrospectively. The validity of the taxation proposal is not dependent on the promulgation and tabling of the notice in terms of section 65(8). On the contrary, the taxation proposal once tabled in the National Assembly becomes law and part of the Customs and Excise Act by virtue of the definition of the phrase 'this Act' in section 1 of that Act.²¹

[75] Therefore, subsections (1) and (8) of section 65 should be seen as setting out two different processes which the Minister may engage in order to introduce new duty or increase the rate of duty payable upon any goods specified in the proposal or notice.

[76] The above interpretation is consistent with the legislative intention of giving the Minister flexibility to introduce new duty whenever the need arises in order to

¹⁹ This sub-Article provides, *inter alia*, that any law providing for a limitation of a fundamental right or freedom must be of general application and not be aimed at a particular individual.

²⁰ Section 13 of the Interpretation of Laws Proclamation reads:

'(13) Where any act, matter or thing is by law directed or authorised to be done by the Governor-General or by the Administrator, or by any public officer, the notification that such act, matter, or thing has been done, may unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.'

²¹Which is defined as including: 'any government notice, regulation or rule issued or made, or agreement concluded or deemed to have been concluded thereunder, or *any taxation proposal* contemplated in section 65 which is tabled in the National Assembly.'

achieve the objectives of the Customs and Excise Act. It is also consistent with Article 63(2) of the Constitution which inspires the National Assembly to ensure that it has the last say on taxation laws. It would appear that the legislature was mindful of the need to ensure that the Minister is given options which he or she may choose depending on the circumstances.

[77] The Court *a quo* erred by reading the provisions of subsection (1) into subsection 8 of section 65 to imply that subsection 8 prescribes procedures which must be followed when introducing duty in terms of section 65(1). In the absence of a conflict, the two provisions operate concurrently in pursuit of the legislative intention.

[78] I hasten to point out, however, that the existence of two options through which the Minister may act does not and should not be taken as a license for the Minister to cherry pick how he or she wants to act. That is not the intention of the legislature. The discretion to choose between the two options must still be exercised in a manner which respects and upholds the constitutional values and the rule of law and a culture of justification, which underpins the Namibian constitutional democratic system. It also goes without saying that once the Minister has taken a decision to invoke a particular section as the preferred means of introducing the new duty, he or she must strictly follow the due process prescribed in the relevant section.

Costs in Ohorongo's application to intervene in the High Court

[79] It will be recalled that Ohorongo, in its application for review, indicated that the presiding judge did not make an order of costs in its application to intervene in the main proceedings. It has been noted that the presiding judge ruled that the costs would be determined by this court. I have already indicated that this was an irregularity. It is expedient and in the interests of justice that in the circumstances where Ohorongo's application has been consolidated with the Attorney-General's petition, this Court should make an order regarding the costs for Ohorongo's application to intervene in the High Court proceedings.

[80] The general rule concerning costs is that costs follow the event, subject to the overriding principle that a court has discretion in awarding costs. It will be recollected that Ohorongo made an application to intervene as a respondent in the main proceedings in the High Court which were due to be heard on 14 January 2013. Both the main proceedings and Ohorongo's application for intervention were postponed by agreement to 23 January 2013. On 23 January 2013, the date when the two applications were to be heard, the main application was withdrawn as the parties in that application had reached a settlement. The presiding judge then refused to hear Ohorongo's application for intervention on the basis that the main application had been withdrawn. Ohorongo obviously had to incur costs to assert its rights. As it has succeeded in showing that an irregularity indeed occurred in the proceedings in which it had sought leave to intervene, it is just and fair that Ohorongo be awarded its costs in respect of its intervention application. It is also fair that the parties to the settlement agreement should pay Ohorongo's costs in the High Court jointly and severally.

Costs in Ohorongo's application

[81] Ohorongo has also sought a costs order in its application in this court. As noted earlier, the application was opposed by Jack's Trading. As Ohorongo has succeeded in its application, it is equally just and fair that it be awarded the costs.

Order

[82] In respect of Ohorongo's application, the following order is made:

1. The High Court proceedings of 23 January 2013 conducted under Case Number A316/2012, including the order bearing the same date are reviewed and set aside.
2. The litigants in Jack's Trading's application under Case No A316/2012 are ordered to pay the costs of Ohorongo occasioned by Ohorongo in its application to intervene as a respondent in Jack's Trading's application referred to above, jointly and severally, the one paying the other to be absolved. Such costs are to include the costs of one instructing legal practitioner and two instructed legal practitioners.
3. Jack's Trading is ordered to pay the costs occasioned by Ohorongo in its review application in this Court, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners.

[83] In respect of the Attorney-General's petition, the court makes the following declaratory orders:

1. It is declared that the interpretation given by the High Court under Case No. A172/2012 delivered on 31 August 2012 that the wording of section 65 of the Customs and Excise Act required that the promulgation of the notice in the *Government Gazette* was to precede the tabling of a taxation proposal contemplated in section 65(1) of the Act is erroneous.
2. It is further declared that subsections (1) and (8) of section 65 of the Customs and Excise Act contemplate two distinct procedures in terms of which a rate of duty may be imposed by the Minister of Finance, namely the tabling of a taxation proposal envisaged in section 65(1) and the process of promulgation by notice in the *Government Gazette* envisaged in section 65(8).
3. No order as to costs is made.

MAINGA JA

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