REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 172/2012

In the matter between:

JACK'S TRADING CC	**APPLICANT**
and	
THE HONOURABLE MINISTER OF FINANCE	**1ST RESPONDENT**
THE COMMISSIONER	
HEAD OF THE OFFICE OF THE	
COMMISSIONER FOR CUSTOMS & EXCISE	**2ND RESPONDENT**

Coram: Smuts, J
Heard: 15 August 2012
Delivered: 31 August 2012

JUDGMENT

SMUTS, J

[1] The issue in this application, brought as one of urgency, is the validity of the imposition of an additional duty upon Portland cement promulgated by the Minister of Finance in a notice dated 27 July 2012.

[2] The applicant is an importer of cement. It has been doing so since its establishment in 2009, although its principal had started importing cement in the previous year through a different entity before the applicant's incorporation in 2009. In the founding affidavit, it is stated on behalf of the applicant that this has brought the price of cement down considerably within Namibia. It is also stated that the applicant had in December 2011 entered into a 4 year supply agreement with the second largest international supplier of cement. It also had other commitments as an importer of cement. These included a lease agreement in respect of storage facilities until it has erected its own warehouse on premises recently purchased in Walvis Bay for that purpose. The applicant also incurred expenditure to verify the quality of cement it imported. This was done by the South African Bureau of Standards.

[3] The Minister promulgated a notice under section 65 of the Customs and Excise Act, 20 of 1998 ("the Act") on 27 July 2012. In the notice, an additional duty is to be levied on the importation of Portland cement. The applicant contends that the notice is of no legal force or effect by reason of non-compliance with the provisions of s 65 of the Act.

[4] The notice provides under the heading of "Notification of Taxation Proposal: Additional Duty: Customs and Excise Act, 1998 (Act 20 of 1998)":

> "In terms of section 13 of the Interpretation of Laws Proclamation, 1920 (Proclamation No 37 of 1920), I give notice that, under section 65(1) of the Customs and Excise Act, 1998 (Act 20 of 1998), I have, on 18 April 2012, tabled a taxation proposal in the National Assembly for additional duty to be levied on importation of Portland cement specified in the table with effect from today, 27th July 2012."

The table then proceeds to list the additional rate of duty over the next 5 years. The notice is signed by the Minister and dated 27 July 2012.

[5] The applicant contends that the procedure contemplated by section 65(8) was not complied with and that failure to have done so invalidates the notice.

This section, together with s 66, is contained in Chapter VII of the Act. The Chapter heading is "Amendment of Duties". That Chapter contains only s 65 and 2 66. The latter section provides for the variation of contract prices where amendments to duties have an impact upon contractual prices. It is not relevant for present purposes. Although subsections (1) and (8) of s 65 are material to this application, it is appropriate to set out other subsections as well for the sake of completeness and for the purpose of the interpretation of this section in viewing the Minister's power to amend and the procedure set out in s 65(8) in the context of the section read as a whole. Subsection (7) (which provides for definitions) is not included as it does not raise matters relevant for present purposes. The rest of s 65 provides:

> "65 Time when new or increased duties become payable
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> (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.
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> (2) When the Minister, under subsection (1), tables a taxation proposal relating to imported or excisable goods, any goods which the Minister may specify in such proposal for the purposes of this subsection shall, though entered for home consumption prior to the 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 been delivered from the stock of an importer, manufacturer or such class of dealer as the Minister may in such proposal specify.

(3) For the purposes of this section any goods which are specified by the Minister in any taxation proposal for the purposes of subsection (2) and which, at the time of the tabling of such proposal are in transit to an importer, manufacturer or a class of dealer so specified by the Minister, shall be deemed to form part of the stock of such importer, manufacturer or dealer, as the case may be, notwithstanding any terms to the contrary of any contract relating to the sale or delivery of such goods.

(4) When the Minister has specified any goods in any taxation proposal for the purposes of subsection (2), every importer or manufacturer or dealer specified in such proposal shall, in respect of any goods so specified-

(a) forthwith take stock of all such goods in his or her stock at the time when the proposal was tabled, and make a clear, accurate and separate record of such imported and excisable goods;

(b) within seven days from the date on which the proposal was tabled under subsection (1), deliver to the Controller a sworn statement containing a description, including the quantities, of such imported and excisable goods separately, which were in his or her stock at such time, and any other information which the Commissioner may require of such importer; and

(c) upon or before the last working day of the month following the month in which the proposal was tabled, pay to the Controller the amount of duty payable by him, or her under subsection (2) in respect of the goods concerned.

(5) If the Minister, in any taxation proposal for the purposes of subsection (2), states that any goods specified in such proposal shall be liable to the duties so specified, if they have not been delivered from the stock of a wholesale dealer at the time of such

proposal, then subsection (4) shall apply to the stock of such wholesale dealer and of any retail dealer conducting his or her business on the same premises as, such wholesale dealer.

(6) The Commissioner may, notwithstanding subsection (5), upon production by a wholesale dealer referred to in that subsection of such proof as the Commissioner may require, exclude, for the purposes of subsection (2), from the stock or the liability for payment of duty of such wholesale dealer-

(a) stock of a class or kind which are sold by such retail dealer only; and

(b) such proportion of the total duty payable by such wholesale dealer as is represented by the proportion of retail sales to total sales of the goods concerned during the period of three months immediately

preceding the date of such proposal, such proportion to be calculated on the basis of quantities of each commodity concerned.

(7) ...

(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.

(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.

(10) 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."

[6] The applicant takes issue with the notice by pointing out that the Minister had indicated in the notice that she had on 18 April 2012 tabled a taxation proposal in the National Assembly for the additional duty on cement. The applicant however contends that s 65(8) contemplates that the notice in the Gazette is intended to inform the public and affected parties of the Minister's intention and must precede the tabling by the Minister of her proposal in the National Assembly. It is common cause that this had not occurred and that the notice was only promulgated on 27 July 2012 whereas the tabling of the proposal had already taken place on 18 April 2012. The applicant contended that the Minister had thus not followed the procedure set out in s 65(8) and is required to comply with this provision for the validity of the imposition of any additional duty on the importation of cement.

[7] The applicant accordingly approached this Court as a matter of urgency for a declaratory order to the effect that the notice was of no force and effect. In the alternative to the declaratory relief sought and only in the event of this Court finding that the notice was lawful, the applicant sought to interdict the imposition of the duty on an urgent basis pending the outcome of a review of the decision to impose the additional duty. In this application, costs were only sought against the Minister and the Commissioner for Customs and Excise (cited as the first and second respondents respectively) in the event of opposition.

[8] In support of the alternative relief, the applicant accepted that the Government of Namibia sought to protect a recently set up cement factory, Ohorongo Cement (Pty) Ltd and that the Government may as a temporary measure levy additional duties on goods imported into Namibia to enable an infant industry to meet competition. But, so the applicant contended, the additional duty of 60% was in the circumstances excessive and unreasonable. The applicant also contended that it should have been afforded a hearing prior to the decision to impose the additional duty of 60% for the period 2012 to 2014 on imported cement. The applicant further referred to representations made to the Government on the issue and contended that there would be reasonable prospects of success in the review application on the grounds of failing to accord the applicant a hearing, the failure to apply the mind and that the quantum of the duty was inequitable or unreasonable in the circumstances.

[9] The applicant submitted that the application was urgent by reason of the fact that the notice by the Minister, in exercising a public power without complying with the peremptory provisions of s 65(8), would amount to a continuing illegality or wrong and entitled the applicant as an affected party to immediate relief. It submitted that if the levy of 60% is unlawful, then the issue should be dealt with sooner rather than later. The applicant also pointed out that the additional duty would have a devastating effect upon its financial cash flow and that the balance of convenience and the prejudice to it would favour the application being heard as one of urgency. The applicant also submitted that it had met the requirements for the interim interdict. As to the requirement of the balance of convenience, it submitted that the additional 60% duty would require

it to sell a bag of cement at a highly uncompetitive price which would result in a "massive and unbearable loss" to it and that its business would inevitably collapse.

[10] The application was launched on 6 August 2012 and set down for 15 August 2012. The second respondent filed an answering affidavit on his own behalf and on behalf of the Minister. In it, the respondents take issue with the applicant's interpretation of s 65. They submit that on a proper reading of the section, the Minister may at any time table a taxation proposal before the National Assembly imposing a new tax. They further contend that, when the Minister imposes a new duty under s 65(8), she is required to give notice in the Gazette and that the notice shall, notwithstanding compliance of s 65(1), be tabled in the National Assembly within 21 days of promulgation and remain on the table of the National Assembly for a consecutive period of 28 days. The respondents contend that s 65(10) confirms this approach. The respondents thus contend that s 65(8) contemplates a situation where a notice is given after the proposal has been tabled so that a proposal can precede a copy of a notice of the proposal, as had occurred in this matter.

[11] As to the alternative relief, the respondents deny that applicant had met the requisites for interim relief and that the order sought was final in effect. The respondents however acknowledged that the purpose of the additional duty was to enable Namibian based cement factories to meet competition from imported products and stated that it was fair and reasonable for the Minister to do so, given the fact that this was also pursuant to the provisions of the Southern African Customs Union Agreement. The respondents further pointed out that there had been consultation prior to the imposition of the duty which had included the Deputy Minister of Finance receiving a delegation from the applicant on 9 July 2012. The respondents accordingly denied that the applicant had been denied a hearing and also denied the other review grounds raised.

[12] The respondents also took the point that the application had not been properly brought as one of urgency. The point is taken that the respondent had

already on 25 April 2012 become aware of new duties to be imposed upon cement. The respondents contend that the commercial urgency alleged by the applicant was thus self-created.

[13] When the matter was called, a large thrust of the respondents' argument advanced by Mr Chibwana on their behalf centred on the question of urgency although argument was also directed on the merits of the application. I shall first refer to the issue of urgency and then the issue as whether the provisions of s 65 had been complied with or not.

Urgency

[14] Mr Cassim SC who, together with Mr G Hinda, represented the applicants, contended that the application is properly brought as one of urgency. He submitted that the question raised issues of illegality and that the impact of an illegality had a massive commercial impact upon the applicant. He referred to Sheehama v Inspector-General, Namibian Police [1] in support of his contention and that urgency would also relate to commercial interest. He submitted that the respondents had sufficient time to oppose the application on the very confined question of law raised by it and that the respondents have not been prejudiced at all by reason of the time frame of the application. He also referred to a letter of the applicant's legal practitioner of 12 July 2012 which had preceded the bringing of the application. In that letter, the applicant's legal practitioner had approached the Ministry for a copy of the intended notice but the Ministry had refused to provide a copy of the proposal. It had only become that it would be Gazetted on 27 July 2012. The applicant then took advice concerning its contents and decided to challenge it. Mr Cassim submitted that it would have been reckless for the applicant to have challenged the Minister until the text of the notice had been provided to it and that this had only occurred on 27 July 2012.

[15] Mr Chibwana however argued that there had been an inordinate delay on the part of the applicant in bringing the application. He submitted that the

[1] 2006 (1) NR 106 (HC) at 108

applicant had been aware since late April 2012 that the Minister intended to impose additional duty upon the importation of cement. In support of his contention he referred to the decision of the Full Bench of this Court in Mweb v Telecom [2]. He submitted that the applicant should have taken steps at a much earlier stage as it was aware that an additional duty would be imposed. He submitted that the failure to do so meant that the applicant had created its own urgency and that this was impermissible as this Court had found in Bergmann v Commercial Bank of Namibia and Another [3].

[16] Mr Chibwana also complained of the short service of the application to the respondents of the limited time available to provide answering papers. When he did so, I enquired as to whether the respondents had been prejudiced by the short notice in the sense that there were further issues which the respondents wished to raise in their answering papers but had not had sufficient opportunity to do so. He conceded that the factual issues were confined and that the principal relief sought by the applicant concerned the interpretation of s 65 and that the respondents did not seek to file any further material on that issue. This concession was in my view correctly made given the fact that the issue concerns the interpretation of the notice and of the section and that limited factual material could be provided on this issue. Nor was any further time sought to prepare argument on the merits of the application.

[17] As to Mr Chibwana's main argument on urgency - that there had been an inordinate delay as the applicant was already aware of the imposition of an additional duty in 25 April 2012, this argument would in my view appear to rest upon a false premise. The application challenges the legality of the terms of the actual notice promulgated on 25 July 2012. Only once the terms of that notice are known to the applicant would the obligation to take steps in bringing an urgent application arise. The applicant had after all sought a copy of the Minister's proposal in advance of the promulgation. This had been refused. Had that been supplied at the time, then the time within which to bring an

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[2] 2012 (1) NR 331 (HC)

[3] 2001 NR 48 (HC)

application would run from the time when the draft had been provided to the applicant. That had not occurred. The fact that the applicant was aware of an intention to impose additional duty would not necessarily mean that the applicant must then take steps. The applicant would be entitled to first consider the terms of the actual notice promulgated before seeking to attack its validity. It would follow that the main thrust of the argument directed at challenging the urgency of the application must fail.

[18] As to the question of prejudice, I have already referred to the concession made that the respondents would not be prejudiced by the matter being argued in the sense of not seeking to provide any further factual matter or argument on the issue by reason of the tight time limits of the application.

[19] It follows that the applicant was not in my view dilatory or delayed the bringing of the application and that the argument that the urgency was self-created must fail.

[20] It is well established that commercial urgency would also justify the use of urgent procedures. [4] This principle was recently referred by the Full Bench of this Court. [5]

[21] In the exercise of my discretion, I would grant condonation to the applicant for bringing this application as one of urgency under Rule 6(12).

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[4] Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others 2012 (1) NR 331 (HC); Sheehama v Inspector-General, Namibian Police 2006 (1) NR 106 (HC); Clear Channel Independent Advertising Namibia (Pty) Ltd v TransNamib Holdings Ltd 2006 (1) NR 121 (HC); Old Mutual Life Assurance Co Namibia Ltd v Old Mutual Namibia Staff Pension Fund 2006 (1) NR 211 (HC)

[5] Walmart Stores Inc v Chairperson, Namibian Competition Commission and Others, unreported, 28 April 2011. Although overruled on appeal in Namibian Competition Commission and Others v Waltmart Stores 2012 (1) NR 69 (SC), the decision to hear the matter as one of urgency and the reasons for doing so were not dealt with or upset on appeal – even though the approach adopted by the Supreme Court would, with respect, appear to have failed to take into account that the matter was found by the court *a quo* on the facts before it to have been urgent and needed to be determined urgently at the time.

Validity of Notice

[22] The applicant's main contention in support of the declaratory relief is that the Minister did not comply with the provisions of s 65(1) because s 65(8) requires that the notice must precede the Minister tabling a taxation proposal as is contemplated in s 65(1) of the Act. The terms of the notice state that the Minister had tabled a proposal in question on 18 April 2012. This, the applicant contends, does not comply with s 65 because the notice should have preceded the tabling.

[23] Mr Cassim further argued on behalf of the applicant that its approach was founded upon the principle of legality which requires the legislature and the executive to exercise no power and perform no function beyond those conferred upon them by law, relying upon the decisions of the South African Constitutional Court. [6] Mr Cassim further argued with reference to the well established principles in the interpretation of statutes that the promulgation of the notice must precede the tabling of the taxation proposal on the National Assembly. In this regard he referred to KPMG v Scurefin Ltd [7] and the very recent authority of Natal Joint Municipal Pension Fund v Endumeni Municipality . [8] He submitted that the intention of s 65 and its meaning were clear. The purpose of promulgation of the notice was, he submitted, to provide a notice to the general public of the intention of the Minister. The tabling of the notice in the National Assembly would then follow. The National Assembly would have the opportunity to pass a resolution relating to the notice within the period of 28 days referred to in s 65(8).

[24] The respondents on the other hand however contended in the answering affidavit that s 65(1) gave the Minister the wide power to table a taxation

[6] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); and the Supreme Court of Appeal recently in DA v President of RSA 2012 (1) SA 417 (SCA) at par [94]

[7] 2009 (4) SA 399 (SCA) at par [39]

[8] 2012 (4) SA 593 (SCA) at par [18] and [23]

proposal at any time before the National Assembly and that s 65(8) meant that whenever the Minister imposes such a new duty, she must give notice in the Gazette and the notice must, notwithstanding compliance with s 65(1), be tabled in the National Assembly within 21 days of promulgation and remain on the table of the National Assembly for a consecutive period of 28 days. But Mr Cassim submitted that such an approach would be in conflict with the ordinary grammatical meaning of s 65(8) requiring that the taxation proposal be tabled by the Minister within a period of 21 days after the promulgation of such notice. Mr Cassim also submitted that the promulgation of the notice 99 days after tabling it in the National Assembly defeated the purpose of the notice. It imposed the additional duty on the very day of the publication of the notice, instead of providing advance notice to the public as contemplated in s 65.

[25] Clearly the Minister can only exercise those powers conferred to upon her by s 65. To act validly under the section, the Minister must act within its four corners. [9] If the Minister acts outside or beyond those powers under s 65, then her decision to do so would lack legality and be *ultra vires*. This is by virtue of the principle of legality which is the cornerstone of the common law and which has been trenchantly reinforced in Article 1 of the Constitution of the Republic of Namibia, entrenching the rule of law and the principle of legality. [10]

[26] A reading of section 65 would in my view mean that the general power of the Minister to amend or impose new duties by tabling taxation proposals is set out in s 65(1). This subsection confers on the Minister this power and also provides for the timing as to when such an amendment comes into operation. The ensuing subsections deal with the consequences of such a declaration and its timing and impact upon those holding a stock of such affected items.

[27] Subsection (8) deals with the procedure to be followed by the Minister when amending a schedule so as to impose a new duty or increased duties

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[9] Pharmaceutical Manufacturers of SA: in re Ex parte President of the RSA 2000 (2) SA 674 (CC); Preddy v Health Professions Council of SA 2008 (4) SA 434 (SCA) at 437E-F

[10] Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte Prison of the Republic of South Africa and Others *supra* at 696, par 44 at p 683, par 17, p 688 par 20 and also page 698, par 50

upon goods. The subsection states that it is applicable 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 s 65(1) even though a notice is not referred to in that subsection. It then proceeds to require in pre-emptory terms that, notwithstanding s 65(1), such a notice must be tabled by the Minister in the National Assembly within 21 days after its promulgation and remain on the table of the National Assembly for a period of not less than 28 consecutive days when the Assembly is in session. If not in session the period would run from its resumption. Subsection (9) sets out the purpose of tabling in the National Assembly. That body would have the opportunity of passing a resolution relating to the notice within that 28 day period. It would thus seem to me that once the Minister invokes the power to amend a duty by giving notice in the Gazette, the Minister is then required to follow the procedure set out in s 65(8). The procedure plainly contemplates and requires in peremptory terms that the promulgation of the notice is to precede the tabling in the National Assembly. As Mr Cassim contended, the purpose of this procedure would be to publish to those affected by the imminent change in the duty. A vital element of enacting any legislation, including subordinate legislation such Ministerial amendment to duties in the Act, is the publication of such legislation. This is to occur within the mechanism provided for in s 65(8).

[28] It would accordingly follow that the wording of s 65 construed as a whole requires that the promulgation of the notice is to precede the tabling of the proposal.

[29] The terms of the notice have been quoted above. The reference to s 13 of the Interpretation of Laws Proclamation, 1920 requires that when an act is authorised in any legislation by a public official, the notification of it is, unless otherwise specified, to be by notice in the Government Gazette.

[30] The notice refers to the tabling of the proposal on 15 April 2012, more than 90 days prior to the notice itself. It would thus appear to me that the notice is thus not in accordance with the procedure in s 65(8) and is indeed in conflict with it. The procedure is set out in peremptory terms. It would need to be

followed for the validity of a notice promulgated pursuant to it. The failure to do so is in my view fatal to the notice.

Conclusion

[31] In the result I am satisfied that the applicant has established its entitlement to its main declaratory relief. Mr Chibwana did not take issue with Mr Cassim's submission that an order for costs should include the costs of two instructed counsel. The complexity of the issues of interpretation and the importance of the matter to the applicant would in my view warrant such an order. Given the entitlement to the declaratory relief, it is not necessary for me to deal with the alternative relief sought.

[32] I accordingly grant the following order:

1. Condoning the applicant's non-compliance with the Rules of this Court and authorising that the application be heard as one of urgency in terms of Rule 6(12).

2. Declaring that the additional duty on the importation of Portland Cement imposed by the Minister of Finance with effect from 27 July 2012 as set out in the Government Notice of 27 July 2012 is of no force and effect.

3. Directing that the respondents pay the applicant's costs, including the costs of one instructing and two instructed counsel.

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DF SMUTS

Judge

APPEARANCES

APPLICANTS:	Adv N Cassim SC (with him Adv G Hinda) Instructed by Sisa Namandje & Co
RESPONDENT:	Mr Chibwana Instructed by Government Attorney