

Trustco Group Holdings Ltd vs NamRA

COURT CASE FINDINGS



SECTION 91 SURVIVES YET A COURT DAY, TO SEE ANOTHER SUNRISE

Trustco Group Holdings Ltd vs Namibia Revenue Agency

(HC-MD-CIV-MOT-REV-2022/00527) [2025] NAHCMD 213 (30 April 2025)

Salient Facts



The Trustco Group of Companies (Trustco), being the Holding Company and 42 subsidiaries took the Namibia Revenue Agency (NamRA) to court on account of “two decisions” by NamRA, relating to the demand for payment of outstanding tax debts assessed at N\$593 million and the appointment of the First National Bank of Namibia (FNB) as an agent by NamRA.



Following the appointment of FNB as an agent in line with section 91 of the Income Tax Act, 1981 (Act No. 24 of 1981), the bank notified Trustco that the latter’s accounts “have been put on hold on the instruction of NamRA”. This seems to have triggered Trustco into action, thereby launching the application which was finally decided by the full bench of the High Court at the end of last month.

Issues before the High Court



Citing several grounds, Trustco wanted the Court to review and set aside NamRA’s decisions linked to the Agency’s efforts to collect tax dues owed by Trustco, holding that such decisions were unfair and unreasonable for want of certain established legal principles.



Essentially, Trustco set its sight on section 91, that it must fall for being unconstitutional as it allegedly operated contrary to the provisions of the Namibian Constitution, in particular Articles 12, 16 and 18.



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NamRA decisions prevail



The NamRA decisions complained of by Trustco in essence had the effect of declining the payment proposal by the latter to reduce the monthly repayment from N\$2 million to N\$1.5 million, affirming that the previous payment plan was no longer in place due to non-compliance by Trustco and demanding that each defaulting company pay 30 percent of capital tax debt within seven days of the letter. The appointment of FNB as an agent would have not made matters any better, so it would appear.



Therefore, Trustco raised several grounds of objection, with *functus officio* being top, effectively meaning that NamRA was barred from reversing its decision/s once taken. In this regard, the Court held that owing to Trustco's failure to honour its part of the agreement and the legislation allowing for amendment and withdrawal of decisions by NamRA officials within two years, this argument by Trustco could not be sustained.



Other grounds included the *audi alteram partem* (the right for the other party to be heard), unfairness and unreasonableness amongst others. Owing to the chain of correspondences between the parties and the applicable framework, these grounds were rejected and NamRA decisions stood firm.

Is section 91 constitutional?



The Court was then called in to assess the alignment of section 91 of the Income Tax Act 1981 with the prevailing constitutional dispensation. Section 91 provides for the appointment of any party that holds or is due to hold money on behalf of a defaulting taxpayer or owes such taxpayer money, as an agent; to collect or pay over such money to NamRA.



Section 179 (1) of the South African Tax Administration Act, 2011 (Act No. 28 of 2011) has a similar provision which empowers a senior official of the South African Revenue Service (SARS) to "by notice to a person who holds



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or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt."



Other jurisdictions such as Canada, the United States and the United Kingdom are said to have similar provisions which have since endured constitutional challenges.



Trustco's objection in this regard rested on a number of grounds, again raising the audi alteram partem in that when the appointment of the agent is made, the defaulting taxpayer is not given prior notice and subsequently not heard before the appointment. The Court held that "swift collection of tax to prevent assets being dissipated considered with the principle of "pay now argue later" constitute exceptional circumstances entitling the tax authority to apply the audi alteram partem after a decision had already been made".



The High Court emphatically maintain that "the Supreme Court has held that our taxation system is based on the principle of "pay now argue later", entrenched by s 78 of the ITA. Therefore, the applicants are not entitled to be heard before the tax authority took action to collect the tax due and payable".



Further grounds on Articles 12 (right to access the court), 16 (right to property) and 18 (right to administrative justice) in the constitutional challenge were also dismissed.



With that, section 91 survived the constitutional evaluation as a necessary tool in the tax collection equation. We borrow from the Zimbabwean matter of Murowa Diamonds v ZIMRA & Anor HH 125-20 HC 156/18, as the High Court there stressed the importance of efficient tax collection. "An efficient tax collection regime is the life blood of all modern societies the fiscal wheels of which must continue turning."

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Major Take-aways



1. Functus Officio Principle

In line with section 3 (2) of the Income Tax Act and section 73 (2) of the Value-Added Tax Act, 2000 (Act No. 10 of 2000), NamRA officials may withdraw any decision within two years of communicating such decision.



2. Pay Now Argue Later

The lodgement or initiation of an objection, dispute or litigation does not in any way suspend the payability of the tax debt. Such debt remains due and payable and may be recovered through the available lawful avenues, notwithstanding an ongoing objection, dispute or litigation.



3. Audi Alteram Partem

When section 91 of the Income Tax Act is invoked, resulting in the appointment of a third-party agent, the audi alteram partem (right of the other party to be heard) may be availed to the taxpayer after the action by the agent.

NamRA therefore calls on all taxpayers with outstanding tax debts to make payments soonest or conclude payment arrangements in line with the applicable framework, to avert the need for invoking section 91.