REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISON

JUDGMENT

CASE NO: I 2063/2014

In the matter between:

SKORPION MINING COMPANY (PTY) LTD **PLAINTIFF**

And

ROAD FUND ADMINISTRATION **DEFENDANT**

Neutral citation: *Skorpion Mining Company (Pty) Ltd v Road Fund Administration (I 2063-2014) [2016] NAHCMD 201 (12 July 2016)*

CORAM: MASUKU J,

Heard: 15, 16, 17, 19 June and 24 July 2015.

Delivered: 12 July 2016.

FLYNOTE: LEGISLATION – Road Fund Administration Act, 18 of 1999 - **PRACTICE –** Amendment of pleadings – Rule 52 (9). **CONSTITUTIONAL LAW –** provisions of Art. 18 and 25 (4) – joinder of Attorney-General and Ministers. **ADMINISTRATIVE LAW -** administrative body and administrative power defined – review powers of the court – the *audi* rule. **LAW OF EVIDENCE** – cross-examination – duty to put one's case to the opposite party's witnesses and the implications of failure to do so – eliciting hearsay evidence from the opposing party's witnesses and effect thereof.

SUMMARY: The plaintiff sued the defendant for payment of two refunds amounting to N$ 1 065. 653. These two claims were in relation to road usage in terms of the Road Fund Administration Act. The defendant rejected the two claims by the plaintiff on the basis that the first claim was not accompanied by original invoices as required. The second claim was rejected for late filing. The defendant opposed the relief sought on the basis that it had followed the prescriptions of the relevant law in so rejecting the two claims.

Held – that the RFA is an administrative body exercising administrative functions within the meaning of Art. 18 of the Constitution of Namibia.

Held – the procedures followed by the defendant in rejecting the claims were not fair and not reasonable within the meaning of Art. 18 of the Constitution of Namibia. *Held that* the regulations and relevant statutory regime had to comply with *audi* principle, which was presumed to apply unless Parliament excludes it in clear and unambiguous terms.

Held further – the RFA had a duty, in dealing with claims for refunds to apply its regulations and policy in a manner that conduces to the success of the claims than one geared to deny the claimants.

Held that – the RFA had a duty to put in place mechanisms for appeal against rejection of refunds and have an independent body to adjudicate in those cases as it had an interest in the rejection of claims.

Held further – that there was no need to cite the Minister of Finance and other Ministers for the reason that the relief claimed did not seek to challenge the constitutionality of the enabling legislation but rather the manner of the implementation thereof.

The plaintiff's claims were granted as prayed with interest and costs.

ORDER

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1. The application for the amendment of the plaintiff's particulars of claim is granted.

2. In respect of claim 1, payment of the amount of N$ 743 054 at the rate of 20% per annum, calculated from 26 July 2012.

3. Payment in 2 above shall be made subject to a confirmation by Engen Namibia of the authenticity of the invoices filed in support of claim 66740 (01007224) by the plaintiff and which confirmation shall be filed with the Registrar of this Court in writing within fourteen (14) days of the date of this judgment.

4. Payment of the amount of N$ 322 599 plus interest at the rate of 20% per annum calculated from 20 February 2013.

5. Cost of the suit.

JUDGMENT

MASUKU J.,

Dramatis personae

[1] This is an unusual action. Unusual not because of the relief sought but because of the basis upon which it is sought and the circumstances giving rise thereto.

[2] The plaintiff is a company duly incorporated in terms of the company laws of this Republic. It is engaged in the mining business and has its main operations in Rosh Pinah in the South of this Republic and an office in Windhoek.

[3] The defendant, the Road Fund Administration, which shall interchangeably be referred to as the R.F.A., is juristic body established in terms of the Road Fund Administration Act,[1] ('the Act"). Its objects are set out in the provisions of s. 2 of the Act

[1] Act No. 18 of 1999.

as being to manage the road user charging system in such a manner as to secure and allocate sufficient funding for the payment of expenditure as contemplated in s. 17 (1) of the Act, with a view to achieving a safe and economically efficient road sector.[2]

What is the RFA?

[4] Simply stated, the RFA is a body that was set up by statute principally to ensure that the public roads in Namibia are safe, efficient and well maintained. Their main source of funding, which enables them to meet this mandate, it would seem, is from a levy imposed on every litre of fuel purchased by consumers i.e. petrol and diesel. This money obtained from the levy imposed, is then transferred to the RFA's coffers. This levy, however applies only to those individuals and companies who use public roads. There are other persons and entities who purchase fuel but do not use public roads and these include farmers and some mining companies, to mention but a few. The latter individuals and entities register with the RFA and are entitled, in terms of the relevant law, to claim from the RFA refunds for fuel they purchased and their claims must be supported by documents issued by those who supplied them with fuel. I shall deal with this issue in greater detail as the judgment progresses.

The pleadings

[5] By combined summons dated 27 May 2014, the plaintiff sued the defendant for payment of two claims being an amount of N$ 743 054.00 and interest at the rate of 20% per year from 26 July 2012, in respect of the first claim and an amount of N$ 322 599.00 and interest thereon at the rate of 20% per year calculated from 20 February 2013 in the second claim. In the alternative, the plaintiff applied for an order reviewing and setting aside decisions made by the defendant in rejecting claims in the above amounts which had been lodged with it by the plaintiff. In this regard, the plaintiff prayed for an order calling upon the defendant to honour the claims mentioned above. Lastly, the plaintiff, as is usual, prayed for the costs of suit.

[2] Section 2 of the Act.

[6] The bases for the claims can be briefly summarized as follows: In respect of claim 1, the plaintiff avers that on 25 July 2012 it submitted a claim for the amount mentioned above, having complied with the defendant's requirements for refund. In the alternative, the plaintiff alleges that it substantially complied with the said requirements. On 14 August 2012, the defendant notified the plaintiff that its claim had been rejected as the latter had failed to file original invoices in support of the petroleum products it had purchased but had instead filed ones marked 'customer copy'. It is alleged that the said rejection of the claim on the grounds stated is unjustified, unlawful and in breach of the provisions of the Article 18 of the Constitution of Namibia. I will return to deal with further allegations in support of the assertion on constitutionality in due course.

[7] Regarding claim 2, the plaintiff avers that on 19 February 2013, it submitted a claim for payment of the amount set out above. It alleges that it complied, alternatively substantially complied with the defendant's refund requirements but the latter, on 1 March 2013 notified the plaintiff that it had rejected the said claim for the reason that it had been filed out of time by a period of three days, contrary to stipulations made by the defendant. It was again alleged that the said rejection was done in violation of the provisions of Article 18 of the Constitution of Namibia. .

[8] For its part, the defendant raised points *in limine* which it did not pursue during the trial and I shall, for that reason, say nothing more of them. The nub of its defence though was that in respect of the first claim, the plaintiff had failed to comply with rules that govern refunds by the defendant and that for that reason, the defendant was not liable to the plaintiff in the amount claimed or at all. A similar position was adopted in relation to the second claim, namely, that there was no money due and payable to the plaintiff because it had failed to comply with the defendant's rules requiring filing of invoices not later than three months from date of issue.

Amendment of pleadings

[9] The plaintiff, during the course of the trial, applied for the amendment of its pleadings in order to include a claim for damages. This is so because when one has regard to the initial particulars of claim, it is plain that the plaintiff's claims were for payment of the amounts of N$ 743 054 and N$ 322 599, respectively, which it was claimed were unlawfully and unreasonably rejected by the defendant.

[10] The amendment sought by the plaintiff was to include words to the following effect at para 21 of the particulars of claim, 'Plaintiff is entitled to the amounts claimed, alternatively, suffered damages in these amounts either in common law or as contemplated in section 25 of the Namibian Constitution.'

[11] The defendant opposed the proposed amendment principally on the basis that the plaintiff sought to include a claim for damages without setting out the allegation in a manner that enables the defendant to reasonably assess the quantum thereof. The court was urged to dismiss the application for amendment with costs.

[12] The amendment of pleadings is governed by the provisions of rule 52 of this court's rules. The part relevant to the present matter is subrule (9) which reads as follows:

> 'The court may during the hearing at any stage, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.'

[13] The above provision empowers the court to grant leave to amend pleadings at any stage of the proceedings, including during trial, and even before judgment, I would venture to say. In dealing with amendments, it is in my view imperative to have regard to the court's general policy to amendments. To this extent, I will have regard to old authorities, which in spite of their age, declare principles which still ring true to date.

[14] In *Whittaker v Roos*[3] the court expressed itself in this regard as follows:

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[3] 1911 TPD 1092 at p 1102.

'This court has the greatest latitude in granting amendment, and it is necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. . . But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. This would be a gross scandal. Therefore, the Court will not look to technicalities, but will see the real position between the parties.'

[15] In *Tidesley v Harper,*[4] the court said,

'My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting *mala fide,* or that by his blunder, he has done some injury to his opponent which cannot be compensated for by costs or otherwise.' See also *Zamnam Exclusive Furniture CC v Josef Stephanus Lewies and Cornelia Catharina Lewis The Trustees of the CC Lewies Family Trust*[5]*.'*

The two quotations above make the point that courts will always lean in favour of granting amendments unless there is some prejudice not compensable in costs that eventuates as a result of the grant of the amendment.

[16] In *D B Thermal (Pty) Ltd v Quality Products,*[6] the Supreme Court stated the following about the issue of amendment of pleadings:

'A further principle is that relates to amendments is that they should be "allowed in order to obtain a proper ventilation of the dispute between the parties . . . so that justice may be done" subject of course to the principle that the opposing party should not be prejudiced by the amendment if the prejudice cannot be cured by an appropriate costs order, and where necessary, postponement.' See also *I A Bell Equipment (Pty) Ltd v Roadstone Quarries CC.*[7]

[4] 10 Ch. D 393 per Lord Bramwell at p 396.
[5] (I 268/2014) [2015] NAHCMD 274 (13 November 2015).
[6] Case No. SA 33/2010 at para 39
[7] (I 601/2013, I 4084/2013) [2014] NAHCMD 306 (17 October 2014)

[17] In the instant case, I am of the view that the amendment sought did not change, colour or jaundice the proceedings in any way that would have served to prejudice the defendant. The amendment proposed was made to cover other eventualities the plaintiff may not have contemplated at the drafting of the proceedings. More importantly, the amendment did not require the leading of any further evidence that would have caused the defendant any prejudice. It was merely an amendment seeking to rely on an alternative cause of action, grounded on the same facts and evidence already led by both parties.

[18] It is fitting to record that the defendant's gripe was that the amendment does not comply with rule 45 (9), which calls upon a plaintiff to set out the damages in such a manner that will enable a defendant to reasonably assess the quantum thereof. I am of the considered view that the damages sought in this matter are liquid and they represent the amounts rejected by the defendant for the reasons alluded to earlier. They are not damages that can be said to be illiquid thereby requiring the application of the subrule quoted.

[19] Having regard to all the foregoing, I am of the considered view that the opposition is in the circumstances, not well-founded. There is absolutely no merit in the opposition. I also find that the amendment sought does not, in any way prejudice the defendant and did not, in any event, warrant any postponement nor did it affect the finalization of the trial in any shape or form. As such, no costs were incurred as a result of the amendment sought. I accordingly grant the amendment sought and shall make no order as to costs, although the plaintiff was successful in its application.

The evidence

[20] The evidence adduced in this matter was fairly straightforward and there is very little contention amongst the parties, as I will demonstrate shortly. The plaintiff, for its part, called four witnesses in support of its case. These witnesses were Ms. Hester Swart, Ms. Michelle Steenkamp, Mr. Cedric Willemse and Mr. Lucien Mouton.

[21] The first three witnesses were in the employ of the plaintiff at the time the claims were lodged with the defendant. They were involved in lodging one or the other of the two claims. It is common cause that both claims were rejected by the defendant on the grounds that one was filed without original invoices accompanying it and that the other was lodged out of time by a period of about 14 days[8].

[22] In respect of the first claim which was rejected for not being accompanied by original invoices, PW1 testified that she filed the said claim and had done so in respect of more than sixty other claims and none of which had been rejected. It was her evidence that this claim was duly accompanied by original invoices from Engen Namibia. It was also her evidence that she left the plaintiff's employ after having submitted the claim and only discovered shortly before the trial that it had actually been rejected by the defendant.

[23] In cross-examination, it was put to PW1 that the defendant, in respect of this claim, went out of its way to alert the plaintiff of the non-compliance with its policy by writing an email through one of its employees, Ms. Beaulah Garises. It was PW1's evidence that she was no longer present when the email in question was sent but she insisted that she had filed original invoices and was unaware why the defendant would claim it received copies only. She suspected that the defendant's employees may have misplaced the original invoices. She maintained under cross-examination that she had not complied substantially with the RFA's requirements in this case but had complied with same to the letter.

[24] PW2, Ms. Steenkamp testified that she is also no longer in the plaintiff's employ but had followed up on one of the claims that had not been honoured by the RFA. This was the first claim and in respect of which Ms. Garises informed her it had been filed without invoices. It was her evidence that she did not personally submit this claim. After speaking to Ms. Garises, it was her evidence that she thereupon went to check on file what may have happened.

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[8] It important to note that there seemed to be a disparity between the pleadings and the evidence regarding the period of delay in relation to the second claim. The pleadings allege a delay of three days yet in evidence a period of 14 days was mentioned. This disparity is not however important having regard to the approach of the Court to the issue of delay *vis-a-vis* the provisions of Art. 18.

[25] Upon perusing the file, she discovered that the copy of the claim was on file and she also established that it was PW1 who had submitted the claim. Attached to the claim form were some copies of the invoices she further testified. The originals were not on file and she presumed these were lodged with the claim submitted by PW1. It was her evidence that she thereupon re-sent the claim and Ms. Garises queried the date of its submission and claimed it had been filed outside the three month deadline.

[26] PW3 also testified about the second claim which the RFA queried on the basis that it was filed three days out of time, i.e. after three months from the date of the invoice. It was her evidence that the claim was filed late because they had received their invoices from Engen late and this she attributed to Engen having problems with their systems at the time. Upon receipt of same, however, she further testified, she immediately completed the form and sent it by courier to the plaintiff's Windhoek office, which was to submit the claim by hand to the RFA. She testified that their office in Windhoek delayed in filing the claim immediately upon receipt and this resulted in the RFA refusing to honour the claim on account of it having been filed out of the stipulated time.

[27] In cross-examination, Mr. Kwala asked the witness what the system issues with Engen were. It was her evidence that the invoices were previously prepared and printed at their Windhoek office but changes had been effected which resulted in that task being given over to the site office. This also entailed training of the staff to carry out this task and this inevitably resulted in delays in issuing the invoices on time.

[28] It must be noted that the evidence of PW2 in this regard was clearly hearsay in nature but where a cross-examiner asks questions of this nature, a witness is permitted to give answers thereto even if they may amount to hearsay. The court is therefore entitled to rely on the answers proffered by the witness in respect of the issue of systems delay as it was adduced at Mr. Kwala's behest and must be accepted.

[29] In the case of *Thuso v The State*[9] Phumaphi J dealt with this issue and stated the as follows:

> 'What the third prosecution witness said about what Kgosietsile told him would ordinarily be inadmissible as hearsay, however, since it was elicited by cross-examination, it became admissible. Vide Hoffman and Zeffert *South African Law of Evidence* at p 458:
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> "If a cross-examiner succeeds in eliciting unfavourable evidence which would ordinarily be inadmissible, he is not entitled to object its being received."'

In any event, this piece of evidence was later confirmed by an employee of Engen Mr. Mouton and the court was therefore, for that further reason, entitled to rely on it.

[30] PW3, Mr. Cedric Willemse's evidence was that he communicated with the Chief Executive Officer (C.E.O.) of the RFA regarding the rejected claims which form the subject of this action. He did so after being approached by the plaintiff's General Manager Mr. Satish Kumar. It was his evidence that he visited the office of the CEO of the RFA and discussed the merits of both claims and enquired if they could possibly look into same with a view to reaching an amicable settlement to the claims. In respect of the first claim he testified that the plaintiff had submitted originals yet the RFA claimed to have received copies. This is what he sought to be resolved with the RFA.

[31] In respect of the second claim, it was his evidence that the plaintiff accepted that the claim had been filed late. His proposal to the CEO was not for the claim to be rejected outright but for the RFA to follow the practice in other institutions where a penalty is levied for late submission. It was his evidence that the CEO promised to look into both claims and take the matter to the RFA Board for further consideration and possible resolution. As a result, he pestered the CEO asking what the resolution of the Board was on the issue. He rejected denials put to him to the effect that the CEO had promised to look into the matter and refer same to the Board for consideration. Lastly, it was PW3's evidence that he never got an opportunity to meet the Board to make any representation to them regarding the plaintiff's rejected claims.

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[9] 2010 (1) BLR 355 (HC) at 356

[32] PW4 was Mr. Mouton, an employee of Engen Namibia Petroleum. He testified that his company issues original invoices to its customers and retains its own copies. The retained copy may be given to a customer if needed later, for instance if the original is lost or misplaced. In that instance, he testified, they provide a copy in their file or they reprint a new one, which is called the duplicate tax invoice.

[33] Regarding the systems issues referred to earlier, PW4 testified that the printing of the invoices was previously done in Keetmanshoop but it was moved to Rosh Pinah. This move, he further testified, was done in the last quarter or so of 2012. At this juncture, the plaintiff closed its case.

[34] The RFA also called four witnesses in support of its case. These were DW1 Ms. Namasiku Mutumba, DW2 Ms. Beulah Garises, DW3 Mr. Willie Katzao and DW4 Mr. Alexander Botha. The upshot of their evidence was that the plaintiff had filed the two claims in contravention of the defendant's procedures relating first to filing original invoices and the second related to the late submission of the claim.

[35] What may be described as the refrain or the chorus of the evidence of the RFA was that the plaintiff did not play by the rules which they well knew and that being the case, the plaintiff had to face the consequences of its non-compliance regardless of the merits or causes of the non-compliance. Rules were made to be obeyed and that it was for that reason fair and just for the plaintiff to forfeit the amounts in question because they had failed to comply with the laid down rules and procedures. Period! Furthermore, in relation to the rejection of the claim on account of late submission, the RFA makes use of a computer programme which automatically rejects the claim once it is submitted late. I will analyse the relevant aspects of this evidence in due course.

[36] The case, particularly presented by the plaintiff in evidence, may appear to be misleading, regard had to the pleadings and the cross-examination in particular. The plaintiff's evidence, as one followed it, seemed to suggest that the plaintiff wanted to the court to interfere with the defendant's decision because the plaintiff was not at fault in

respect of both claims and that if it was, it was not so culpable as to deserve having to forfeit their entire value of the rejected claims.

[37] The real nature of the case, as pleaded, began to emerge in the cross-examination of the RFA's witnesses by Mr. Coleman. The matter is essentially a constitutional one and it revolves around the proper interpretation of the provisions of Article 18 of the Namibian Constitution and more particularly, whether in coming to a decision to reject the plaintiff's claims, the defendant took into account and actually applied the said provisions of the Constitution.

[38] To this extent, I am fortified in stating without equivocation that the evidence adduced by the plaintiff's witnesses pays second fiddle, if at all. The main duty of the court is to investigate the actions of the RFA's employees as revealed in evidence and to decide whether the RFA rules, in the manner they were or are being applied in rejecting claims for refunds meet the constitutional muster.

The Statutory Regime relating to Road Refunds

[39] The RFA is set up in terms of s. 2 of the Road Fund Administration Act.[10] Its functions, in terms of the relevant Act[11] include the following:

(a) to manage, subject to ss. 16 and 17, the Fund;
(b) to impose, subject to s. 18, road user charges, to determine rates of those charges and to collect those charges;
(c) to determine, subject to s. 19, the amount of the funding to be made available through the road user charging system;

[10] Act No. 18 of 1999.
[11] S. 15 of the Act

(d) to make recommendations to the Minister regarding the application of the Act and amendments to it.

[40] A Government Gazette, dated 6 September 2001,[12] entitled 'The Imposition of Fuel and Levy On Petrol and Diesel Road Fund Administration Act', notified the public that the RFA, in consultation with the Minister of Finance, had imposed a levy on every litre of petrol and diesel sold in Namibia in accordance with provisions set out in a Schedule thereto. It proceeded to revoke Government Notice No. 95 of 1 April 2000.

[41] Section 7 of the Notice, titled 'Refunds claimable in respect of levy paid on petrol or diesel purchased' provides the following:

'(1) A person who –

(a) carries on a qualified business; and
(b) is registered with the Road Fund Administration in accordance with subparagraph (2) as a consumer entitled to a refund in respect of the levy, may in accordance with the rate of allowable refund determined in terms of (*sic*) in subparagraph (3), claim from the Road Fund Administration a refund in respect of the levy paid on the volume of petrol or diesel purchased by that person for the purposes of the business activity not being for on-road use.

(2) An application for registration must be made to the Road Fund Administration in the form and manner determined by it.'

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(6) 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;

[12] Government Notice No. 183 of 2001.

(c) be submitted within three calendar months after the date of purchase of the petrol or diesel.'

[42] It would appear, from the RFA's evidence and it common cause, that the plaintiff was alleged not to have complied with (b) and (c) above, namely failure to supply original invoices in respect of claim 1 and submitting a claim after the lapse of three months from the date of purchase in claim 2.

[43] There is no gainsaying that the plaintiff is duly registered with the RFA and also carries out what is referred to as a qualified business and also uses fuel for non-road purposes. There is no accusation against the plaintiff along those lines. In point of fact, from the evidence adduced, it is clear that the plaintiff has had dealings with the RFA for a long time and has from time to time filed claims for refunds in terms of the relevant law.

[44] It is perhaps fitting to mention at this stage that according to DW2, the RFA had problems with the plaintiff's claims and it would seem, on a continuous basis. I will not lend any or much credence to this piece of evidence as it was never put to any of the plaintiff's witnesses and only surfaced after they had left the witness box yet that evidence tends to suggest that the plaintiff was a problematic client.[13] It would be very unfair, in the circumstances, to have regard to this prejudicial piece of evidence when the plaintiff was not afforded an opportunity to refute it during its witnesses' sojourn in the witness' stand. This evidence must, accordingly regarded as an afterthought as I hereby do.

Relevant Constitutional provisions

[45] Article 18 of the Namibian Constitution provides the following on administrative justice:

[13] *Small v Smith* 1956 (1) SA *and South African Rugby Football Union v The President of the Republic of South Africa* 2001 (1) SA 1.

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

[46] I should perhaps start by observing the obvious, regard had to the nomenclature used by the Law-giver, namely that the above Article is couched in peremptory terms regarding the exercise of administrative powers by officials. That this is the case, in my view, is to be gleaned from the use of the word 'shall' in the opening line of the section in question. It follows therefore that an administrative body that fails to adhere to the prescripts of the article courts disaster as it may have its actions or decisions declared to be unconstitutional and therefore set aside.

Is the RFA an administrative body within the meaning of Article 18?

[47] There should, in my view, be no question, doubt, any qualms or argument that the RFA is such a body and to which the imperatives of the above-quoted Article applies. I did not understand Mr. Kwala to argue that the RFA is not such a body. The RFA clearly exercises administrative powers and to which the epithets mentioned above apply, together with both the common law and statutory provisions referred to. In that regard, the RFA would be expected by the Constitution, to act fairly, reasonably and in line with common law and statutory dictates in relation to epithets that may not presently be mentioned in the above section in carrying out its duties which impact on other persons and their rights.

[48] In *Transworld Cargo (Pty) Ltd v Air Namibia and Others*[14] Ziyambi AJA, stated that the test for determining whether conduct under enquiry constitutes 'administrative action' is not whether the action in question is performed by a member of the executive organ of State. In this regard, the question is whether the task itself is administrative or not and this depends on the nature of the power exercised. The court proceeded to say that a number of considerations may influence the decision whether the act complained of is administrative or not, and these include the nature of the power, its subject-matter,

[14] 2014 (4) NR 932.

whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters and on the other, to the implementation of legislation.

[49] Regarding whether the defendant performs a public function, the following array of factors may be decisive, namely, the identity and the legal nature of the entity; the source of the power in question i.e. whether it flows from legislation, the constitution or a contractual instrument. Another factor may be what is called the financial test, namely, what the financial source for the entity is, i.e. is it funded by public taxes or it is entirely privately funded? A further test may be its institutional make-up i.e. whether it is an institution of government. The last is what is referred to as the 'functions test', which considers the actual nature of the function under review.

[50] I am of the considered view, however one looks at the various tests that the defendant appears to tick all the boxes of being an administrative body and especially one that exercises a public function. It performs statutory functions and derives it powers or authority from statute. From any perspective, I am of the considered view that there can in the circumstances be no question that the provisions of Article ineluctably apply to the defendant. And as stated earlier, and in fairness to the defendant, it never contended that its nature and powers were not amenable to the provisions in question. In point of fact, it makes that concession in para 29 of its heads of argument, where it states that it is a public body that operates and is governed by a set of rules.

[51] The other constitutional provision cited in the particulars of claim, as amended in terms of the amendment granted earlier in this judgment, is Art. 25 of the Constitution. It deals with the enforcement of Fundamental Rights and Freedoms. The relevant Article is 25 (4), which reads as follows:

'The power of the court shall include the power to award monetary compensation in respect of any damage suffered by aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'

I shall revert to deal with this particular provision as the judgment unfolds, should it be necessary to do so.

Findings of fact

[52] Having had a bird's eye view of the matter, I am of the considered view that it is possible to come to a conclusion on the first claim without having to deal with and making a factual finding as to whether the plaintiff did, as testified by its witnesses, file the original invoices. This, it must be recalled, was denied by the defendant, which eventually rejected the claim on the basis that no original invoices had been filed in line with the procedures stipulated. I am of the view that like the second claim, the issue is capable of being resolved even on the basis of the defendant's version, namely that the original invoices were not submitted.

[53] In this regard, the question for determination will be couched as follows: supposing the plaintiff did not file original invoices as alleged, did the defendant, in that eventuality, deal with the matter before, rejecting the claim, in a manner that is consistent with the constitutional imperatives of fairness and reasonableness and compliance with requirements of the common law and any relevant legislation, as enshrined in Art. 18 of the Constitution.

[54] In respect of the second claim, there appears to be no dispute that the defendant filed the claim later than the period stipulated in the relevant provisions of the relevant Government notice. For that reason, there is no need for the court to make any factual finding as the parties are *ad idem.* The question for determination, is whether the defendant, in connection with the second claim, complied with the imperatives of fairness and reasonableness, coupled with compliance with the requirements of the common law and the relevant statutes.

[55] In dealing with the enquiry in respect of both claims, I am of the view that it would be prudent to first set the stage by dealing with case law that touches upon the constitutional concepts of fairness and reasonableness in so far as they relates to Art. 18. I will then proceed to consider the relevant evidence in respect of each claim and

then come to a conclusion as to whether the plaintiff has made out a case for the invocation of the provisions of Art. 18, as prayed for.

The import of Article 18 of the Constitution

[56] There is no need to reinvent the wheel in respect of the import of Art 18. There is no paucity of case law regarding what the requirements of this provision are. In *Minister of Mines and Energy and Others v Peetroneft International Ltd and Others,*[15] the Supreme Court stated the following regarding the requirements of the constitutional provision in question:

'There can be no doubt that art 18 of the Constitution of Namibia pertaining to administrative justice requires not only that reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement are fair procedures which are transparent.'

Words that immediately leap out and demand attention from the excerpt above are reasonableness, fairness and transparency. I will not have regard to the latter epithet as it does not appear to constitute the basis of the plaintiff's claim.

[57] In *Immigration Selection Board v Frank,*[16] the court expressed itself thus, in relation to this provision:

'The Article draws no distinction between quasi-judicial and administrative acts and administrative justice whether quasi-judicial or administrative in nature "requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent"'.

At p. 171, the court proceeded and said, 'For purposes of this case it is enough to say that at the very least the rules of natural justice apply such as the *audi alteram partem* rule and not to be the judge in your own cause etc.'

[15] 2012 (NR) 781 (SC) at 32 and 33.
[16] 2001 NR 107 at 170, per Strydom CJ.

[58] The Black's Law Dictionary defines the key words 'reasonable' and 'fair' in the following terms:

'reasonable, - Fair, proper, or moderate under the circumstances.' Fair, is defined as 'Impartial, just; equitable; disinterested. Free of bias or prejudice'. Claassen[17] defines 'reasonableness' as 'considering the matter as a reasonable man normally would and decide. As will be recalled, "reasonable man" is regarded as a person of ordinary intelligence, knowledge and prudence.'

[59] It would seem, from the foregoing definitions and legal propositions, that there is, to some extent, a degree of intercourse and intersection between the two words. Stripped to the bare bones, however, one can say the administrative bodies are impelled by the Constitution in Art. 18, to act in a manner that is justifiable, consonant with basic common sense and reason; not unduly harsh; free from bias and prejudice; impartial; rational and to an extent, considerate. This eschews actions actuated by or indicative of capriciousness, vindictiveness, malice, interest, bias and which are whimsical or of such kindred spirit. It is in this context that the actions of the defendant complained of shall have to be considered.

The relevant evidence

[60] As I have indicated earlier, I will not make a factual finding on this claim regarding whether or not the invoices filed by the plaintiff were original. The evidence suggests that after receipt of the claim from the plaintiff, an email was written to the plaintiff indicating that an original invoice had not been submitted together with the claim, contrary to the stipulated procedure. The question for determination is whether in rejecting the claim, the defendant took steps that are reasonable and fair, within the meaning and spirit of the provisions of Art. 18 as described above.

[61] In order to come to a view on this issue, it may be well to indulge to the necessary extent in the consideration of evidence led, particularly the answers returned

[17] Dictionary of Words and Phrases, Vol 1 Butterworts, 2003 at C-136; See also *Miguel Mingeli v Oshakati Premier Electric (Pty) Ltd (I 3683/2014) [2015] NAHCMD 45 (6 March 2015)* AT P.5 -6 para [10].

by the defendant's relevant witnesses in cross-examination, during the battle of wits between them and Mr. Coleman. I will summarise the relevant evidence and briefly quote relevant excerpts where called for.

[62] The first witness for the defendant was Ms. Namasiku Mutumba, employed as the accountant in the fuel and levy and mass distance charges section. It was her evidence that the letter of rejection is a *pro forma* letter conveying to the claimant the fact of rejection. Regarding the requirement for original invoices, she testified that these are required in order to avoid the defendant paying twice for the same invoices. In other words, this requirement was introduced to prevent fraudulent claims from being honoured. She was asked if a claimant would be refunded if they lose the original and her answer was in the negative. It was her evidence that in agreeing to the terms of refund, the claimants bound themselves and agreed to have their claims rejected on failure to produce original invoices.

[63] In response to a question from the court as to what happens to the refund if a rejection has been notified to the claimant, her evidence was that that money goes back to the coffers of the defendant. It was also her evidence that there has never been any exception in matters of rejection if the claimant falls foul of either failing to file an original invoice or if the claim for a refund is lodged late. The failure to meet either requirement results in the claim for a refund being rejected in either case.

[64] The second witness was Ms. Beulah Garises. She testified in relation to both claims that were rejected. It was her evidence-in-chief that she could tell an original invoice from a copy and that the defendant's claim had staples to show that the original had not been filed. It was her evidence that the originals were not filed after the rejection of the copies by the claimant. It was her further evidence that if the claims were not in compliance with policy, they were liable for rejection and this approach was inflexible regardless of the reason advanced and accordingly admitted of no exceptions whatsoever.

[65] In cross-examination, Ms. Garises was asked as to what happens if an original is not filed and she testified that in that event, the claim is not rejected but they call the

supplier and obtain a copy of the original invoice from them. In the course of the cross-examination, the following exchange took place as the battle of wits between Mr. Coleman and the witness raged on as recorded in my handwritten notes:

> Q: What does the RFA try to prevent by accepting computer generated printouts and refusing photocopies.
> A: We try and avoid fraudulent claims and insist on originals.
> Q: There is no reason why if you receive an invoice from a claimant that appears to be the customer's original or a photocopy, not to confirm the veracity with the supplier?
> A: We are not responsible for following up wholesalers for confirmations. It is for the client to produce the original.
> Q: Do you accept that there could be a variety of reasons why the original invoice cannot be produced and a copy is available, being the best the claimant can provide?
> A: Yes.
> Q: How fair and reasonable is it that a claim for over N$ 700.000 stands rejected?
> A: . . . (Pause) . . . The plaintiff knows these are the rules. They should ensure that they follow them. It is fair.
> Q: Rules are rules and if you do not follow them it is fair not to get your N$700.000?
> A: Yes.
> Q: Is there any basis on which you suspect that any of the invoices do not depict the accurate information?
> A: . . . Pause . . . Yes. It becomes questionable when a copy is made when an original should be available. One can tamper with copies.
> Q: This is a general proposition?
> A: Yes. The rules apply to all claimants.
> Q: Do you suspect that the information was tampered with?
> A: With such documents, it is possible to generate and change the figures and then submit falsified figures.
> Q: Do you doubt that Engen is the wholesaler?

A: No. Their name appears.

Q: Do you doubt that the invoice is dated 2 June 2012?

A: No.

Q: Do you doubt that the number of the invoice is correct?

A: No.

Q: Do you doubt the amount of fuel is correct.

A: No.

Q: You have no reason to doubt the accuracy?

Q: Even if you had any doubts about the invoice, nothing prevented you from calling Engen to verify?

A: It is not my duty to call Engen to verify the correctness of the invoices.

Q: If a customer files a copy of customer original, would you reject the claim without finding out why the original was not filed?

A: Yes.

Q: You would not be interested in any reason the customer may advance for not filing the original?

A: On applying, we tell the customers to file original invoices within 3 months. If they do not, we are not obliged to call them to ask why.

Q: Customer originals - which are copies, are before the court – do you not think it is unfair to and unreasonable to reject a claim so huge on the basis of these reasons.

A: We have rejected claims bigger and lesser than the present claims for the very same reasons. It is not unfair.

Q: I put it to you, the RFA is obliged by the provisions of Art. 18 of the Constitution to be reasonable under all circumstances? The attitude you display is manifestly unreasonable?

A: It is not.

Q: You know we operate under a Constitution?

A: Yes.

Q: The defendant is subject to the Constitution?

A: Yes.

[66] I now turn to deal with question relating to claim 2 which was rejected for lateness. In this regard, the following exchange took place between the two:

> Q: The other invoice 4000478744 dated 5 December 2012 you rejected?
> A: Yes.
> Q: You rejected it because it was filed on 19 February 2013?
> A: Yes.
> Q: There is a time span between the date of the invoice and the date of its submission, i.e. it was late by 14 days from the 3 month period prescribed.
> Q: This claim you recommended be rejected even before you knew the reason why it was rejected?
> A: Yes. The system is such that if a document is late, it will be automatically rejected.
> Q: RFA's computer system is such that when a claim is late, it is electronically rejected?
> A: Yes.
> Q: It is not for you or the manager to reject the claim, it is rejected automatically?
> A: Yes.
> Q: It is not for you as an assessor, your manager, the CEO or the Board to consider the reasons for the late submission of the claim?
> A: No.
> Q: Do you know where the 3 month cut=off period came from?
> A: No.
> Q: I put it to you, the 3 month period is fundamentally unfair and unreasonable?
> A: It is not.
> Q: The plaintiff's business is 800 kms from Windhoek, on the Orange River?
> A: I do not know the exact distance.
> Q: Is it not fair to uncompromisingly reject a claim in respect of such a company if it's a day late?
> A: No it is not.

[67] This was the material extent of the said witness' evidence that has a bearing on the provisions of Art. 18. I may have quoted quite generously from the exchange

between the cross-examiner and the witness that usual. It will however, be clear, from what I will say below as to why it was necessary in the peculiar circumstances of this case to quote extensively from the notes as I have.

[68] Another witness called by the defendant was Mr. Alexander Botha. He testified that he was the employed as the defendant's Manager, Special Projects and had been in the defendant's employ for a period of 15 years. He also acted at some point as the defendant's CEO. He testified about the meetings with Mr. Willemse who was asked by the defendant to negotiate, if possible, an amicable settlement of the issue with the defendant. I will, however, deal with his evidence in so far as it is relevant to the issue under consideration presently. In particular, he confirmed that the plaintiff's claims were rejected for not complying with the relevant regulations and that in the circumstances, the defendant could not come to the plaintiff's aid and contravene the relevant regulations.

[69] In the course of his evidence in chief, Mr. Botha testified that because of the defendant's consistency in dealing with the claims in similar situations, he could not say that they were in any way unfair. He reasoned that the rationale for the submission of original invoices and time limits for filing, was to ensure that invoices are not falsified. It was his evidence that if the technocrats in the defendant's employ had rejected a claim, even the RFA Board could not undo that decision, whether it was rejected for lateness or for failure to file an original invoice and the claimant, for that reason, had no remedy or relief.

[70] In cross-examination, Mr. Coleman asked the following questions from Mr. Botha and the answers thereto are likewise recorded below:

Q: The consideration of the amount lost by the plaintiff was not considered?

A: Yes.

Q: Do you agree that the fuel levy is designed to be a road user charge?

A: Yes.

Q: It is not to charge vehicles in mines and farms?

A: Yes. It is for off-road use.

Q: If a company like the plaintiff pays a levy in respect of mining activities, it owes no levy to the defendant. It does not owe the RFA but a management system?
A: I cannot answer that. It is a refund.

[71] It is plain, from the excerpts quoted above what the approach of the defendant's employees to the issue of refunds is. In respect of invoices which they are of the view are not original, they testified that it is not their duty to verify with the fuel supplier whether indeed the invoices presented are genuine. Furthermore, they find nothing inherently unfair in not ascertaining from the wholesaler, particularly in view of the sometimes huge amounts of the refunds. That the claimants are not given a hearing before such a drastic step of denying them their refund is fair as the claimants signed up for that. They were of the view that they were not obliged to give a hearing and act in a manner fair to the claimants before deciding to reject a claim.

[72] It was also stated that even if the defendant's staff had no reason to suspect any of the claims for fraud, especially when all the documents appeared in order, they were still obliged to reject the claim for the fact that there is no original invoice and that they have no obligation to follow up on the wholesaler to verify the authenticity of the invoice as it is not their duty to do so but for the customer to produce the original invoice. This, in my view, is the high-water mark of unreasonableness.

[73] I should point out that the attitude of the defendant's staff, in this regard, is not only unreasonable and unfair, as I have found and held above, more importantly, it appears to run counter to the provisions of s. 8 of the Imposition of Levy on Petrol and Diesel Road Fund Administration Act (Government Notice)[18], in cases where the original invoices have not been filed or attached. The said provision reads as follows:

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

[18] No. 183 of 2001

This appears to me to afford the defendant leeway in establishing the authenticity of invoices where a need arises, including those situations where an original invoice has not been filed and reasons advances for that position have been proffered.

[74] I am also of the considered view that this provision has a twin effect in addition to what I have said immediately above. First, it creates an obligation on the RFA, in appropriate circumstances, to make enquiries from claimants and fuel suppliers in relation to matters that may assist it in assessing the claims lodged with it. Secondly, it serves to create a legitimate expectation on the part of a claimant that if there are queries regarding the claim submitted, that claimant will be given a hearing before a decision rejecting the claim can be made, including those cases where a claim is, in the eyes of the RFA, not accompanied by an original invoice.

[75] I must also point out pertinently that according to Ms. Hester Swart she submitted the first claim on 15 July 2012 and when she left the plaintiff's employ, no indication had been given by the defendant regarding the status of the claim. It was only when Ms. Steenkamp took over and realized that the claim had not been honoured after a long time that she was, for the first time informed by Ms. Garises that original invoices had not been submitted with the claim and hence it had been rejected therefor. This notification of the rejection was given in March 2013 and had devastating consequences for the plaintiff because at this time when it attempted to file original copies, it was informed that the claim was now hit by the 3 month rule and could not be accepted therefor.

[76] This is eminently unfair and unreasonable. The long time it took the defendant to notify the plaintiff that its claim had been rejected is gross and allowed it to rest on its laurels entitled to believe that its claim would be honoured as no indication to the contrary had been given up to that time. When it did enquire, it was then told that the claim had been rejected and it could not, at that point attempt to rectify the cause of the complaint because the claim was now outside the 3 month period.

[77] It is important in this regard for the defendant to notify claimants of the rejection and the reasons therefor in good time to enable them to attend to rectify the problems

identified as the reasons for the rejection. To sit and ruminate over a claim for such a long period of time is in my judgment not only unfair but also unreasonable and remiss, particularly when the claimant cannot, because of the defendant's delay, not remedy the fault identified as the reason for the rejection. This brings the defendant's actions within the realms of the provisions of Art. 18.

[78] In respect of claims rejected for late submission of the claim, a similar approach is adopted by the defendant's employees. The computer decides the dates and no amount of explanation can persuade them to accept late payments regardless of the reasons or even length of the delay, which may in some instances be negligible. They seemed to view their consistency in applying the strict approach as mounting to fairness, whereas these issues are not necessarily the same. It was also not important to them how far the claimant's premises or place of business was from the defendant's offices in Windhoek, as the computer religiously recorded the time for filing, admitting of no exceptional or other compelling circumstance.

[79] In the circumstances, I am of the considered view that the actions of the defendants in dealing with the rejection of the claims was eminently unfair and also unreasonable within the meaning of Art 18. The inflexible and unyielding approach to the claims and the failure to give a hearing to the claimants before rejection is in my view unfair and unreasonable and not consonant with the principles of natural justice. It is in evidence that the delay in filing the second claim on time was as a result, not of the claimant's delay, but due to the wholesaler's system problems and still that was not investigated and correctly viewed as a circumstance worth considering in order to relax the stringent conditions.

[80] I am of the considered view that the plaintiff has made out a case for the invocation of the provisions Art. 18 in the instant case. As will become apparent below, the rejections should be viewed in the light of two contextual factors. First, that the money in question does not belong to the defendant but is in fact a refund to the claimant from the defendant. Secondly, that the defendant is the sole and direct

beneficiary in respect of claims that have been rejected. The latter was established in evidence.

[81] I should also mention *en passant* that from the documents discovered to the court by the defendant in relation to the rejection of claims, it would appear that between 25 July 2012 and 1 January 2013, a total of 540 claims were rejected by the defendant, supremely for violation of the two cardinal requirements discussed above. There were only a few claims, numbering less than 10 that were rejected for other reasons. The information does not, however, disclose the total amount of the claims rejected by the defendant. From the amounts claimed by the defendant, including both those that were honoured and those that were rejected, it is not idle to surmise that the figures are staggering indeed, running into many millions of dollars. This high number of rejections within such a relatively short period of time must be a matter of some concern to the court regard being had to how the defendant handled the claims in issue in this judgment.

The defendant's position – legal submissions

Non-citing of Ministers

[82] The defendant, in its heads of argument, raised a few legal issues and with which I intend to deal presently. First, it contended that it is not in a position to change the policy with which the plaintiff is unhappy. It contends further that the change of the policy does not lie with the defendant but with the Ministers of Finance, Works and Transport and Mines and Energy. It is further contended that the said Ministers have not been cited and therefore have effectively been denied a hearing or an opportunity to participate and assist the court in addressing this conundrum.

[83] In *Von Weidts v Minister of Lands and Resettlement,*[19] this court cited with approval the case of *Kavendjaa v Kaunozondunge* ***NO*** *and Others,* where Damaseb JP highlighted the importance of citing the Government and the Attorney-General in

[19] (I 1852/2007) [2016] NAHCMD 92 (4 April 2016).

matters where legislation is sought to be impugned on the basis that it is unconstitutional. In point of fact, the court held that the failure to cite these important offices is fatal to the proceedings as the said offices carry the political responsibility for the continued existence of the law in question but cannot enter the fray to assist the court.

[84] I am of the view that this argument is totally misplaced and finds no application in the present proceedings. I say so for the reason that if one carefully considers the plaintiff's claim, the basis for same and the order sought, it will immediately dawn that the plaintiff's case is not for the declaration of any legislation or even policy unconstitutional. The plaintiff's case, properly construed, is that there is a policy in place which is grounded on enabling legislation and the plaintiff complains about the implementation of same, namely that the defendant fails to act reasonably and fairly.

[85] The end result of the plaintiff's complaint and the endgame the plaintiff wants to see is not the court setting aside the relevant provisions for want of constitutionality. What it seeks to be done, is for the defendant to infuse an element of reasonableness, rationality and fairness in the application of the policy, especially by ensuring that before claimants' claims are rejected in terms of the policy, the right to be heard and to make representations is given and in an efficacious manner. In other words, the plaintiff does not seek that the policy and the relevant legislation should be set aside but that before a claim for a refund is rejected, that party has been given notice, and afforded ample opportunity, to make representations which are meaningful and are reasonably conducted in a fair and evenhanded manner.

[86] In its heads of argument, the defendant stated the following at para 34:

'Defendant was placed under an obligation to implement the policy and not to unilaterally alter the policy as was requested by (*sic*) Plaintiff. Before the plaintiff can succeed in its challenge to the policy, it is under a legal obligation to cite the respective ministers as they have a direct interest in this matter'.

As is evident from what I have set out above, it is clear that the defendant has misconstrued the plaintiff's claim. As stated, the plaintiff does not challenge the constitutionality of the policy and the underlying law. Rather, the attack is aimed not at the law and the policy, but in the manner in which the policy is implemented by the defendant, namely, that the parties are not given their common law rights and other rights consistent with the constitutional imperatives of reasonableness and fairness enshrined in Art. 18.

[87] The defendant, in argument, referred the court to the South African Constitutional Court judgment in *South African Reserve Bank and Another v Shuttleworth and Another.*[20] It appears to me that the judgment is not helpful to the defendant's case for the reason that the case was raised on the constitutionality of charges imposed by the Reserve Bank. Shuttleworth was arguing that the Reserve Bank 'was entitled to depart from the condition set by the minister, and its failure to do so rendered the decision inflexible and invalid'.[21] The dynamics of this case are radically different as I have endeavoured to show above.

[88] What the defendant is asked to do, is not to depart from the policy but to infuse the constitutional imperatives in Art. 18 before a decision to reject a claim is made. This has nothing to do with the Ministers' powers in this case, but it is to do exclusively with the implementing agency, the defendant, complying with these important constitutional imperatives for which they need no nod or cue from the Ministers, who are themselves also bound by the Constitution which supersedes every person and entity in this Republic.

[89] It must also be poignantly observed and repeated that it is assumed that Parliament presumed the application of the *audi alteram partem* principle in every legislative enactment unless provided otherwise and in clear and unambiguous

[20] [2015] ZACC 17.
[21] *Ibid* at para 20

language. In *Westair Aviation (Pty) Ltd v Namibia Airports Company,* [22]Hannah J. stated the following in this regard:

> 'One begins with the presumption that the kind of statute referred to impliedly enacts that the *audi alteram partem* is to be observed, and because there is a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication.'

[90] It thus becomes clear that the ball is squarely in the defendant's court to show that the application of the *audi* rule was excluded by Parliament, not in veiled but explicit terms. Figuratively speaking, the defendant should not want to engage in a doubles' tennis game with the collective of Ministers joining the defendant in court on the opposing end, when this is essentially a singles' game, pitting the plaintiff against the defendant.

[91] I am of the considered view that the Ministers have the responsibility to lay the legal framework for the operation of the policy but when it comes to its implementation, the defendant should ensure that the said policy is applied in a manner that is consistent with the constitutional ethos contained in Art. 18. The Ministers have simply no role to play in the implementation, they assuming, I must add, that the defendant will implement the law and policy in line with the constitutional imperatives as there is nothing to indicate that the provisions of Art. 18 are in any way excluded, which would be something of an anathema in any event. The Ministers accordingly have no role to play in this debacle in my respectful view. Their role and responsibility is not in any way questioned but the defendant's implementation of their policy.

Administrative law review

[92] Another arrow up the defendant's string relates to the remedy sought. The defendant argues that the relief sought by the plaintiff in the instant case is not

[22] 2001 NR 256 at 265 D.

appropriate as there is no evidence or circumstance that serves to justify the review of the defendant's decision to reject the aforesaid claims. In this regard, the defendant claims that its power to reject or approve any claim is a matter of policy and legislative responsibility.

[93] In support of its contentions, the defendant relied on *Bevan Wina v The Minister of Works Transport and Another.*[23] I am, however, not certain that the decision quoted actually supports the defendant's case, particularly considering the finding above that the defendant has totally misunderstood the plaintiff's claim.

[94] The defendant quoted the following excerpt from the said judgment at para 44 of its heads of argument:

> 'Article 18 does not say that the requirements therein apply to administrative law and administrative officials only when they "act" in the exercise of any particular power or perform any particular functions, i.e. "executive" or "purely administrative", "rule-making" (e.g. the making of bye-laws), and "quasi-judicial". All that Article 18 is saying is that: when administrative bodies and administrative officials "act" (i.e. take decisions and actions) they must do so fairly and reasonably and comply with the requirements imposed upon them by the common law and any relevant legislation, so long as such actions and decisions affect the rights, interest and legitimate expectations of persons.'

[95] With respect, this quotation would appear to fully support the plaintiff's case rather than that of the defendant. All that is stated by the learned Judge in that case is fully applicable and present in the instant case, thus leading to the conclusion that the case constitutes a sword into the defendant's heart rather than a shield. The defendant may well have plunged a poisonous dagger into its very heart in this regard.

[96] The defendants also argued that there is no material before court that would suggest, short of the court acting *mero motu,* that there is any reason for invoking the administrative law review powers. I do not agree with the defendant in this regard for the reason that it is clear from what has been stated that in the instant case, the defendant took two decisions which affect the rights and interests of the plaintiff to reject their

[23] Case No. SA 2/2007.

claims. It has been shown that these decisions were unreasonable and unfair within the meaning of Art. 18. There can be no better place to invoke these powers in my view. The contention that this court has no discretion to order the payment of the money even if it is found that the rejection was unconstitutional, unlawful and unjustified in the circumstances, is not supported by any authority. In my view, the opposite would appear to true.

[97] I should point out that the court has not acted or purported to act *suo motu a*s suggested by the defendant's counsel in his heads of argument. The court has dealt with the matters and issues as raised in the pleadings, as amended, and in the light of the evidence adduced by both sets of protagonists. The insinuation that the court has chosen to deal with the matter *mero motu* is accordingly misplaced and is hereby rejected.

[98] The defendant also sought to argue that court should decline to use its processes to reject the plaintiff's claim for reasons of practicality and taking also into account the interests of the parties. In this regard, reference was made to the case of *Centeni Investment CC v Namibian Ports Authority and Another*.[24] I am of the view that the case at hand is a totally different kettle of fish. I say so because there is, in my view a very important issue to consider in this case at it is this – the money, which is the subject of the proceedings is actually a refund due to the claimant, the plaintiff. The word 'refund' in my view, is very critical and must not be regarded as idle or inconsequential.

[99] According to the Longman's Dictionary, refund means 'A repayment or a sum of money refunded'. 'To give back or to restore, to make return or restitution, to reimburse a person'.[25] The Black's Law Dictionary, on the other hand defines a refund as, '1. The return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or who the employer withheld too much tax from earnings . . . 2. The money returned to a person who overpaid.'

[24] (A274/2011) [2013] NAHCMD 235 (5 August 2013).
[25] Oxford English Dictionary Vol II.

[100] It is clear, from the foregoing definitions that for one to refund means the item being refunded actually belongs to the one being refunded and was in the hands of the one returning same for reasons that show, after a proper or careful analysis, that the money be given back to the one who made the payment or on whose behalf the payment was made.

[101] This, in my view, is a very important and central issue to the question of fairness in this case. If this is a refund, as the Act says it is, then it means the money being refunded in this case actually belongs to the plaintiff and is only by means of logistical conveniences and arrangements that it is in the defendant's hands in the first place. If all things were equal, it seems to me, this money would have been channeled directly into the claimants' coffers from fuel suppliers without having to go via the defendant's bank account.

[102] For that reason, I find it very hard to accept that the refund in this matter is forfeited to the defendant when it actually belongs to the claimant without any hearing at all and in the absence of procedures and an approach to the rejection that is in all the circumstances fair and reasonable. For instance, if the reason for a possible forfeiture of the money is because of delay in lodging the claim, why should a notice not be issued to all the possible claimants to advise them that the time to claim their money is past due and give them an opportunity, to file the claims within an additional period that may be worked out, failing which the forfeiture may then take place.

[103] Furthermore, some hearing, to investigate the reason for the delay must be carried out. In the instant case, for instance, it is clear that it was alleged, and this could not be gainsaid, and should therefore stand and be held for a fact, that the delay in lodging the claim for a refund was due to system problems with the fuel supplier. For this delay and over which the plaintiff had no control, it would seem, the claimants forfeit large sums of money. What also appears to be unfair is that the rejection appears not to have any regard for the length of the delay, not to mention the reason therefor. Whether the delay is for one day or seven months, appears to make no difference. This, to my sense of justice, is shocking and unacceptable.

[104] Regarding the other reason for the rejection, it was stated in evidence, and quite understandably so that the *raison d' etre* for the requirement for original invoices is to avoid fraud. This is perfectly understandable and a noble consideration. I am of the view that there is nothing that should prevent the defendant, when original invoices have not been produced, to make their own independent enquiries, with evidence produced by the fuel supplier, that the claim in question is genuine. This could be at the pain of imposing some penalty. For a claimant to forgo a whole refund, and which in this case goes to several millions of Dollars, is in my view unconscionable.

[105] The policy must be interpreted and applied by the RFA in a manner that conduces to the claimants receiving the refund due to them than in a manner that seeks to deprive them of what is essentially theirs, to the benefit of the RFA and in a manner that appears to be unjust and unfair, and which importantly leaves a bitter aftertaste in one's judicial palate.

[106] As indicated above, it was shown in evidence that the plaintiff's claims were not just isolated claims. Many other claimants fell foul of the defendant's requirements at the pain of losing millions of Dollars. In point of fact, there was a number claims that were rejected in the document handed to court and this money, it must again be stated, was refund, meaning that the defendant does not ordinarily have title to it. The amount of the claims rejected would appear to be horrendous given the instant claims and one can only hope that the forfeiture of the money does not serve as an incentive to the defendant to rashly enforce the provisions, considering that the defendant is a direct beneficiary when there has been a rejection of a claim for a refund.

[107] In the premises, I am of the view that there is nothing wrong or untoward with the court setting aside the decisions of the defendant in this case as it has been shown that the procedures followed are eminently unfair and unreasonable and there appears to be no willingness or readiness to apply the constitutional imperatives by the defendant as they consider themselves bound by and married to the policy, for better or worse. There is no basis, in my view, to allow such decisions, taken as they are in contravention of the provisions of Art, 18, as I have found, to stand.

[108] I must also mention that I find the conciliatory approach taken by the plaintiff as condign and one to be encouraged. I found it very sensible and reasonable i.e. to place a penalty for late claims, after dealing with the period of lateness and the reasons therefor. To bluntly put a cut off, regardless of circumstance does not settle at all in the house of justice, reasonableness and fairness. A penalty could also be placed for non-filing of original documents, after a confirmation from the fuel supplier of the genuineness of the claims. These steps, would not, in my view, be unduly cumbersome for the defendant as they would benefit from financially from the penalties levied. For the defendant, however, to claim the entire amount, to which it is not otherwise entitled, is in my view unconscionable and must not be allowed to stand.

[109] I must mention, without being prescriptive, that one thing that cannot be gainsaid, is that the defendant is a direct beneficiary in cases where claims have been rejected for whatever reason. Those refunds then tend to devolve on the defendant. This then raises a legitimate question whether the defendant would be regarded as a fair and impartial arbiter in those matters where a possible rejection has been notified and where some representations for the allowing of an otherwise rejected claim can be made. It would, in the circumstances, appear to me that the fairest approach would be for an independent and impartial body to be set up to deal with appeals against the decisions of the defendant in respect of rejected refund claims. To leave the matter within the realms of the Fund, when it has a clear pecuniary interest in confirming rejections, leaves a bad aftertaste in this court's judicial palate.

<u>The proper remedy</u>

[110] In *Steenkamp **NO** v Provincial Tender Board, Eastern Cape,*[26] Moseneke J made the following remarks regarding the orders to be issued in cases of constitutional violations:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must be fair to those affected by it and yet vindicate effectively, the right

[26] 2007 (3) SA 121 (CC) para 29-30

violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the common law.'

[111] The learned Judge then made the following cautionary statement at para …:

'It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately, the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

[112] In *Fose v Minister of Safety and Security,*[27] it was stated that appropriate relief under the Constitution must effectively vindicate the right infringed and the courts must be willing to fashion new tools to achieve this noble aim.

[113] It is clear from the evidence adduced by the defendant's witnesses that they exercised no discretion whatsoever in all these matters. The cold reality, which sums up their position, is that it is actually the computer that makes the decision of rejection in cases where the claims were filed late. They operated like automated machines, exercising no discretion whatsoever, as they felt, rightly or wrongly, that their hands were tied and they were in duty bound to reject a claim where it is filed after the period stated in the policy.

[114] The reasons for the lateness, it would seem, do not matter or fall into the equation, even as here, where there were system problems from the fuel supplier not attributable to the plaintiff. These were regarded as irrelevant because the computer (which you cannot speak to or negotiate with) had taken the unalterable and unappealable decision to reject the claim. In this regard, the right to be heard was not applied and this in my view, is unfair and unreasonable.

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[27] 1997 (3) SA 786 (CC) at para 69.

[115] The last issue to determine is what the proper order should be in the circumstances of this case. Generally speaking, once the court has found, as it has, that a party in the position of the defendant has violated a constitutional requirement. I must mention that on consideration of this case, the finding of the court has been that there were violations of Art. 18 in that the procedures followed were not only unreasonable but they were also unfair. Part of the finding was that the impugned decisions to reject the plaintiff's claim were not preceded by a hearing, let alone a fair one.

[116] Ordinarily, if the case under consideration was one where only the *audi* principle was not followed, it may have been the proper decision to remit the matter back to the defendant with an order that it should grant the plaintiff a hearing as required by common law. Even then, I must say there may have been difficulties in view of the fact that the RFA appears to have an interest in the matter of the rejection of the claims and one may be tempted to say that a party in the position of the plaintiff may, for that reason, not be granted a fair hearing on account of the adjudicator being a interested party.

[117] In this case, that is not all. The main consideration is that the procedures followed, even apart from the violation of the *audi* principle are inherently unreasonable and unfair. I am of the view that a remittal of the matter to the defendant would not be the correct panacea in the present circumstances. The evidence suggest inexorably that in respect of both claims the plaintiff was not treated fairly and reasonably so that it is necessary, in my view to award the plaintiff the relief they seek for the violation of their constitutional right enshrined in Art. 18.

[118] In the premises it would appear to me that there was no basis from the evidence, for the defendant to reject the plaintiff's claim save the policy, which I have found was unreasonably and unfairly applied in any event. The effects of the violation of the provisions of Art. 18 are in my view manifest and I cannot, in the circumstances find any plausible reason why the plaintiff should not be adjudged entitled to be paid the money in respect of both claims. I will, in respect of the first claim stipulate conditions to be met before the payment can be made.

[119] In view of the matters that arise from this judgment, I order that a copy should be given to the Law Reform Commission of Namibia and the Honourable Attorney-General, to enable them to study the judgment and to initiate what they may consider, either individually or collectively, to be necessary and suitable amendments geared to bring the relevant legislation and policy in line with the provisions of Art. 18 of the Constitution, as articulated above.

[120] In the premises, I issue the following order in favour of the Plaintiff:

1. The application for the amendment of the plaintiff's particulars of claim is granted.

2. In respect of claim 1, payment of the amount of N$ 743 054 at the rate of 20% per annum, calculated from 26 July 2012.

3. Payment in 2 above shall be made subject to a confirmation by Engen Namibia of the authenticity of the invoices filed in support of claim 66740 (01007224) by the plaintiff and which confirmation shall be filed with the Registrar of this Court in writing within fourteen (14) days of the date of this judgment.

4. Payment of the amount of N$ 322 599 plus interest at the rate of 20% per annum calculated from 20 February 2013.
5. Cost of the suit.

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TS Masuku

Judge

APPEARANCES

PLAINTIFF:	G Coleman Instructed by Du Plessis Roux De Wet & Partners
DEFENDANT:	F. M. Kwala Instructed by Kwala & Company Inc.