



REPORTABLE

CASE NO: SA 74/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**KAMBAZEMBI GUEST FARM CC t/a WATERBERG
WILDERNESS**

Appellant

And

MINISTER OF LANDS AND RESETTLEMENT

First Respondent

**MINISTER OF AGRICULTURE, WATER AND
FORESTRY**

Second Respondent

MINISTER OF FINANCE

Third Respondent

CHAIRPERSON OF THE LAND REFORM

ADVISORY COMMISSION

Fourth Respondent

COMMISSIONER FOR INLAND REVENUE

Fifth Respondent

ATTORNEY-GENERAL OF NAMIBIA

Sixth Respondent

VALUATION COURT

Seventh Respondent

Coram: MAINGA JA, SMUTS JA and MOKGORO AJA

Heard: 2 July 2018

Delivered: 27 July 2018

Summary: The appellant launched a number of constitutional applications in the court *a quo* in which its main attack was directed against ss 76 to 80 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 ('the Act') which provide for the imposition of land tax. The appellant also challenged the legality of the regulations made under that Act (issued under Government Notice 120 of 18 June 2007) and sought to have them declared inconsistent with Arts 63(2), 8, 10, 12(1) (a), 18 and 22 of the Namibian Constitution and therefore invalid, the rate of tax as well as recent assessments of land tax. A full bench of the High Court found that the land tax imposed under these sections passes constitutional muster and dismissed the challenges to the regulations and other decisions taken pursuant to them. The appellant appeals against these findings.

The statutory scheme and constitutional imperative for land reform in Namibia is to be seen within the context of 'the ravages of inequality brought about by Namibia's colonial past'. In addressing the issue there was wide consultation by the Namibian Government in the national land conference in 1991. The resulting Act was aimed to bring about reform in ownership and access to agricultural land in Namibia in 1995. Amendments to the Act in 2000 and 2001 established the Land Acquisition and Development Fund and land tax respectively as a means to fund the land reform and transformation process.

Appellant argued that the land tax regime in the Act, brought about by ss 76 and 77, amounted to an impermissible delegation of legislative power to the executive branch of government in the person of the Minister. Appellant contended that this is in conflict with the doctrine of separation of powers upon which the Constitution is based and in direct conflict with Art 63(2)(b) of the Constitution.

Respondents argued that the appellant's approach failed to take into account Art 63(2)(b) properly construed and the nature of the tax scheme imposed under the Act. They submitted the key features of the scheme bringing about land tax were designed by Parliament, including the formula as to how the tax liability is calculated. What was left to be determined by the Minister was the rate within the formula which was to be approved by way of resolution by the National Assembly.

They further argued that, the wide wording in Art 63 should be considered in the light of what was stated by this court in *Du Preez v Minister of Finance* that taxation is to be understood as being 'imposed by the legislature or other competent authority.'

Held that, s 76 does not conflict the constitutional principle of separation of powers and Art 63(2)(b) which accords the National Assembly the power 'to provide for revenue and taxation'. The National Assembly exercised its own powers and provided for land tax in s 76, which Art 63(2)(b) expressly authorised it to do so. The tax is based upon the unimproved site value of agricultural land multiplied by a rate. The Minister only determines the rate in the formula, subject to approval by resolution of National Assembly. The unimproved site value is to be determined in accordance with a procedure set out by the Minister in the regulations.

The court concluded that Parliament cannot be expected to deal with all details of implementing legislation and involve itself in the minute details of the tax and that there was nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to the Minister to address the administration and collection of the tax.

The approach of the High Court is thus correct.

With regard to the challenge against s 76B being an impermissible delegation in conflict with the constitutional principle of equality and Art 22(b) of the Constitution.

It is held that, Art 23(2) of the Constitution authorises parliament to enact legislation to provide indirectly for the advancement of previously disadvantage persons. This s 76B does by empowering the Minister upon application to exempt such landowners from land tax. The challenge to s 76B accordingly failed.

The regulations challenged by the appellants set out how the land tax is to be administered. They provide for the valuation of agricultural land, the appointment, powers and duties of a valuer and the process of valuation, objections against values included in a provisional valuation roll, the establishment, powers and

duties of the valuation court appointed to consider and determine objections against valuations, appeals from that court to the High Court, the validity of the valuation roll and alternations to it. The regulations also provide for the furnishing of returns and the assessment of land tax, rebates and interest on tax, its recovery and the service of notices. Appellant in essence argued reg 4(4), reg (7)(a) and (b), reg 4(9)(b), reg 4(13) and reg 6(8), reg 13(1), reg 14(1) and (3), reg 15(b) offended against constitutional provisions or principles relied upon or the common law.

It is held that, appellant failed to show how each of these impugned regulations offended against constitutional provisions and principles relied upon or common law. The challenges were found to be without merit and the approach of the court *a quo* upheld.

It is further held that, the multiple further applications brought under the different case numbers were also without merit and the court *a quo* did not err in dismissing them.

Held further that, in exercising the court's discretion with respect to costs, this court found it unnecessary to decide whether to adopt the general rule developed by the South African Constitutional Court as confirmed in *Biowatch Trust v Registrar, Genetics Resources* namely that in constitutional litigation, an unsuccessful litigant asserting constitutional rights ought not ordinarily to be ordered to pay costs. This was because of the manner in which the multiple applications were pursued which amounted at the minimum to be within the category of manifestly inappropriate and thus outside the scope of *Biowatch*. The conduct and unnecessary proliferation of this litigation are to be discouraged, resulting in considerable costs and judicial time being spent upon it.

It is thus held that, the appeal is dismissed with costs (the costs are to include the costs of one instructing and two instructed counsel).

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and MOKGORO AJA concurring):

[1] At issue in this appeal is the constitutionality of the land reform and transformation programme of the Government of Namibia. Although a wide ranging attack upon the programme has been made by the appellant, its main thrust is directed against sections 76 to 80 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 ('the Act') which provide for the imposition of land tax. The appellant contends that the system of land tax imposed under the Act was not duly enacted by the legislative branch and is in conflict with Art 63 of the Constitution which vests the National Assembly with the power and function to provide for revenue and taxation and is void as a consequence. The appellant also challenges the legality of regulations promulgated under the Act, the rate of tax as well as recent assessments of land tax. A full bench of the High Court found that the land tax imposed under these sections passes constitutional muster and dismissed the challenges to the regulations and other decisions taken pursuant to them. The appellant appeals against these findings.

Factual background and litigation history

[2] The appellant is a close corporation and is the registered owner of agricultural land in the Otjiwarongo district. The appellant in July 2013 received an assessment to pay land tax for the tax year 2012/2013. Despite paying previous land tax assessments, the appellant in August 2013 launched an application¹ seeking to set aside s 76 to 80 of the Act and the Land Valuation and Taxation Regulations published in Government Gazette No 2678 of December 2001 as

¹ In case 295/2013.

unconstitutional.² This, the main application, set out 38 prayers in its notice of motion, challenging the constitutionality of those sections, the regulations as a whole and several individual regulations separately as well as impugning certain administrative action.

[3] Following the Minister of Land Reform (the Minister) noting his opposition to this application, a multiplicity of applications followed. In total, six substantive applications were brought. Some of these in turn generated a number of interlocutory applications, resulting in considerable costs and judicial time being spent on them. The second³ and the third⁴ substantive applications challenged subsequent assessments of land tax imposed upon the appellant.

[4] The fourth application⁵ applied to set aside an amendment to regulation 17(3) of the regulations, published in Government Notice No 185 of 17 August 2015. The next application⁶ sought the same relief and to set aside the assessment for the 2015/2016 tax year. The sixth and final application sought to set aside a notice by the Minister dated 1 June 2016 under regulation 6(4) as a nullity.

[5] Ueitele J in the High Court initiated a process which resulted in the consolidation of these multiple applications which had been allocated to different High Court judges, introducing some order and coherence to this proliferation of litigation initiated by the appellant to challenge and arrest the land transformation

² These regulation were replaced by the Land Valuation and Taxation Regulation in Government Notice 120 of 2007 in Government Gazette 3870, which came into force on 3 July 2007.

³ Case No A 21/2015.

⁴ Case No 197/2015.

⁵ Case No A 234/2015.

⁶ Case No A 158/2016.

programme under the Act. In terms of the ensuing agreement to consolidate the proceedings, approved by the High Court in case management, the main application (A295/2013) as well as two others where no answering affidavits had as yet been filed, were to be determined on the basis of the appellant's founding documentation with the respondents deemed to dispute the appellant's factual averments and legal contentions. It was also agreed that certain of the interlocutory applications relating to discovery or which were appealed against were no longer in issue. Despite the consolidation, the earlier litigation chaos caused by the multiplicity of applications continued to find expression in the record presented to this court.

[6] The consolidated case was then heard by a full bench of the High Court. The High Court, per Ueitele J dismissed the consolidated application.

Appellant's case as pleaded in the applications

[7] In the main application, the appellant's sole member, Mr Rust, explains that the appellant's agricultural land is put to use for tourism purposes. The appellant has spent a sum in excess of N\$7,8 million in improvements to its agricultural land and paid the assessed land tax for 2001 until 2013. No explanation is given for the change of stance to contest the constitutionality of land tax and the further applications directed at retarding its implementation.

[8] Mr Rust states that the appellant's financial position is sound. Although the founding papers in the main application refer to the precariousness of farming in Namibia, the appellant is however clearly not unable to pay the land tax assessed upon its farms. The total amount of land tax assessed for both farms for the tax

2013/2014, 2014/2015 and 2015/2016 years is N\$7546 in each year. In the founding affidavit it is said that the spectre of paying land tax 'struck like lightning' and had not been preceded by consultation, and without regard to recent droughts and the plight of farmers.

[9] In essence, the main applications seeks to strike down s 76 to s 80 of the Act as unconstitutional on the basis that the imposition of the tax was impermissibly delegated by the legislature to the Minister as part of the executive – in conflict with the fundamental principle of separation of powers. Section 76B, which authorises the Minister to grant exemptions from paying land tax, is said to constitute an impermissible delegation of a discretion upon the minister to execute a law enacted by the legislature and also as being inconsistent with Art 22 of the Constitution.

[10] The primary basis for the challenge to the various impugned regulations is the premise that they were issued pursuant to a tax regime which was contended to be invalid on the constitutional ground already stated. Individual regulations were also impugned upon other grounds, in some instances as being inconsistent with the rule of law, or the common law or Arts 12 and 18 of the Constitution or a combination of these but without specifying in which respects they were alleged to offend against these principles and/or provisions. The founding papers merely deferred the basis for making these assertions to legal argument.

[11] This approach lacks the particularity required for pleading in constitutional litigation.

[12] In discussing the general principle of parties pleading their cases with sufficient particularity, this court in *Standard Bank Namibia v Maletzky* recently stated:⁷

'Rule 6(1) of the High Court Rules provides in relevant part that '(e)very application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief'. The purpose of identifying the key facts in the founding affidavit is to enable a respondent to know what case must be met. The founding affidavit must thus contain all the essential factual averments upon which the litigant's cause of action is based in sufficiently clear terms that the respondent may know the case that must be met Clarity in the founding affidavit is necessary for the expeditious and fair adjudication of the dispute between the parties. Where founding affidavits lack that clarity not only will respondents struggle to determine the case that is to be met, but judges too will be hampered in their task of administering justice fairly to all litigants. . . .'⁸

[13] These principles apply with equal force in proceedings where statutory provisions come under constitutional attack. Not only are the impugned provisions to be precisely identified, but the challenge upon them must be substantiated and specified so that respondents are fully apprised of the case to be met and evidence which may be relevant to it.⁹ This was lacking in several instances in the appellant's founding papers.

Issues on appeal

[14] The main thrust of the appellant's appeal is the constitutional challenge to the s 76 and s 76B of the Act on the grounds of an impermissible delegation of

⁷ 2015 (3) NR 753 (SC).

⁸ At para 43.

⁹ *Lameck & another v President of the Republic of Namibia and others* 2012 (1) NR 255 (HC) at para 58; *Prince v President, Cape Law Society and others* 2001 (2) SA 388 (CC) at para 22.

plenary legislative powers by parliament to the executive in s 76 and an impermissibly wide and unlawful delegation of the power of exemption in s 76B. The parties' submissions on these issues and the approach of the court below are first addressed after first setting out the statutory scheme. The various attacks on individual regulations and administrative action are thereafter addressed.

The statutory scheme in its historical and constitutional context

[15] The fraught pre-independence history of land deprivation and dispossession and the resultant profound inequality in land ownership is set out in some detail in the judgment of the High Court. A full bench of the High Court in *Kessl*¹⁰ had also addressed this vexed topic. After citing the works of several writers placed before it, the full bench in *Kessl* referred in this context to 'colonial dispossession by removing indigenous people from their lands to create farms for successive waves, of first, German and, secondly, South African settlers'. Discriminatory access to land and favourable terms accorded upon racial grounds to acquire it and to subsidise farming it during the apartheid years compounded the inequality. In ending colonialism and apartheid upon independence, the Constitution's preamble recognised the need to protect the gains of the liberation struggle and constitute the Republic of Namibia as a democratic unitary state securing to all citizens justice, liberty and equality.

[16] A compelling constitutional imperative was to bring about land reform and transformation of what this court has termed in this context 'the ravages of inequality brought about by Namibia's colonial past',¹¹ as reflected in agricultural land ownership at independence. A national land conference was held shortly after

¹⁰ *Kessl v Ministry of Land of Resettlement* and two similar cases 2008 (1) NR 167 (HC) at para 7.

¹¹ *Denker v Ameib Rhino Sanctuary* 2017 (4) NR 11273 (SC) at para 5.

independence in 1991, involving wide consultation.¹² Some four years later, the Act was passed to bring about reform in ownership and access to agricultural land in Namibia. Its long title reflects the means set out in the Act to achieve reform and transformation in ownership and access to agricultural land:

‘To provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices; to vest in the State a preferent right to purchase agricultural land for the purposes of the Act; to provide for the compulsory acquisition of certain agricultural land by the State for the purposes of the Act; to regulate the acquisition of agricultural land by foreign nationals; to establish a Lands Tribunal and determine its jurisdiction; and to provide for matters connected therewith.’

[17] An amendment to the Act in 2000 enacted s 13A. It established the Land Acquisition and Development Fund (the fund). Section 14 of the Act empowers the Minister to acquire agricultural land out of moneys available in the fund primarily for the purpose of resettling ‘Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices’.

[18] The Act underwent further amendment in 2001 to introduce land tax as a means to fund the land reform and transformation process upon which the Act is premised. The primary provision is s 76 which states:

¹² *Kessl* at para 9.

'76. (1) Notwithstanding any other law to the contrary the Minister, with the concurrence of the Minister responsible for Agriculture, and the Minister responsible for Finance, may -

- (a) for the benefit of the Fund by regulations made under section 77, impose a land tax to be paid by every owner of agricultural land on the value of such land, the amount of which shall be calculated in accordance with the following formula:

$$T=V \times R,$$

in which formula –

"T" represents the land tax payable;

"V" represents the unimproved site value as determined under those regulations; and

"R" represents the rate of land tax as determined under paragraph (b); and

- (b) by notice in the *Gazette* determine the rates of such land tax.'

[19] The rate in the formula in s 76 was determined by the Minister in 2004 and published in a Government Notice¹³ and set it at 0.75.

[20] Section 76B, also challenged in these proceedings, provides under the heading, 'Exemption from land tax':

'(l) The Minister may on application made to him or her by an owner of agricultural land, exempt by notice in the *Gazette* for such period as may be specified in that notice from land tax imposed pursuant to section 76 –

¹³ Government Notice 193 of 2004, Gazette 3269 of 1 September 2004.

- (a) any agricultural land of such owner, but only if he or she is a person belonging to the category of persons contemplated in Article 23 of the Namibian Constitution;
- (b) any agricultural land that is primarily used for the activities of-
 - (i) a church, mission, hospital, school or hostel, provided such activities shall not be for profit or gain;
 - (ii) any state-aided institution, or any charitable institution as defined in section 1 of the Sales Tax Act, 1992 (Act No. 5 of 1992). [The Sales Tax Act 5 of 1992 has been replaced by the Value-Added Tax Act 10 of 2000.]

(2) An application referred to in subsection (1) shall be in such form as the Minister may determine and shall specify the agricultural land to which it relates.

(3) The Minister may revoke any exemption granted under subsection (1) if the reason for granting such exemption ceases to exist, but shall do so only after having afforded the owner concerned an opportunity to be heard.'

[21] Section 77 empowers the Minister to make regulation in relation to:

- '(a) the forms to be used for the purposes of this Act;
- (b) the procedure for making any application under this Act;
- (c) the procedure for applying for any consent to any transaction relating to or affecting land under this Act; and
- (d) any matter required or permitted to be prescribed by regulation under this Act.'

[22] Section 78 concerns the service of notices and documents contemplated and required by the Act whilst s 79 creates an offence for hindering and

obstructing authorised persons from carrying out inspections or performing tasks under the Act. The provisions of s 79A authorise the Minister to delegate certain powers or duties imposed upon the Minister under the Act and s 80 states that limitations upon the fundamental right to dispose of property and its acquisition by the state under the Act is upon the authority of Art 16(2) of the Constitution read with Art 23(2). Although the main application also impugned s 78 to s 80 which have a wider application than relating to land tax, it would seem that their constitutionality is no longer in issue.

[23] The regulations were promulgated in December 2001 and were later repealed and replaced in July 2007.

Appellant's submissions

[24] Mr Töttemeyer, who appeared on behalf of the appellant (although the heads of argument were prepared by Mr Henning SC and himself) forcefully argued that the land tax regime in the Act, brought about by s 76 and 77, amounted to an impermissible delegation of legislative power to the executive branch of government in the person of the Minister. This, he submitted, was in conflict with the doctrine of separation of powers upon which the Constitution is based and in direct conflict with Art 63(2)(b) of the Constitution.

[25] Article 63 sets out the functions and powers of the National Assembly. Sub-article 63(1) sets out its power as principal legislative authority 'to make and repeal laws' for Namibia. Article 63(2)(b) provides:

- '(2) The National Assembly shall further have the power and function, subject to this Constitution:
- (a)
 - (b) to provide for revenue and taxation.'

[26] Mr Töttemeyer argued that the Act did not establish land tax but had impermissibly left the essential ingredients of the tax to be determined by the executive branch in the form of the Minister. He pointed out that the rate in the formula set out in s 76 was determined by the Minister and that the further core ingredients to the tax are left to the regulations promulgated under s 77 by the Minister and not the legislature as is presupposed by Art 63(2)(b) and the separation of powers doctrine. He further submitted that s 76 contained no guidelines as to how the unimproved site value of agricultural land was to be determined.

[27] It was also contended on behalf of the appellant that it was impossible for those liable to pay land tax under the Act to determine the extent of their liability under the Act, rendering the provisions impermissibly uncertain. He also argued that the approval of the rate by way of resolution of the National Assembly in s 76(4) did not amount to supervision or oversight of the Minister's power in determining the rate.

[28] Mr Töttemeyer also argued that the discretion accorded to the Minister to exempt persons from paying land tax in s 76B is impermissibly wide and amounts to an unguided discretion, in conflict with constitutional principles and the terms of Art 22 of the Constitution.

[29] The appellant's contentions in support of the constitutional and administrative law challenges to the individual regulations and other administrative action taken in terms of the regulations are referred to below where each challenge, upon which argument was directed, is separately dealt with. Those upon which no written or oral argument was directed are deemed to be no longer in issue.

Respondent's submissions

[30] Mr Maleka SC, together with Mr Pelser and Mr Nekwaya appeared for the Minister although the heads were prepared by Mr Gauntlett QC SC, together with Messrs Pelser and Nekwaya. Mr Maleka argued that the appellant's approach failed to take into account Art 63(2)(b) properly construed and the nature of the tax imposed under the Act. He submitted that Parliament had designed a scheme of land tax which by definition included the regulations.

[31] Mr Maleka contended that the key features of the scheme bringing about land tax were designed by Parliament, including the formula as to how the tax liability is determined. What is left to be determined by the Minister is the rate which is in turn to be approved by way of resolution by the National Assembly. He argued that tax based upon a value such as a land tax requires a process involving expert valuers who can be engaged by landowners in the process of determining values in accordance with procedures which can be set out in subordinate legislation.

[32] Mr Maleka also referred to the wording in Art 63(2)(b), conferring upon the National Assembly the power and function 'to provide for taxation'. Comparisons with differently worded constitutional provisions elsewhere were of limited value. The wide wording in Art 63 should, he said, be considered in the light of what was stated in this court in *Du Preez v Minister of Finance*¹⁴ that taxation is to be understood as being 'imposed by the legislature or other competent authority.'¹⁵ He also pointed out that the Act was remedial in nature and that land tax was imposed to acquire agricultural land for the purpose of the complex constitutional imperative of providing access to land to those previously excluded from doing so, as was expressly ordained in the Act.¹⁶

[33] Turning to s 76B, Mr Maleka argued that the appellant's approach negated the clear wording of Art 23(2) which expressly provides that Parliament may enact 'legislation providing directly or indirectly' for redress. In this instance, he submitted that Parliament indirectly provided for exemption on grounds of affirmative action as was clearly authorised by Art 23 itself. It followed, he argued, that the system of *ad hoc* exemption contemplated by s 76B did not violate Art 22(b) and was constitutionally compliant.

The approach of the High Court

[34] In interpreting Art 63(2)(b), the High Court held that the fundamental values of the Constitution are to be borne in mind and that the words used in Art 63(2)(b) 'to provide for' are to be given their ordinary meaning. The High Court found that the National Assembly gave effect to Art 63(2)(b) when enacting s 76 of the Act.

¹⁴ 2012 (2) NR 643 (SC).

¹⁵ At para 8.

¹⁶ S 14 of the Act.

The court found that this accorded with the plain meaning of 'provide for' which, it said, was also consistent with a purposive approach in interpreting constitutional provisions. The High Court found that delegating subordinate regulatory authority to other bodies did not offend the separation of powers principle and did not amount to the assignment of plenary legislative powers. The impugned section after all contained the formula for determining the amount of tax payable. The court concluded that s 76 did not violate the principle of separation of powers.

[35] The High Court also rejected the challenge to s 76B, finding that it did not confer upon the Minister the authority or discretion whether or not to execute a law passed by parliament or constituted an impermissible delegation. The court found s 76B to be consistent with Art 23 and dismissed the constitutional challenge upon this section as well.

The constitutional challenge to s 76

[36] Although there was no trace of any acknowledgement in the appellant's papers or written argument as to the constitutional imperative to bring about land reform, this was however correctly acknowledged by Mr Töttemeyer in oral argument.

[37] The purpose of the Act has been held by this court to 'address the pressing issue of land reform, a perennial problem associated with this country's history'.¹⁷ To this end, the Act provides for the acquisition of agricultural land by the state 'to address the ravages of the inequality brought about by Namibia's colonial past'.¹⁸ The primary beneficiaries of this transformation programme are those Namibian

¹⁷ *Schweiger v Müller* 2013 (1) NR 87 (SC) at para 20.

¹⁸ *Denker v Ameib Rhino Sanctuary (Pty) Ltd and others* 2017 (4) 1173 (SC) at para 5.

citizens disadvantaged by past discriminatory laws or practices.¹⁹ These practices included forcible dispossession from land by successive colonial regimes and subsequently favouring the beneficiaries on racially discriminatory grounds in their acquisition of the land and with subsidies for their farming activities.²⁰

[38] It has also been said that land reform in this context is a complex and multifaceted exercise, involving historic, economic, political and financial considerations.²¹

[39] Whilst the Constitution is founded upon a separation of powers, with the legislative power vested in the National Assembly, no system of separation of powers is absolute.²² Article 63(1) provides that the National Assembly, as principal legislative authority, has the power ‘to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia’.

[40] Article 63(2)(b) further empowers the National Assembly, subject to the Constitution, ‘to provide for revenue and taxation’. This court has held that this power accords with the principle of ‘no taxation without representation’ by ensuring that ‘the subject cannot be made to suffer the burden of tax except by law duly enacted by the branch of the government wielding the power to make and unmake laws’, namely the National Assembly.²³

¹⁹ *Schweiger* at para 20.

²⁰ *Kessl v Ministry of Lands Resettlement* and two similar cases 2008 (1) NR 167 (HC) at para 7.

²¹ *De Villiers Land reform: Issues and challenges – A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*, Konrad Adenauer Foundation Occasional Papers (Johannesburg 2003 at p 4).

²² *Communications Regulatory Authority of Namibia (CRAN) v Telecom Namibia Ltd and others* Case No SA 62/2016 (11 June 2018).

²³ *CRAN* at para 16. See also *Visser v Minister of Finance* 2017 (2) NR 359 (SC), at para 13; *Medical Association of Namibia and another v Minister of Health and Social Services and others*

[41] This court in *CRAN* also emphasised that:

‘ . . . (A)lthough it is permissible for parliament to delegate a legislative power to the executive or an administrative body, it may not delegate *plenary* legislative power. That approach has been accepted as trite by the South African Constitutional Court and applies with equal force to the interpretation of the Namibian Constitution. As Chaskalson P put it in *Executive Council, Western Cape Legislature, & others v President of the Republic of SA & others* 1995 (4) SA 877 (CC) para 51:

“In a modern State detailed provisions are often required for the purpose of implementing and regulating laws Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is however a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body.”

[42] The central issue to be determined in this appeal is whether s 76 conflicts the constitutional principle of separation of powers and Art 63(2)(b) which accords with the National Assembly the power ‘to provide for revenue and taxation’. This depends on the language employed in the Constitution, properly construed in accordance with the values embodied in the Constitution. In my view it does not. On the contrary, this is what the National Assembly did in s 76. It provided for land tax which Art 63(2)(b) expressly authorises to do so.

[43] Section 76 itself enacted and established land tax upon landowners, payable on the value of agricultural land in accordance with a formula set out in s 76(1)(a) by the National Assembly. The tax is arrived at by multiplying the unimproved site value by the rate of land tax. The only component of the formula (in arriving at the tax) which is left to the Minister to determine, is the rate. The regulations promulgated by the Minister under s 77 relate to the administrative process primarily directed at how the unimproved site value is determined – a technical process involving expertise in land valuations.

[44] The rate which the Minister determines is subject to approval by resolution of the National Assembly. I do not agree with the appellant that this entails no oversight or supervision of this very function. Approval by resolution necessarily means oversight and supervision. It is a jurisdictional fact required for the valid determination of the rate. In the absence of the National Assembly's approval, there is no valid rate. That process certainly amounts to supervision and at the very least oversight by the legislature.

[45] As was argued on behalf of the Minister, Art 63(2)(b) properly construed does not mean an absolute monopoly preserved for parliament in the process of imposition of taxation and revenue collection. It is difficult to conceive a system of determination of value, presupposed by land tax, to be performed by parliament itself. This is inherently an exercise properly left for technical and expert determination in accordance with a fair procedure established in subordinate legislation, as occurred in this case. This forms part of the administration of the land tax system based on value and established by parliament. This structure accords with the widely accepted approach recognised and accepted by this court,

that the complexities of the administration of a modern welfare state, particularly in technical fields, means the passing of legislation setting principles and standards which are left to subordinate legislation for greater particularisation for their administration and implementation.²⁴

[46] What the legislature did in s 76 was to exercise its own power to impose and make provision for land tax on landowners in accordance with a formula which it set out in the section. Section 76 does not vest in the Minister or the executive any independent power to impose a tax, the principle relied upon by the appellant as set out in a footnote in *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*.²⁵ What is left to the Minister is to determine the rate, subject to parliament's approval, and promulgate regulations to provide for a procedure for the determination of the unimproved site value of land and related matters, thus giving efficacy to the land tax established by the legislature. This is indeed a far cry from vesting an independent power to tax upon the Minister. Parliament itself established the tax, the formula for its determination and merely left the rate to the Minister but subject to its approval. Parliament left the administration and collection of the tax to the Minister.

[47] The approach of the appellant to land tax that it is unconstitutional for any authority other than the legislature to prescribe or determine any element of a tax is fundamentally misconceived and is in conflict with an ordinary meaning of the term 'provide for taxation' which is contained in Art 63(2)(b).

²⁴ *Visser* at paras 13-14. *Medical Association* at para 63. See Generally Wade & Forsyth *Administrative Law* (10ed, Oxford University Press) at 731-732.

²⁵ 1999 (1) SA 374 (CC) ft 52 at para 44.

[48] The regulations essentially prescribe the means and procedure of determining the unimproved value of agricultural land so that the land tax, established by parliament, can be determined in accordance with the formula set out by parliament in s 76(1). The determination of the value of agricultural land is inherently a matter of administrative action for duly qualified valuers involving a reasonable and fair procedure which can be provided for in subordinate legislation, as has occurred in the regulations. The detailed provisions dealing with valuation, objections, a valuation court, appeals from it and service of notices are likewise administrative matters to be particularised by the Minister in regulations under the Act and do not constitute an unconstitutional delegation of legislative powers.

[49] The High Court's fundamental approach to this question in its closely reasoned judgment is thus sound. It follows that the primary basis upon which the land tax provisions (s 76 and s 77) and the regulations have been challenged falls to be rejected.

Section 76B

[50] The attack upon s 76B(1) is that it is inconsistent with the equality clause (Art 10), contains an impermissibly wide and unguided discretion and is in conflict with Art 22.

[51] Article 23(2) of the Constitution, referred to in s 76B provides:

'Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in

the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.'

[52] It expressly authorises parliament to enact legislation 'providing directly or indirectly' for the purpose set out in it. Section 76B empowers the Minister upon application to exempt landowners by notice in the Gazette from paying land tax but only if belonging to the category of persons contemplated in Art 23.

[53] In enacting this provision, Parliament has provided, by means of an exemption upon application granted by the Minister, indirectly for the benefit of persons referred to in Art 23(2). The reason for providing the Minister with this power is self-evident. The purpose of the imposition of the tax is to enable the fund to provide funds to the Minister for the purpose of acquiring agricultural land in the public interest under s 14 read with s 13A, in order to make that land available for Namibian citizens who do not own or have the use of agricultural land and who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices. As was pointed out on behalf of the Minister, if these beneficiaries of land reform under the Act were to be taxed without differentiating, this could impose a burden on those who could least of all afford paying land tax and who have not as yet reaped the benefit of landownership. As was also correctly pointed out, those previously disadvantaged persons in a position to pay land tax may however not be exempted by the Minister in the exercise of his discretion on a case by case assessment, given the personal and subjective circumstances of each case. As was also correctly conceded on behalf of the Minister, anything else may bring about injustice and could be subject to a challenge.

[54] The full bench case cited in support of the appellant's argument against s 76B, *Grobbelaar v Council of the Municipality of Walvis Bay*²⁶ does not in fact support its position at all. In *Grobbelaar*, there was no power enacted by parliament to exempt, as opposed to where this is expressly done in s 76B. The *ad hoc* exemptions contemplated by s 76B – expressly authorised by Art 23 and by invoking that provision – would not entail any violation of Art 22(b).

[55] The appellant also took issue with exemptions under s 76B on the basis that s 76B had failed to come into operation because the procedure contemplated (by way of regulation for exemption applications) in s 77 had not been invoked. This argument rests on an incorrect premise. The coming into operation of s 76B is provided for in Act 2 of 2001 and not in the regulations to be made by the Minister. It was thus put into operation by the Act.

[56] A point was also taken in the founding affidavit that exemptions were invalid by reason of the failure by the Minister to do so by notice in the Gazette. This is a factual question and is governed by the agreement to consolidate the proceedings. Factual averments were deemed in that application to be placed in issue. The court below and this court is not in a position to determine this issue. Furthermore, there was no attempt to join recipients of exemptions who would plainly have an interest in relief directed at setting aside their exemptions. This even after non-joinder was raised. For these reasons, it is not necessary to express a view on this point as the relief sought can thus not be granted.

²⁶ 2007 (1) NR 259 (HC).

[57] It accordingly follows that the High Court did not err in rejecting the challenge upon s 76B of the Act.

The challenge upon the regulations

[58] As I have already said, the primary attack upon the validity regulations is that they were issued pursuant to a taxation scheme under s 76 and s 77 which is in conflict with the Constitution. That premise has been shown to be unfounded. Several individual regulations were also challenged on further grounds which are separately specified with reference to each of the impugned regulations in respect of the challenges which remain in issue on appeal.

[59] The regulations set out how the tax is to be administered. They provide for the valuation of agricultural land, the appointment, powers and duties of a valuer and the process of valuation, objections against values included in a provisional valuation roll, the establishment, powers and duties of the valuation court appointed to consider and determine objections against valuations, appeals from that court to the High Court, the validity of the valuation roll and alternations to it. The regulations also provide for the furnishing of returns and the assessment of land tax, rebates and interest on tax, its recovery and the service of notices.

Regulation 4(4)

[60] Regulation 4 deals with the appointment, powers and duties of the valuer. Sub-regulation 4(4) provides:

‘The minister must cause a certificate of appointment in such a form as the Minister may determine to be issued to a valuer upon his or her designation or appointment.’

[61] The appellant's complaint against this regulation is that 'the form should be predetermined by (the Minister) and published'.

[62] Mr Töttemeyer argued that the appointment is thus 'secretive' and that this sub-regulation is void as a consequence. Quite how the appointment is impermissibly secretive is not self-evident. Mr Töttemeyer argued the issue of an appointment certificate is a jurisdictional fact in the process of determining value and the form should be predetermined and should be 'transparent, comply with open justice and must not be vague'. But neither the founding papers nor his argument explains why the form should be 'predetermined and published'. Nor were any practical reasons advanced as to why the form of an appointment should be 'predetermined and published' and why the absence of predetermination and publication renders this provision void.

[63] The appellant singularly failed to show how and in what respects this sub-regulation could conceivably be void on the grounds stated in the notice of motion, not amplified in the founding papers and only cryptically referred to in argument.

Regulation 4(7)(a) and (b)

[64] Sub-regulation 4(7) provides:

'(7) In determining the value of any agricultural land in terms of these regulations, a valuer –

- (a) must have due regard to the carrying capacity of such land as supplied by the Ministry administering agricultural affairs at the date of valuation; and

- (b) may use a mass appraisal approach to value the land and may –
- (i) divide the Republic of Namibia cadastral map into value zones to create an iso-value map showing the values of agricultural land per hectare;
 - (ii) (ii) create value zones each of which may contain agricultural land with the same carrying capacity classification, and any agricultural land that lies in two or more carrying capacity classifications may, for the purpose of preparing value zones, be placed in the carrying capacity classification that constitutes the greater part of such land.'

[65] In the notice of motion, the appellant contends that regulation 4(7)(a) is invalid 'because it is inconsistent with the rule of law, Arts 12(1)(a) and 18 of the Constitution, the common law and the third paragraph of the preamble'. In argument, this provision was also described as secretive and that it offended against the right to a fair trial in Art 12(1)(a), transparency and open justice'.

[66] Nowhere is it explained in the papers quite how this provision has these unconstitutional consequences. Nor was this explained in written argument. When pressed on this and other challenges, Mr Töttemeyer argued that the valuation process should be considered 'conjunctively' and viewed as a whole, together with other provisions where the standard of evidence is referred to and appeals are confined to a question of law.

[67] It was not explained how the 'open justice' concept is offended. That principle requires that courts are to be open to the public as is emphatically enshrined in Art 12(1). Whether or not and the extent to which a valuer has

regard to the carrying capacity of land does not arise for the purpose of open justice protected by Art 12. If the valuer were to act irregularly in doing so, the remedy would be judicial review.

[68] It is incumbent upon a party alleging that a regulation is unconstitutional to establish that, as was correctly held by the court below. The court correctly found that the appellant failed to establish the invalidity of sub-regulation 4(7)(a).

[69] The appellant's complaint against regulation 4(7)(b) is that the mass appraisal approach referred to in it 'fails to determine the actual carrying capacity of the land'. This, so the appellant argued, denies individualisation and in turn offends against 'the rule of law, legality, fairness and justice for all'. Apart from this bald assertion, it is not explained why a mass appraisal approach as an aid to value land across the country is not appropriate to this process. Clearly a landowner who may feel aggrieved or prejudiced by this method would have the opportunity to object to the provisional valuation roll as the regulations provide.

[70] The appellant failed to show how this approach (of mass appraisal) has the far reaching unconstitutional consequences attributed to it. The High Court correctly held that this challenge was unfounded.

Regulations 4(9)(b), 4(13) and 6(8)

[71] These related impugned provisions are as follows:

- '4(9) When a valuer or any person assisting the valuer exercises or performs a power or duty in terms of these regulations in the presence of any person affected thereby, he or she must, on demand by such person –

.....

- (b) in the case of a person assisting the valuer, produce a letter duly signed by the valuer authorizing him or her to perform specified duties on the valuer's behalf in accordance with subregulations (13) and (14).'

And

'4(13) A valuer, when necessary, may delegate or assign to any suitable person any power or duty conferred or imposed upon the valuer in terms of these regulations.'

And

'6(8) For the purpose of resolving an objection or reaching an agreement to settle an objection with an owner who has lodged an objection pursuant to subregulation (4), the valuer or any person assisting the valuer may communicate to such owner, and may –

- (a) withdraw the objection; or
- (b) reach an agreement to settle the objection, prior to the valuation court sitting.'

[72] These provisions are attacked on the ground that the assistant (to the valuer) is not bound by the oath and that the valuer exercises an 'uncontrolled power resulting in taxation'. In argument, it emerged that these provisions are challenged on the grounds of an impermissible delegation – referred to as a sub-delegation said to be 'inconsistent with Art 18, the rule of law and legality.'

[73] This characterisation of sub-delegation is incorrect. The valuer is not delegated by the Minister but is authorised by Parliament in terms of s 76 of the Act, and thus vested with original authority to assess the unimproved site value of agricultural land by the Act. This objection falters upon this false premise. The High Court also correctly held that these regulations are not void.

Regulation 13(1)

[74] This provision states:

‘(1) The proceedings before a valuation court are conducted in such a manner as the presiding officer considers most suitable to resolve the issues before the court and the court is not bound by any law relating to procedure and admissibility of evidence.’

[75] In the notice of motion, it is contended that this provision is void ‘because it is inconsistent with the rule of law, Arts 12(1)(a) and 18’. In argument this was expanded by describing the regulation 13 procedure as ‘unpredictable, impossible to anticipate and accordingly to prepare for a hearing’ and that the procedure is ‘foreign to accepted jurisprudence’. Three cases are cited in support of this latter contention. One is a judgment of the High Court as it was previously constituted²⁷ which merely likens *quasi*-judicial proceedings before a transport commission to proceedings before a court. The two South African cases are to similar effect.²⁸ These cases are not authority for the proposition that regulation 13(1) would necessarily conflict with Arts 12 or 18 or the common law. On the contrary, the courts in Namibia and elsewhere recognise the role of specialist tribunals where procedures may differ from adversarial trial procedure.

²⁷ *Du Toit v Voorsitter, Nasionale Vervoerkommissie* 1985 (3) SA 56 (SWA).

²⁸ *Minister of Agricultural Economics v Virginia Cheese and Fruit Co 1941 (Pty) Ltd* 1961 (4) 415 (T) at 422. *Nasionale Vervoerkommissie v Sonnex (Edms) Bpk* 1986 (3) SA 70 (A) at 83E-H.

[76] The rules governing District Labour Courts established by the Labour Act, 1992²⁹ had a similar provision:

‘The hearing of the complaint shall be conducted in such manner as the chairperson considers most suitable to the clarification of the issues before the court and generally to the just handling of the proceedings and the chairperson shall, so far as it appears appropriate, seek to avoid formality in the proceedings and, except terms of the provisions of section 110 of the Act, shall not be bound by any law relating to the admissibility of evidence.’

A similar provision is to be found in the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner³⁰ where rule 18 provides:

‘The arbitrator must conduct the arbitration in a manner contemplated in s 86(7) of the Act and may determine the dispute without applying strictly the rules of evidence.’

[77] Specialised tribunals have the advantage of expertise being deployed, as is recognised by Wade & Forsyth *Administrative Law*.³¹

‘Qualified surveyors sit on the Land Tribunal and experts in tax sit as Special Commissioners of Income Tax. Specialised tribunals can deal more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialised tribunal quickly builds up expertise in its own field. Where there is a continuous flow of claims of a particular class, there is every advantage in a specialised jurisdiction’.

²⁹ Act 6 of 1992.

³⁰ Published in Government Notice No 262 of 2008 in Gazette 4151 of 31 October 2008.

³¹ (10th ed) Oxford University Press, p 774.

[78] By providing that a valuation court would not be bound by any law relating to procedure and admissibility of evidence is in favour of land owners seeking to object to values and addressing valuation issues, with the valuation court being thus authorised to consider valuation certificates without the necessity of calling the authors to give evidence.

[79] Article 12 entrenches the right to a fair trial and Art 18 to fair and reasonable administrative action. The appellant has not shown that this regulation infringes those rights in any way at all. By permitting flexibility to the proceedings cannot of its own infringe those rights. On the contrary, it would seem that a provision of this nature may enhance fairness and accessibility to justice for those affected by the tax. This challenge is likewise devoid of merit.

Regulations 14(1) and (3)

[80] These sub-regulations provide:

'(1) A person who has lodged an objection pursuant to regulation 6 and who is aggrieved by a decision of the valuation court made in relation to that objection may, within 30 days from the date on which notification of the decision was given appeal on a point of law against the court's decision to the High Court.

...

(3) Despite any law to the contrary, the fact that an appeal against the decision of a valuation court is pending does not –

(a) interfere with or affect the operation of such decision; or

(b) prevent the land tax from being assessed and recovered on the basis of the valuation fixed by such decision in like manner as if no appeal was pending.'

[81] Regulation 14(1) restricts an appeal from a decision of a valuation court to a point of law whilst regulation 14(3) applies the principle of 'pay now, argue later' to an appeal on a point of law. The appellant contends that these are unconstitutional.

[82] The appellant argued that by excluding site value determination from an appeal (because it would not normally be a legal issue) 'access to justice' is 'eliminated' in conflict with Arts 12 and 18 of the Constitution. No further grounds are advanced for this conclusion. Nor is any authority. Indeed, a judgment of this court cited by the appellant in a different context, *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd*³² refers to a similar provision in the Labour Act³³ which restricts appeals from arbitrators' awards to 'question of law alone'. O'Regan, AJA interpreted that provision in the context of 'the constitutional principles of the rule of law and justice for all (which) require at the very least a dispute resolution system that eschews arbitrary, irrational or perverse decision-making . . .'.³⁴ O'Regan AJA held that a decision on the facts which could not have been reached by a reasonable arbitrator would be arbitrary or perverse and that 'the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review'.³⁵ The point taken by the appellant with reference to regulation 13(1) is not only unsubstantiated but is emphatically gainsaid by a decision of this court.

³² 2016 (2) NR 554 (SC).

³³ Section 89(1) of Act 11 of 2007.

³⁴ At para 42.

³⁵ At para 44.

[83] The objection to the ‘pay now, argue later’ principle is likewise without merit. This principle is commonly found in tax legislation and its constitutionality upheld in comparable jurisdictions,³⁶ and followed in Namibia.³⁷ This sub-regulation also does not amount to a ‘repeal’ or modification of the common law for the purpose of Art 66(2). It is a procedural matter relating to a statutory appeal and this principle in tax legislation has been very much part of Namibian law³⁸ prior to the adoption of Art 66 and has been aptly described by Angula DJP in *Mugimu* in these terms:

‘In summary, at the heart of the concept ‘*pay now argue later*’ are the considerations of public interest in obtaining full and speedy payment of the tax amount due to the Fiscus. Furthermore it limits the ability of noncompliant taxpayers to use objection and appeal procedures as a strategy to delay payment of their tax.’³⁹

Regulation 15(b)

[84] Regulation 15 provides thus:

- ‘(15) A valuation contained in a main or interim valuation roll approved by the valuation court in terms of regulation 16(1) is not invalid by reason only of –
- (a) a mistake or variance in the name of owner, farm name, postal address or identity number of the owner of any agricultural land; or
 - (b) an irregularity which occurred during the preparation of such valuation roll.’

³⁶ *Metcash Trading Ltd v Commissioner, SA Revenue Service* 2001 (1) SA 1109 (CC) at paras 35-36.

³⁷ In *Mugimu v Minister of Finance and others* 2017 (3) 670 (HC) at para 77-80.

³⁸ Section 78 of the Income Tax Act, 24 of 1981.

³⁹ At para 80.

[85] The complaint levelled against regulation 15(b) echoes earlier attacks – being invalid as being ‘inconsistent with the rule of law, Arts 12 and 18, the common law and the third paragraph of the preamble’.

[86] In terms of this provision, a valuation in a main or interim valuation roll is not invalid merely because of a preceding irregularity in the preparation of that valuation roll. The roll in question would in the interim have been approved by the valuation court after landowners had the opportunity to object to the roll’s approval before the valuation court. This sub-regulation means that the discovery of an irregularity after the approval of the roll would not of itself result in the invalidity of the roll. This provision would not preclude judicial review of the valuation roll in the event of a reviewable vitiating irregularity and a valid explanation by a landowner for not invoking the irregularity before the valuation court.

[87] This regulation thus does not offend against the constitutional provisions or principles relied upon or the common law. As was stated in the respondent’s written argument, the appellant’s approach is to ‘elevate prior form over substantive outcomes’ and that this provision is intended to ‘exclude precisely such procedural bounty hunting.’

The challenge upon the rate

[88] Although the rate determined by the Minister in terms of s 76 and published in Government Notice 193 of 2004⁴⁰ was challenged on several review grounds, it would seem that the only remaining review ground advanced on appeal is that ‘there is no proof that the notice was approved by the National Assembly by

⁴⁰ In Government Gazette No 3269 on 1 September 2004.

resolution' (as is required by s 76(4)). The Hansard as part of the decision-making record however shows that the rate was tabled and debated and approved by the National Assembly.

The issuing of assessments

[89] Assessments are challenged in the main and other applications on the grounds of being issued by the Minister and not by the Commissioner of Inland Revenue who is empowered by regulation 21 to cause assessments of land tax to be made.

[90] It was argued on behalf of the appellant that causing assessments to be made by the Minister instead of the Commissioner renders them nullities. It was argued that the Commissioner under regulation 21 has decision making responsibilities appointed by the Minister and that s 76 does not grant the power to the Minister to make and serve assessments.

[91] Regulation 21(1) provides:

'(1) The Commissioner, from valuations supplied by the Minister, must cause assessments to be made of the land tax payable by owners of agricultural land.'

[92] Regulation 21(3) authorises the Commissioner to serve notices of assessment upon landowners.

[93] The High Court held that regulation 21(1) does not in any way detract or take away the Minister's power to impose land tax, including the power to issue

and serve an assessment. If regulation 21 did so, the court held that the regulation would to that extent be invalid.

[94] The court correctly pointed out that the regulation 21(1) did not require the Commissioner to personally assess the land tax but to cause that it be done without saying by whom, a construct overlooked by the appellant. The court concluded that it was not *ultra vires* the Act if the assessments were to be done by the Minister or under the Minister's auspices.

[95] The conclusion of the High Court is in my view correct. It also accords with the principle that a power delegated (to the Commissioner) – in this instance in the regulations – may be exercised by the delegator of the power - the Minister - provided that no rights are retrospectively adversely affected.⁴¹ The Minister thus retains the statutory power to issue the assessment without reliance upon administrative support resorting under the Commissioner. The responsibility to issue assessments remains with the Minister to assess land tax in accordance with the formula contained in s 76(1)(a). It is thus incorrect to assert that this is a discretion vested in the Commissioner by regulation 21(1) – or for that matter with the Minister. It is rather a statutory task to be performed by applying the formula in s 76.

[96] It follows that, whether the tax collecting infrastructure resorting under the Commissioner is utilised or not, an assessment issued by the Minister exercising his own statutory power is not invalid on the grounds raised by the appellant.

⁴¹ Baxter Administrative Law (Juta, 1984) at 718.

Applications A 21/2015 and A 197/2015

[97] In each of these applications, the appellant raises two points. The first is that the assessment in question was not made and served by the Commissioner. This point is without substance and has been addressed in the preceding paragraphs.

[98] The second issue is that 'no applicable valuation roll' was in place because of the appellant's contention that the previous roll had expired on 31 March 2013. This latter contention is based upon the erstwhile wording of regulation 17(3) which provided:

'The valuation roll is valid for a period of five years from the date it comes into operation.'

[99] The appellant asserted that this provision is to be read with regulation 3(1) which places a duty on the Minister 'at intervals of five years to cause a general valuation to be made' of agricultural land after the first valuation.

[100] The High Court rejected the contention of an alleged absence of a valuation roll with reference to authorities on statutory interpretation and found that the appellant did not contend for or establish any prejudice if the 2007-2013 roll were to be used.

[101] The approach of the High Court on this issue is also sound.

[102] The appellant's point with regard to the duty to cause valuation rolls to be done at five yearly intervals rests upon an assumption that the failure to perform an administrative function within a stipulated period would divest an administrator of a power and duty.

[103] This court recently confirmed the position that time periods imposed upon public officials for the performance of functions or duties are not generally intended to vitiate the exercise of public power if the duty were not to be performed within that period.⁴² This court in *Torbitt* made it clear that the intention of the legislature is to be sought in order to determine the consequence of non-compliance with a statutory injunction that a duty is to be performed within a specified period. This court in *Torbitt* referred with approval the approach in *Volschenk v Volschenk*⁴³ where it was held that there is no

'general rule that all provisions in respect of time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.'

[104] As was demonstrated by the facts in *Torbitt*, one of the principal reasons for this approach is that it would lead to absurd results not consistent with the intention of the legislature if a public official or body, tasked to perform a statutory duty or function, is disqualified by its own delay from giving effect to that statutory

⁴² *Torbitt and others v International University of Management* Case No SA 16/2014 (28 March 2017).

⁴³ 1946 RPD 486 at 490. The approach in *Volschenk* was also approved in this *Court in Rally for Democracy and Progress v Electoral Commission of Namibia* 2010 (2) NR 487 (SC) at para 32.

duty. This court in *Torbitt* accordingly roundly rejected an approach which would nullify the late performance of a statutory duty.

[105] The Act and the regulations properly construed do not evince an intention to create a nullity if a valuation roll is not done within five years of the previous one.

[106] Furthermore, there is not the faintest suggestion in the appellant's papers or in argument on its behalf of any prejudice to it if the 2007-2013 roll is utilised (as well as in several of the appellant's other complaints such as the Minister 'acting' instead of the Commissioner). None is pleaded or raised in argument. This is understandable because there cannot be prejudice to landowners. Land tax is after all calculated with reference to the value of agricultural land in accordance with the s 76 formula. A more recent valuation roll would result in higher land values as a consequence of inflation alone which this court can take into account. This would result in a higher land tax payable by landowners in accordance with the formula in s 76. As is stressed by *Baxter Administrative Law*⁴⁴ prejudice or at least potential prejudice is to be established in order to justify the award of a remedy. Even though prejudice may be assumed where unlawfulness is established, it would still need to exist.⁴⁵

[107] In the absence of prejudice, the approach of this court in *Torbitt* (and the several cases it followed) is in turn to be followed. The Government through the Minister is not divested of the power and duty to generate land tax for the purpose of land reform as enjoined by the Act in s 14. It thus follows that the consequence of the expiry of the five year period referred to in the regulations is not a nullity.

⁴⁴ (Juta, 1984) at p 718.

⁴⁵ See *Baxter* at 718 and the authorities collected there.

Application A 234/2015

[108] In August 2015, the Minister gave notice of an amendment to regulation 17(3) to read as follows in its amended form:

‘The valuation roll is valid from the date it comes into operation until it is replaced by a new valuation roll.’

[109] In September 2015, the appellant launched application A 234/2015 to declare this amendment null and void.

[110] In the founding affidavit, the appellant contended that the amendment created a new regime which can endure indefinitely and that this was destructive to the existing regime, illegally retrospective, took away existing rights and made the imposition of land tax more unpredictable. The appellant further said that the Minister had ‘invoked his ministerial whim’ in issuing this amendment proclamation.

[111] It was also contended that the amendment conflicted with the rule of law, Arts 8, 12 and 18, open justice and accountability required by the rule of law. No factual content was provided in support of these multipronged attacks upon the amendment. It was also contended that the amendment was *ultra vires* s 76(2)(a) and s 77 of the Act without explaining in what respect(s). These bald assertions were repeated in the appellant’s heads but remained unsupported by any factual substratum or further argument. Nothing further was said as to how procedural fairness was adversely affected. The appellant simply failed to establish any procedural unfairness despite these extravagant assertions.

[112] In oral argument, Mr Töttemeyer contended that it could not be accepted that land values would always increase. But there is no evidence or even a suggestion at all of any prejudice if the values on the existing roll were applied or of any fall in agricultural land values at all.

[113] In the Minister's opposition to these proceedings, he stated that all the amendment was intended to achieve was legal certainty. Quite how this can amount to an *ultra vires* act is understandably nowhere explained. Plainly the Minister's power to prescribe by regulation would include the power to amend regulations as well.

[114] The appellant failed to show how the amendment to regulation 17(3) is *ultra vires* to sections invoked or at all.

[115] The other unsupported assertions contained in the founding affidavit, also without any factual underlay, likewise do not withstand analysis and fall to be rejected.

[116] The contention that the roll will endure indefinitely does not form a proper basis to challenge the regulation. If the roll is applied in circumstances where it becomes outdated and prejudicial to landowners, then judicial review may arise. But there are no allegations to that effect. As was pointed out on behalf of the Minister, the reality is that the amendment would clearly not operate to the prejudice of landowners as inevitable increases in values are disregarded. The resultant tax is less than would otherwise be the case and thus be to the benefit of

landowners. As was also correctly contended, there is no merit in the retrospectivity point as no landowner can have a legitimate interest in immunity from land tax duly enacted under the Act or in deferring it.

[117] Nor does the point about unpredictability have any substance. The continuation of an existing roll where values are set out has in fact the opposite effect. The system is predictable as the values are precisely those set out in the roll. The rate is determined. The tax is thus predictable and remains at the same level.

Application A158/2016

[118] In this application, the appellant challenged a further assessment on the basis raised in application A 21/2015 and also attacked the amendment to regulation 17(3) on the grounds raised in application A 234/2015. The High Court correctly dismissed this application for the reasons already set out relating to applications A 21/2015 and A 234/2015.

Application A 184/2016

[119] On 1 June 2016, the Minister gave notice of a new valuation roll and of a sitting of the valuation court to commence on 1 August 2016. Later that month the appellant launched an urgent application to declare the notice a nullity. In it, appellant again challenged s 76 and s 77 of the Act and the regulations on the constitutional basis already addressed. The appellant also contended that the Minister had failed to invoke regulation 3, and that the valuer had not been nominated under regulation 4(1) or appointed in terms of regulation 4 and had not made a declaration in terms of regulation 6. This application is based on the

premise that the 2007 valuation roll was only valid for five years and was then a nullity. That premise has been shown to be unfounded for the reasons already given.

[120] The appellant also appears to rely upon a High Court judgment (per Hoff, J)⁴⁶ given in September 2013 in an application involving the same parties for a proposition that all processes would need to start entirely from scratch. But that judgment simply does not remotely require or contemplate that. If anything, it is destructive of this proposition. Hoff, J held that the proceedings were to commence anew pursuant of the provisions of regulation 8 (5)(c). That meant that the Minister would merely need to reconstitute the valuation court anew under regulation 8(5)(c) and that the Minister should in terms of regulation 6(4) cause a notice to be published not earlier than 60 days before the date determined for the sitting of the valuation court. There was thus no question of the whole process starting from scratch and complying afresh with regulation 3.

[121] The reliance upon the judgment of Hoff, J is accordingly entirely misplaced. The High Court also correctly ruled on this application.

Conclusion and costs

[122] It follows for the reasons set out that the appellant's attack upon the constitutionality of the land tax regime as provided for in the Act and the regulations is without merit and must fail. So too the challenges to administrative action taken pursuant to the scheme in the multiple applications brought by the

⁴⁶ As he then was, in Case no A 295/2013 on 11 and 18 September 2013.

appellant. In a closely reasoned judgment, the High Court rejected the appellant's contentions. Its approach in doing so is sound and is to be upheld.

[123] It follows that the appeal against the judgment of the High Court fails.

[124] There remains the question of costs. Mr Töttemeyer argued that this court should apply the approach of the South African Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources*⁴⁷ in the event of the appellant's challenge not succeeding and that no costs order should be made against it. The Constitutional Court held that in litigation between private parties and government, where a private party unsuccessfully seeks to assert a constitutional right each party would bear its own costs.⁴⁸ In *Biowatch*, the Constitutional Court made it clear that this general approach is not unqualified or risk free, adding:

'If an application is frivolous or vexatious or in any way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.'⁴⁹

[125] The court in *Biowatch* also made it clear that if a litigant acted from improper motives or there are other circumstances which make it in the interest of justice to order costs, the court in its discretion would do so, controlling as it does its process.⁵⁰

⁴⁷ 2009 (6) SA 232 (CC).

⁴⁸ *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC).

⁴⁹ At para 24.

⁵⁰ *Biowatch* at paras 20, 23 -24, *Lawyers of Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) at paras 17-18. See also *Helen Suzman Foundation v President of the Republic of South Africa and others*, 2015 (2) SA 1 (CC) at paras 36 to 38.

[126] Although there is much to recommend itself in the approach of the Constitutional Court in *Biowatch* in cases where constitutional rights are invoked to challenge legislation or practices, it is not necessary in this matter to decide whether and the extent to which it should be applied to Namibia and whether or not to include cases invoking Art 18. That is because the appellant has not, in my view, brought itself within its ambit by reason of the manifestly inappropriate manner in which this litigation has been conducted. It has been argued on behalf of the Minister that the appellant's litigation has been pursued in a vexatious manner to stymie land reform. Reference was also made on behalf of the Minister to deliberate factual misrepresentations made by the appellant, exposed in an answering affidavit and not addressed in reply. Mr Töttemeyer however argued that the manner in which the manifold challenges have been advanced by the appellant was not vexatious.

[127] It is clear to me that the multiple applications – some of which generated interlocutory applications - have been pursued in a manner bent upon frustrating the constitutional imperative to bring about land reform and to bring the entire process to a standstill. The appellant pursued these multiple applications without adhering to the well-known 'pay now argue later' principle embodied in the regulations and applicable to tax regimes. This despite previously paying land tax for some years until 2013 and not providing any explanation for this change in stance.

[128] The multiple challenges to the statutory provisions and regulations and administrative action have also not been properly pleaded, as I have already pointed out, and were replete with extravagant assertions of constitutional conflict

which were unsupported by fact and seldom in argument. Some challenges were not pursued in argument but were not formally abandoned. Relief was also sought against previously disadvantaged individuals concerning exemptions they received from land tax without citing those individuals.

[129] Furthermore, the central conclusion reached by the High Court on the separation of powers of issue was described in the appellant's written argument as being 'destructive of the central function of parliament, . . . destructive of democracy, resulting in an executive state and dictatorship'. It is also said that the conclusion violates the third paragraph of the preamble to the Constitution. This court endorses that conclusion reached by the High Court so characterised in the appellant's submissions.

[130] Regulation 23, which was not challenged, and deals with the collection of land tax is also described in hyperbolic terms written argument – as taking 'injustice to extremes' – and referred to as 'brutal'. This form of recovery thus described as 'brutal' is also to be found in the Income Tax Act and has been expressly approved by this court in *Hindjou v Government of the Republic of Namibia (Receiver of Revenue) and another*.⁵¹ Tax recovery, after all, occurs after land owners had the opportunity to object to the value (upon which land tax is based) and to appeal if dissatisfied with the outcome of the objection.

[131] The manner in which the multiple applications were pursued at the minimum falls within the category of manifestly inappropriate and thus outside the scope of *Biowatch*. The conduct and unnecessary proliferation of this litigation is to

⁵¹ 1997 NR 112 (SC) at 117-119.

be discouraged, resulting in considerable costs and judicial time being spent upon it.

[132] The High Court, in its discretion, did not award costs against the appellant in respect of the main application. That order was not appealed against and it thus stands. In the exercise of discretion, I would certainly not consider that any basis to deviate from the usual rule as to costs following the result in this appeal has been established.

Order

[133] The following order is made:

- (a) The appeal is dismissed with costs;
- (b) The costs are to include the costs of one instructing and two instructed counsel.

SMUTS JA

MAINGA JA

MOKGORO AJA

APPEARANCES

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