



NAMIBIA - July 2018

ATTACK ON LAND TAX ENDS IN FINAL FAILURE 1

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AN ATTEMPT to have Namibia's land tax system declared unconstitutional has ended in a final failure in the Supreme Court.

In a judgement delivered in Namibia's top court on Friday, appeal judge Dave Smuts ruled that two High Court judges in November 2016 correctly dismissed an attempt to have the tax on commercial agricultural land declared unconstitutional.

The tax, which was imposed through the Agricultural (Commercial) Land Reform Act of 1995, does not violate the constitutional principle of a separation of powers between the legislative and executive arms of the state, judge Smuts found in his judgement, with which appeal judge Sylvester Mainga and acting judge of appeal Yvonne Mokgoro agreed.

The Supreme Court not only dismissed the appeal that the close corporation Kambazembi Guest Farm, which owns the Waterberg Wilderness private nature reserve east of Otjiwarongo, lodged against the High Court's dismissal of its constitutional attack on the land tax system, but judge Smuts also indicated that he was not amused by the way the close corporation and its lawyers pursued their constitutional challenge in the High Court.

The litigation initiated by Kambazembi proliferated into six separate applications aimed at challenging and stopping the government's land ownership transformation programme, and caused litigation chaos until judge Shafimana Ueitele introduced some order and coherence to the legal process by consolidating the applications into one case, judge Smuts noted.

The multiple applications were pursued in a manner bent on frustrating the constitutional goal of bringing about land reform and in an attempt to bring the entire land reform process to a standstill – all while Kambazembi did not adhere to the well-known principle of “pay now argue later” that applies to disputes about the payment of tax, judge Smuts commented.

He added that the multiple applications pursued by Kambazembi were “manifestly inappropriate” and had to be discouraged, as it resulted in considerable costs and judicial time that had to be spent on it.

Kambazembi launched a first case in August 2013, in which it asked the court to declare five sections of the Agricultural (Commercial) Land Reform Act and its regulations as unconstitutional. The ministers of land reform, agriculture, finance, the attorney general, the Land Reform Advisory Commission, and the commissioner for inland revenue were cited as respondents in the case.

That first case was still pending when Kambazembi followed up its legal action with another five applications against the same respondents.

In those cases, land tax assessments were under attack, the constitutionality of an amendment of the regulations under the act was questioned, and an attempt was also made to question the legality of a notice in which the minister of land reform announced a session of the Valuation Court, which considers farm owners' objections against a provisional land valuation roll.

The main constitutional challenge against the Agricultural (Commercial) Land Reform Act was based on an argument that in the law the National Assembly impermissibly delegated the imposition of land tax to the minister of land reform.

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Judge Smuts noted that, given Namibia's history of racial discrimination, which had a profound impact on inequality in land ownership, there was a compelling constitutional need for land reform and to transform the inequalities caused by the country's colonial past.

The land tax introduced through the Agricultural (Commercial) Land Reform Act was approved by parliament, and only the rate at which the tax is levied on the value of commercial agricultural land was left for the minister of land reform to determine – but that rate still has to be approved by the National Assembly as well, judge Smuts also noted.

Kambazembi's approach that it was unconstitutional for any authority other than the legislature to prescribe or determine any element of a tax was “fundamentally misconceived”, judge Smuts commented, before stating that the High Court's approach to the central issue that it considered in its judgement was sound.

Judge Smuts also remarked that Kambazembi's challenges to the statutory provisions, regulations and administrative actions by the land reform minister were not properly pleaded, and were “replete with extravagant assertions of constitutional conflict which were unsupported by fact and seldom in argument”.

The court dismissed the appeal with costs.

Kambazembi was represented in both the High Court and the Supreme Court by senior counsel Reinhard Töttemeyer, who was instructed by Charles Bodenstein.

Senior counsel Vincent Maleka, assisted by Frank Pelsler and Eliaser Nekwaya, represented the respondents in the Supreme Court, where oral arguments on the appeal were heard on 2 July.

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