

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CONSTITUTIONAL CASE NO.7/2016**

In the matter between:

**LESOTHO DAIRY PRODUCTS (PTY) LTD**

**APPLICANT**

And

**MINISTER OF FINANCE**

**1<sup>ST</sup> RESPONDENT**

**LESOTHO REVENUE AUTHORITY**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY-GENERAL**

**3<sup>RD</sup> RESPONDENT**

**NATIONAL ASSEMBLY OF  
HOUSE OF PARLIAMENT**

**4<sup>TH</sup> RESPONDENT**

**SENATE HOUSE OF PARLIAMENT**

**5<sup>TH</sup> RESPONDENT**

**CORAM:**

**S.N. PEETE J.**

**S.P. SAKOANE J.**

**K.L. MOAHLOLI AJ.**

**HEARD: 22 MARCH, 2017**

**DELIVERED: MAY, 2017**

## SUMMARY

Constitution – separation of powers - delegation of legislative powers by Parliament to a Minister – regulations prescribing and re-determining rates of VAT on basic food items - whether this constitutes a permissible amendment of a schedule which forms part of the principal law – Constitution section 70 read with Value Added Tax (Amendment) Act 2003 and regulations.

### ANNOTATIONS:

### CASES CITED:

#### LESOTHO

Chief Justice and Others v. Law Society LAC (2011-2012) 255

Minister of Labour and Employment and Others v. Tšeuoa LAC (2007-2008) 289

Phoofolo v. R LAC (1990-94) 1

Road Transport Board and Others v. Northern Venture Association LAC (2005-2006) 64

#### UNITED KINGDOM

Ferguson, Maritime Life (Caribbean) Ltd & Ors v. the Attorney General of Trinidad and Tobago [2016] UKPC 2; [2016] 40 BHRC 715

#### INDIA

Pandit Barnasi Das Bhanot v. The State of Madhya Pradesh & Ors [1959] 1 S.C.R. 427

#### IRELAND

City Press v. An Chomhairle Oilíuna [1980]

#### SOUTH AFRICA

Executive Council, Western Cape Legislature and Others v. President of the Republic of South Africa and others 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC)

Glenister v. President of the Republic of South Africa and others 2000 (2) BCLR 136 (CC)

## UNITED STATES

J.W. Hampton JR & Co. v. United States 276 US 394 (1928) (72 L. Ed. 624)

## STATUTES:

Interpretation (Amendment) Act No.4 of 1993

The Constitution of Lesotho, 1993

The Constitution of Massachusetts, 1780

Interpretation Act No.19 of 1977

Value Added Tax Act No.9 of 2001

Value Added Tax (Amendment) Act No.6 of 2003

Value Added Tax Regulations, 2003

Value Added Tax (Amendment) Regulations, 2003

## BOOKS:

Currie & de Waal (2005) The Bill of Rights Handbook 5<sup>th</sup> Edition (Juta)

De Smith, Woolf & Jowell's Principles of Judicial Review (1999) (London: Sweet & Maxwell)

Joubert W.A. et al (2011) The Law of South Africa, 2<sup>nd</sup> Edition Vol. 25 Part 1 (Durban: LexisNexis)

Thomas E.W. (2005) The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles (Cambridge University Press)

# JUDGMENT

## I. INTRODUCTION

- [1] The applicant is a company trading in the production of milk products including sour milk. Sour milk is distributed countrywide. Before October, 2014, milk and its variant of sour milk were zero-rated basic goods and thereby not subjected to payment of Value Added Tax. But as from October, 2014, sour milk was taxable at the rate of 14%. This came about as a result of the 1<sup>st</sup> respondent so prescribing in terms of the **Value Added Tax (Amendment) Regulations, 2003**. These regulations had been gazetted on 25 November, 2003 as **Legal Notice No.194 of 2003**.
- [2] When this happened, the applicant engaged officers of the 1<sup>st</sup> and 2<sup>nd</sup> applicants about the matter by way of a letter from its plant manager dated 19 May, 2014 which reads thus:

“The Principal Secretary  
Ministry of Finance  
Box 630  
Maseru

Dear Sir

### **VAT ON CULTURED MILK**

We have noted that use of the word “cultured” appearing in paragraph (8) of the Legal Notice number 105(sic) of November 2003 titled Value Added Tax (Amendment) renders “mafi” liable for VAT payment. We therefore request that the word “cultured” mentioned in the above mentioned regulation be deleted so that

“mafi” as a basic food is given the same treatment as all other basic foods similarly processed.

We trust this will meet your favourable response.”

[3] The Principal Secretary replied by way of a letter dated 3<sup>rd</sup> September 2014 which reads as follows:

“The Plant Manager  
Lesotho Dairy Products (Pty) Ltd  
P.O. Box 2151  
Maseru  
Lesotho

Dear Mr. Samosamo

**RE: VAT ON CULTURED MILK**

Reference is made to your letter dated 19<sup>th</sup> May 2014 requesting deletion of the word “cultured” from paragraph (8) of Legal Notice Number 105 of November 2003 in order to classify “mafi” as a basic food commodity.

According to our definition of basic food, this should be food stuffs which have not been prepared or processed. For milk, the definition does not extend to the milk that has been condensed, evaporated, sweetened, flavoured, cultured or subjected to any other process other than homogenization or preservation by pasteurization, ultra-high temperature treatment, sterilization, chilling or freezing. The VAT zero rating in Lesotho is therefore only applicable to full cream milk.

“Mafi” or soured milk is a milk product that has been subjected to certain processes, and may be produced in different ways. The milk is either fermented with lactic acid bacteria or then sometimes called fermented or cultured or it acquires its sour taste through the addition of an acid. Depending on the used bacteria the sourness of the end product may be determined. This clearly indicates that this type of milk has been further prepared/processed in order to come up with the end product. It therefore, does not meet the criteria of defining the basic food commodity.

Due to the above mentioned reasons, we regret that at this point in time we are not able to amend the law to include “mafi” as a zero-rated food commodity. Amending the law would imply that all other categories of zero-rated commodities would also have to be revisited and the definition would also have to be changed. We thank you for understanding.”

- [4] The applicant avers that its engagement with the officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents bore no fruits. This averment is not addressed in the answering affidavits. It should then be taken to be admitted.

### **Relief sought**

- [5] It is against this background that the applicant invokes this Court’s constitutional jurisdiction for the following relief:

- “1. That it be declared that it section 88 (1) (b), (c), (d) and (e) of the Value Added Tax Act No.9 of 2001 is unconstitutional for contravention of section 70(1) of the Constitution of Lesotho.
2. That it be declared that section 88(1) (b), (c), (d) and (e) of the Value Added Tax No.9 of 2001 is unconstitutional for violation of the principle of separation of powers.
3. That it be declared that Value Added Tax (Amendment) Regulations 2003 (Legal Notice No.194 of 2003) is unconstitutional to the extent that it purports to amend Value Added Tax (Amendment) (sic) No.6 of 2003.
4. Costs of suit.
5. Further and/or alternative relief.”

## **II. MERITS**

### **A. The Facts**

#### **Applicant's case**

[6] The applicant's case in the founding papers is that:

- 6.1 There is no sophisticated process involved in the production of sour milk. Sour milk and full cream milk are only different in that the former is no longer fresh if not consumed within a certain time.
- 6.2 Between the date of the promulgation of the impugned regulations in 2003 and October 2014, sour milk was classified as a basic food commodity and therefore, zero-rated. By treating it as separate from milk and subjecting it to a rate of 14% VAT is irrational.
- 6.3 The Principal Act classifies milk as zero-rated. The 1<sup>st</sup> respondent has acted beyond his powers by taxing milk and sour milk at a standard rate of 14%.

6.4 The changing of the zero-rated status of milk by way of regulations is contrary to Schedule IV of the Value Added Tax (Amendment) Act No.6 of 2003. Consequently, the Value Added Tax (Amendment) Regulations, 2003 are unconstitutional to the extent that they purport to amend Schedule IV to the Value Added Tax (Amendment) Act, 2003.

6.5 By giving the 1<sup>st</sup> respondent powers to amend the provisions of an Act and schedule thereto under section 88(1) (b), (c) (d) and (e) of Value Added Tax Act No.9 of 2001, Parliament violated the principle of separation of powers and also contravened section 70 (1) of the Constitution.

### **Respondents' answer**

[7] The respondents answer the applicant's case as follows:

7.1 It is admitted that sour milk had been zero-rated in terms of the law. It was only subjected to 14% VAT rate in terms of the Value Added Tax (Amendment) Regulations, 2003. In so doing, the 1<sup>st</sup> respondent



acted in terms of section 6A of the VAT (Amendment) Act, 2003.

7.2 The applicant should have complied with the Amendment Act by charging VAT on the coming into operation of the Amendment Act.

7.3 Sour milk is not considered as a basic food commodity. It is a cultured milk produced from acidification of milk and, therefore, the applicant is wrong to suggest that sour milk and full cream milk are not different.

7.4 By not classifying sour milk as a basic food commodity and subjecting to a rate of 14%, the 1<sup>st</sup> respondent acted within the parameters of the law.

7.5 It is only the 1<sup>st</sup> respondent who can make a determination whether or not sour milk is zero-rated. It is denied that the 1<sup>st</sup> respondent acted contrary to Schedule IV of Value Added Tax (Amendment) Act, 2003.

7.6 Section 70(2) of the Constitution authorizes Parliament to give 1<sup>st</sup> respondent power to make regulations. This Parliament did under the VAT Act, 2001. But it is conceded that 1<sup>st</sup> respondent's delegated powers do not include power to make fundamental changes to the law. The powers are limited to amending any schedule to the Act and prescribing rates of VAT by way of regulations.

7.7 The constitutionality of the impugned sections and regulations should be determined in the context of the VAT Act which is designed to implement the economic policy of the country. Only the 1<sup>st</sup> respondent can determine, as a matter of State policy, items that should remain zero-rated.

7.8 The regulations were tabled in Parliament which was at liberty to provide any inputs to them.

7.9 In the premises, it is denied that section 88 and the impugned regulations are unconstitutional.

## **B. The Laws**

[8] Section 70 of the Constitution gives plenary legislative powers to Parliament as follows:

- “(1) Subject to the provisions of this Constitution, the legislative power of Lesotho is vested in Parliament.
- (2) Nothing in subsection (1) shall be construed as preventing Parliament from conferring on any other person or authority the power to make any rules, regulations, by-laws, orders or other instruments having legislative effect as Parliament may determine.”

[9] Section 88(1) (b), (c), (d) and (e) of the **Value Added Tax Act No.9 of 2001** (hereinafter referred to as the principal Act) provides that:

- “(1) The Minister may make regulations
  - (a) .....
  - (b) to amend a Schedule to this Act;
  - (c) to amend any monetary amount set out in this Act;
  - (d) to amend the time of filing a value added tax return under section 27; or
  - (e) to amend the rate of additional tax imposed under sections 54 and 55.”

[10] Section 6A (2) of the **Value Added Tax (Amendment) Act No.6 of 2003** (hereinafter referred to as the amendment Act) decrees that:

“For the purposes of this Act, zero-rated goods shall be restricted to those listed in Schedule IV;

Provided that –

- (i) the determination and duration of this rate shall be dictated by the extent to which such item or items are regarded as a basic necessity;
- (ii) the Minister shall make Regulations to re-determine the rates as a matter of State Policy.”

[11] Section 15 of the amendment Act adds Schedule IV to the Schedules to the principal Act as follows:

**“SCHEDULE IV (Section 6A)  
Zero Rated Supplies**

The following goods are prescribed for zero rating for purposes of section 6A:

- (a) agricultural input-fertilizers, seeds and pesticides;
- (b) beans;
- (c) bread;
- (d) lentils;
- (e) livestock feed and poultry feed;
- (f) maize (grain);
- (g) maize meal;
- (h) milk;
- (i) paraffin intended for use as fuel for cooking, illuminating or heating;
- (j) peas;
- (k) sorghum meal;
- (l) unmalted sorghum grain;
- (m) wheat (grain)

(n) wheat flour:

Provided that the determination of rates for any item in this list will be dictated by the extent that such item may be regarded as a necessity for the duration of a tax period.”

[12] In 2003, the 1<sup>st</sup> respondent promulgated the **Value Added Tax Regulations, 2003** gazetted as **Legal Notice No.95 of 2003**. The 1<sup>st</sup> respondent stated that he was doing this in exercise of the powers conferred by section 88 of the principal Act. Regulation 21 (1) and (7) provide thus:

“(1) For the purposes of Section 6A of the Act, basic food supplies listed in Schedule IV are zero-rated.

.....

(7) Milk (Tariff Headings 041.10, 0402.2, 0403.90) intended for domestic consumption is zero-rated.”

[13] In the course of the same year (2003) the 1<sup>st</sup> respondent amended Regulation 21 in terms of the **Value Added Tax (Amendment) Regulations, 2003** gazetted as **Legal Notice No.194**. Regulation 21 (7) was deleted and substituted with (8) as follows:

“(8) Full Cream Milk (Tariff Heading 041.10) intended for domestic consumption is zero-rated, being the milk of cattle that has not been concentrated, condensed, evaporated, sweetened, flavoured, cultured or subjected to any other process other than homogenization or preservation by pasteurization, ultra-high temperature treatment, sterilization, chilling or freezing.”

### III. ANALYSIS

## Submissions

[14] The attack on the 1<sup>st</sup> respondent's powers is at two levels. The first is that Parliament has wrongly ceded its plenary powers to amend a schedule to an Act under section 88 (1) of the principal Act. The second attack is that the 1<sup>st</sup> respondent has no power to remove milk and its variant of sour milk from zero-rated Schedule IV basic food commodities.

[15] The basis of the first attack is grounded in the proposition that a schedule to an Act is an integral part thereof which is only amendable by Parliament and not any other person or authority. The second attack is premised on the proposition that the Schedule IV list of zero-rated basic food commodities cannot be chopped and changed through delegated legislation.

[16] Dr. 'Nyane, for the applicant, relies heavily on the judgment of the Constitutional Court of South Africa in **Executive Council, Western Cape Legislature and others v. President of the Republic of South Africa and others** 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC). Much store was put in the *dicta* in paragraphs (51) and (62) of the judgment. In paragraph (51) Chaskalson P said:

“The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms – ‘to make laws for the Republic in accordance with this Constitution’. In a modern

State detailed provisions are often required for the purpose of implementing and regulating laws and 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, including, as s 16A does, the power to amend the Act under which the assignment is made.”

[17] At paragraph (62) D-I, the learned President reasoned that:

“The new Constitution established a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication. Section 37 of the Constitution spells out what those powers are. It provides that:

‘The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.’

The supremacy of the Constitution is reaffirmed in s 37 in two respects. First, the legislative power is declared to be ‘subject to’ the Constitution, which emphasizes the dominance of the provisions of the Constitution over Parliament’s legislative power, (**S v Marwane** 1982 (3) SA 717 (A) at 747H-748A) and, secondly, laws have to be made ‘in accordance with this Constitution’. In para [51] of this judgment I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary, it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the Executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by

necessary implication from the terms of the Constitution could be subversive of the 'manner and form' provisions of ss 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both Houses in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks."

[18] Dr. *Nyane* produced a second string to his bow by relying on section 7 (2) of the **Interpretation Act No.19 of 1977** which provides that:

"Every schedule to or table in an Act and any notes to such schedule or table shall be construed and have effect as part of such Act."

[19] The proposition advanced is that the amendment of any part of an Act is a plenary power of Parliament to legislate. Therefore, such a power is not delegable. For this proposition reliance is reposed on paragraph (33) F-H of **Executive Council, Western Cape Legislature** where it was held:

"...Ordinarily, the position with regard to matter contained in a schedule is set out by Kotze JA in **African and European Investment Co Ltd v. Warren and Others** 1924 AD 308 at 360:

'No doubt a schedule or rule attached to a statute and forming part of it is binding, but in case of clear conflict between either of them and a section in the body of the statute itself, the former must give way to the latter.'

Craies, **Statute Law** 7 ed by (Edgar, 1971) at 224, notes:

'A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much, a part of the statute, and is as much an enactment, as any other part, but if an enactment in a schedule contradicts an earlier clause the clause prevails against the schedule.'



[20] Mr. *Moflikoane* for the 2<sup>nd</sup> respondent, with whom Miss *Tau* for the rest of the respondents made common cause, counters by submitting that there is everything right and not wrong in the impugned section 88 and the regulations in terms of which the 1<sup>st</sup> respondent has been conferred powers to amend Schedule IV and to re-determine VAT rates in relation to food commodities. For this submission, reliance is reposed on **J.W. Hampton JR & Co. v. United States** 276 US 394 (1928) (72 L.Ed. 624) and the judgment of the Supreme Court of India **Pandit Barnasi Das Bhanot v. The State of Madhya Pradesh & Ors** [1959] 1 S.C.R 427.

[21] In **J.W. Hampton JR & Co.**, Chief Justice Taft said:

“It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the application of the congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry

out this purpose with the advisory assistance of a Tariff Commission appointed under congressional authority.”

[22] In **Pandit Barnasi Das Bhanot**, the Supreme Court of India had to determine the constitutionality of a section in a Sales Tax Act which enabled the State Government by notification to amend a schedule. The Supreme Court held at pp.435 and 436:

p.435 “Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like.

.....

p.436 “the question arose whether (in *Hampton J.R. &Co.*) section 315 (b) of the Tariff Act, 1922, under which the President had been empowered to make such increases and decreases in the rates of duty as were found necessary for carrying out the policies declared in the statute was an unconstitutional delegation, and the decision was that such delegation was not unconstitutional. We are therefore of the opinion that the power conferred on the State Government by s 6(2) to amend the schedule relating to exemption is in consonance with the accepted legislative practice relating to the topic, and is not unconstitutional.”

### **The inter-play between Acts and schedules**

[23] When Parliament enacted section 88 of the principal Act in 2001, it can legitimately be assumed that it was well aware of the provisions of the **Interpretation Act, 1977** in respect of the legal status of a schedule to an

Act as provided for under section 7(2). Similarly, Parliament must have known the legal status of subsidiary legislation referenced under section 23 (d) and (g) thus:

“.....

(d) where an Act confers powers on an authority to make subsidiary legislation for any general purpose, and also for any special purposes the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

.....

(f) subsidiary legislation may provide for imposition of fees and charges in respect of any matter with regard to which provision is made in such subsidiary legislation **or in the Act under which such subsidiary legislation is made.** [Emphasis added]

[24] This is the legislative context within which the 1<sup>st</sup> respondent was conferred powers by Parliament to amend Schedules and re-determine VAT rates as a matter of State policy.

[25] In my respectful view, it should weigh with us that despite conferring legislative powers of the sort to the 1<sup>st</sup> respondent, Parliament still holds control over the 1<sup>st</sup> respondent in the form of the peremptory procedural requirement of laying of regulations before both Houses for approval within 15 days of their publication in the gazette. Otherwise, they cease

to have any effect: sections 27A and 27B of the **Interpretation (Amendment) Act No.4 of 1993**.

[26] However, the resolutions of Parliament in regard to the regulations do not have the imprimatur of statutes and are, therefore, not prerequisites for the validity or invalidity of regulations. More importantly, such resolutions do not immunize the regulations from judicial review: see De Smith, Woolf & Jowell's **Principles Of Judicial Review** (1999) (London: Sweet & Maxwell) para 12-065; **LAWSA** 2<sup>nd</sup> Edition Vol.25 Part 1 para 296 (i).

## **Separation of powers**

[27] The question that must first be answered is the typology of separation of powers doctrine that underpins the Constitution. In this respect, I consider that the answer to be provided the Privy Council in **Ferguson, Maritime Life (Caribbean) Ltd & Ors v. The Attorney General of Trinidad and Tobago** [2016] UKPC 2 (25 January 2016); [2016] 40 BHRC 715. Commenting on the features of “Westminster model” Constitutions like ours, the Privy Council advised thus:

15. “One of the fundamental principles of the Constitution is the qualified separation of powers. It is qualified because the “Westminster model” has never required an absolute institutional separation between the three branches of the state. But the relations between them are subject to

restrictions on the use of its constitutional powers by one branch in a manner which interferes with the exercise of their own powers by the others. In **Hinds v. The Queen** [1977] AC 195, 212-213 Lord Diplock, speaking of the Constitution of Jamaica, said:

‘... a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively...’”

[28] This *dicta* emphasizes the conventional wisdom that separation of powers does not constitute the building of a *Chinese wall* between the functions of the three arms of government. It is a doctrine on the delineation of cooperative governance and shared responsibilities in certain areas. Where the red lines are drawn is often not a matter of explicit expression but implicit expression and interpretation. This is explained by Mr. Justice Thomas in his book thus:

“Political scientists have long since exposed the strict doctrine of the separation of powers as an illusion. In Westminster-type democracies, in particular, the relationship of the legislature to the executive is anything but separate, and all three branches of government exert powers that can properly be described as legislative, administrative and judicial. This is not to deny, of course, that each branch of government has a core function. The separation of powers doctrine is best diluted to a formula that acknowledges that core functionalism. Feeley and Rubin argue that functionalism in the separation of powers context permits one branch of government to venture into the territory of another so long as it does not interfere with the core functions of that branch. In other words, one branch should not function so as to disable another branch from functioning effectively in its core area of responsibility. If this principle is transgressed, people are denied the advantage and access that the particular branch would otherwise provide.” (**The Judicial Process: Realism, Pragmatism Practical Reasoning and Principles** (2005) (Cambridge University Press) p.77. See also **Glenister v. President of the Republic of South Africa and others** 2009 (2) BCLR 136 (CC))

[29] Separation of powers can be gleaned from the broad delineation of the different powers of the three branches of government provided for the Legislature under sections 70 and 78, for the Executive under sections 86 and 88 and the Judiciary under section 118. Nothing therein is expressly stated that those powers cannot be shared to any extent. This is unlike the absolute and inflexible separation of powers doctrine found in the Constitution of Massachusetts 1780 which in Part 1 Article XXI provides that:

“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; ...to the end it may be a government of laws, and not of men.”

**Have the impugned regulations impermissibly amended a schedule to an Act?**

[30] Section 70 of the Constitution should be interpreted and understood in the context of shared legislative functions between Parliament and the Executive. Super-ordinate legislation belongs to Parliament while subordinate legislation is a product of legislative power conferred on the Executive by Parliament.

[31] Superordinate legislation lays out the broader frameworks while subordinate legislation fills in details necessary for implementation. The minutiae of details is often left for determination by the authority implementing the superordinate legislation. What Parliament has provided for under section 88 of the principal Act is to clothe the 1<sup>st</sup> respondent with legislative power to amend schedules to the superordinate legislation. There is nothing expressly stated by the Constitution that this Parliament cannot do. Any prohibition in this regard should then be a matter of implicit prohibition. And whether there is such, is a question of interpretation of the words used.

[32] Section 88 of the principal Act makes reference to regulations to “amend”. “Amend” is defined under section 3 of the **Interpretation Act**,

1977 to mean “repeal, revoke, cancel, add to or vary”. “Repeal” includes “revoke, rescind or cancel”. Since “repeal” is included in “amend”, the latter is the larger power. What Parliament has then conferred is the plenitude of the larger power to even repeal a schedule by subordinate legislation.

[33] This construction leads to a conclusion which Dr. ‘Nyane submits is constitutional anathema, namely, a member of the Executive cannot repeal part of an Act without passage of a bill by Parliament under section 78 of the Constitution to amend. Section 78 provides in relevant parts:

- “(1) The power of Parliament to make laws shall be exercisable by bills passed by both Houses of Parliament (or, in the cases mentioned in section 80 of this Constitution, by the National Assembly) and asserted to by the King.
  - (2) A bill may originate in the National Assembly.
  - (3) When a bill has been passed by the National Assembly it shall be sent to the Senate and –
    - (a) .....
    - (b) .....
- it shall be presented to the King for assent.”

[34] If it is accepted, as it must, that a schedule is part of an Act, what section 88 does, is to clothe the 1<sup>st</sup> respondent with subordinate legislative powers to amend part of an Act without any bill passed by Parliament in that



regard. This interpretation is subversive of the principle that Parliament's plenary powers under section 70(1) are not delegable. We then have to explore whether a narrower construction of the word "amend" as used in section 88 is possible and justifiable in order to save section 88 from the peril of being struck down.

[35] That line of enquiry is open to us if we consider section 88 to be genuinely ambiguous or otherwise unclear so as to give it a reasonably possible interpretation whose result would make it escape from the alleged unconstitutionality: Currie & de Waal (2005) **The Bill of Rights Handbook** 5<sup>th</sup> Edition (Juta) 3.4 (a). In my consideration, there is neither an ambiguity nor lack of clarity in the section. Its constitutionality need not be reached for reasons hereafter.

[36] In my opinion, the breadth and width of the 1<sup>st</sup> respondent's powers to amend Schedule IV are narrower and do not entail repeal if regard is had to the 1<sup>st</sup> respondent's power to make regulations to prescribe rates of VAT and to re-determine same under 6A (2) of the amendment Act. Put differently, section 88 confers broader powers to amend while section 6A (2) confers narrower powers to change VAT rates. In construing these powers, the maxim *generalia specialibus non derogant* applies i.e. specific provisions prevail over general ones. Otherwise the use of both

powers would result in a conflict of repeal of a Schedule under section 88 and determination and duration of VAT rates to a schedule under section 6A (2).

[37] When Parliament introduced Schedule IV through the amendment Act and gave the 1<sup>st</sup> respondent limited powers to “make Regulations to re-determine the rate as a matter of State policy”, it deliberately did not mention the general power to amend the Schedule IV by manner of removing listed goods or adding thereto. Parliament left it to the 1<sup>st</sup> respondent’s discretion make a determination, re-determination and duration of zero-rating as “dictated by the extent that such item may be regarded as a necessity for the duration of a tax period”. In other words, whether a Schedule IV item should remain in the schedule as a zero-rated item or be removed and rated above zero is a policy matter for the Executive.

[38] It follows that once the 1<sup>st</sup> respondent makes a re-determination that the rate of an item should not no longer be zero-rated, this can be done via regulations prescribing new rates made pursuant to section 19 of the principal Act as amended by section 10 of the amendment Act. Effectively this means that once a fiscal policy decision is reached that a Schedule IV item is no more a basic commodity, it loses its zero-rated

status. Consequently, it can and should be removed from Schedule IV. It, however, may be brought back if a policy decision is changed. This would be feasible, for example, if an item becomes scarce because of drought, thereby resulting in famine. To stimulate production and availability, the 1<sup>st</sup> respondent may make a fiscal policy decision to zero-rate it.

[39] On this analysis, I would reject the contention that the 1<sup>st</sup> respondent had no power to remove milk and its variant of sour milk from Schedule IV and thereafter to subject it to the VAT rate of 14%. In the same vein, I would reject the contention that what is done under the impugned regulations constitutes a statutorily and constitutionally impermissible delegation of plenary powers of Parliament.

[40] On this approach, I am driven to the conclusion that the section 88 (1) of the principal Act does not apply to prescription of VAT rates on Schedule IV goods. In short, the regulations envisaged under section 88 (1) are different from the regulations envisaged under section 6A (2) of the amendment Act read with section 19. This is so notwithstanding the statement in **Legal Notice No.194** that the impugned regulations are made pursuant to the exercise of powers conferred by section 88. That

statement is severable from the rest of the regulations: **Phoofolo v. R**  
LAC (1990-94) 1

[41] What the 1<sup>st</sup> respondent has done is to use his section 6A and section 19 powers to make a determination that the duration of milk as a zero-rated item has ceased and then subjected it to another rate pursuant to section 19.

[42] The impugned amendment regulations were made by the 1<sup>st</sup> respondent, at least insofar as the applicant's complaint is concerned, to re-determine, as a matter of policy, the duration of milk a zero-rated item. There is then no inconsistency between these regulations and the amendment Act.

[43] The complaint of delegation of Parliament's plenary powers to the 1<sup>st</sup> respondent to amend Schedule IV under section 88 is, in the circumstances, misconceived and falls to be rejected. Ditto the complaint of violation of separation of powers.

[44] I find it fitting to conclude this judgment by quoting the *dicta* of the Irish Supreme Court in **City Press v. An Chomhairle Oiliuna** [1980] IR 381 at 398:

“The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State. Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that which is challenged as an unauthorized delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorized; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorized delegation of legislative power.”

#### **IV. DISPOSITION**

[45] It follows in my view, that the application must fail.

[46] There remains the question of costs. The operative general principle in constitutional matters is not to make an order as to costs. The principle serves to encourage, and not stifle, vindication of fundamental human

rights and freedoms: **Minister of Labour and Employment and Others v. Tšeuoa** LAC (2007-2008) 289 para [33]; **Chief Justice and Others v. Law Society** LAC (2011-2012) 255 para [16]. However, an exception is made where the litigation is in pursuit of commercial interests. In casu, the applicant is doing just that in this case: **Road Transport Board And Others v. Northern Venture Association** LAC (2005-2006) 64 para [16].

### **Order**

[47] In the result, the application is dismissed with costs.

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**S.P. SAKOANE**  
**JUDGE**

I agree:

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**S.N. PEETE**  
**JUDGE**

I agree:

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**K.L. MOAHLOLI  
ACTING JUDGE**

**For the Applicant:**

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**For the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents:**

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