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SUPREME COURT DISMISSES LAND TAX APPEAL..... 1

Supreme Court dismisses land tax appeal

WINDHOEK – Three judges of the Supreme Court have dismissed an appeal by Kambazembi Guest Farm cc trading as Waterberg Wilderness against a judgement by the Windhoek High Court in a number of constitutional applications directed against the Agricultural (Commercial) Land Reform Act which provides for the imposition of land tax. The order included costs to include one instructing and two instructed counsel.

Waterberg Wilderness also challenged the legality of the regulations made under the Act and sought to have them declared inconsistent with Articles 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 tax assessments of land tax.

A full bench of the High Court ascertained the land tax imposed under these sections passes constitutional muster and dismissed the challenges to the regulations and other decisions taken pursuant to them. Waterberg Wilderness appealed against these findings in the Supreme Court.

Judge of Appeal Sylvester Mainga who wrote the judgement in agreement with Judge of Appeal Dave Smuts and Acting Judge of Appeal Yvonne Mokgoro said 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’ and 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”, the appeal judge said and continued: “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.”

Waterberg Wilderness argued in the appeal hearing that the land tax regime in the Act, brought about subsections 76 and 77 of the Act, amounted to an impermissible delegation of legislative power to the executive branch of government in the person of the Minister.

They further contended this is in conflict with the doctrine of the separation of powers upon which the Constitution is based and they said it was in direct conflict with Article 63(2)(b) (the powers and functions of the National Assembly) of the Constitution.

Government on the other hand argued that the approach of Waterberg failed to take into account Article 63(2)(b) is 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 to be calculated. What was left for the Minister to determine was the rate within the formula which was to be approved by way of resolution by the National Assembly. They further argued the wide wording in Article 63 should be considered in the light that taxation is to be understood as being imposed by the legislature or other competent authority.

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In light of this, the Supreme Court judges held that section 76 does not conflict the constitutional principle of separation of powers and Article 63(2)(b) which accords the National Assembly the power to provide for revenue and taxation. According to Judge Mainga, the National Assembly exercised its own powers and provided for land tax in section 76, which Article 63(2)(b) expressly authorized it to do.

This tax is based upon the unimproved site value of agricultural land multiplied by a rate and the Minister only determines the rate in the formula, subject to approval by resolution of the National Assembly which unimproved site value is to be determined in accordance with a procedure set up by the Minister in the regulations, the judge ruled.

According to the Supreme Court, the approach of the High Court that there is nothing in the Constitution that prohibits parliament from delegating subordinate regulatory authority to the Minister was thus correct.

Government was represented by Advocate Vincent Maleka SC assisted by FB Pelser and E Nekwaya, instructed by the Government Attorney, and Waterberg Wilderness by Advocate Reinhardt Töttemeyer instructed by ENS Africa.

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