REPORTABLE

CASE NO.: SA 19/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE PERMANENT SECRETARY OF FINANCE **FIRST APPELLANT**

SECOND APPELLANT

THE MINISTER OF FINANCE

And

SHELFCO FIFTY-ONE (PTY) LTD **RESPONDENT**

Coram: Shivute, C.J., Strydom, A.J.A. *et* Chomba, A.J.A.

Heard on: 17/10/2007

Delivered on: 27/11/2007

APPEAL JUDGMENT

STRYDOM, A.J.A.: [1] This matter concerns the powers of

the first appellant to levy transfer duty upon the sale of property. These powers are set out and are circumscribed in the Transfer Duty Act, Act 14 of 1993 (the Act). Sec. 10 (1) of the Act specifically states that the appellant shall be responsible for the administration of the Act and subsec. (2) provide for delegation of the duties of the appellant to any officer acting under his control or direction.

2] Initially the respondent only cited the second appellant but when objection was raised to the *locus standi* of the Minister of Finance, on the basis that it was the first appellant who was charged with the administration of the Act, the respondent applied for, and was allowed by the Court *a quo,* to join the first appellant to the proceedings. As the appeal lies against the decision of the first appellant and or his delegate I will refer to the Permanent Secretary of Finance as the appellant.

3] The background to the application is set out by Mr.

Kinghorn, the sole director of the respondent and the legal adviser of a company known as Etale Fishing Co. (Pty) Ltd (Etale), a commercial fishing company catching, processing and marketing fish at Walvis Bay. The processing and marketing of fish is done at a factory which was leased by Etale from Northern Fishing Industries (Pty) Ltd (Northerns). In order to facilitate the berthing of fishing vessels to off-load their catches, and to bunker, a quay and jetty were previously constructed adjacent to the factory. These structures formed part of the contract of lease between Etale and Northerns.

4] When Etale's term of lease expired during April 2004 it entered into negotiations with Northerns and was able to acquire the property previously leased by it.

5] The property so acquired consisted of the following erven, namely:

(a) Portion 9 of Portion B of the Farm Walvis Bay Town and Townlands No. 1

(b) Erf No. 3690, Walvis Bay; and

(c) Erf No. 4586 (a Portion of Erf No. 4585), Walvis Bay.

6] The fixtures, erected on these properties, were the fish processing factory, the administrative offices, store rooms and other ancillary improvements.

7] These properties were transferred by registration in the Deeds Registry at Windhoek on 30 September 2004 into the name of the respondent, the latter being the nominee of Etale in terms of its agreement with Northerns.

8] From diagrams compiled by the Surveyor General and attached to the Title Deeds of the erven, it seems that erven 3690 and 4586 lie alongside the sea but, in each instance, only extend to the high-water mark. (See annexures “HK1” and “HK2”). The quay and jetty were constructed adjacent to these erven and abutting the erven.

9] The jetty is described as a permanent superstructure built of concrete and erected on the sea floor, jutting out perpendicularly at right angles to the land and extending approximately respectively 35 and 50 metres into the sea from where it connects to the quay, where it abuts erf No. 3690. It was further said that the jetty, for its full length, was erected below the high water mark and therefore rested exclusively on the sea bed.

10] The quay was described as a superstructure also built of concrete but erected parallel to the land and forming an artificial new breakwater, approximately 200 meters in length, and also built directly on the sea bed. The quay abuts both erven 4586 and 3690 as a continuous structure. The vertical front of the quay is interspaced with vertical openings which act as pillars allowing the tide to ebb and flow between such pillars. The high-water mark, it is said, lying in the direction of the land, is still some metres inland from the vertical (sea facing) front of the quay. Holes were drilled through the

concrete surface of the quay through which the ocean can be viewed beneath. This showed that the quay was also built below the high water mark and therefore stood directly on the sea bed.

11] Because these structures were situated on the seabed below the high-water mark, Northerns never claimed ownership in the structures and they, as well as Etale, accepted that the structures attached in ownership to the land on which they were built, by operation of the common law rule and principle of *superficies solo cedit.* It was common cause that the sea-shore and sea-bed belonged to the State.

12] As a conveyancer of 25 years practice, Kinghorn stated that only surveyed erven or portions of land falling within a local authority's jurisdiction, or consisting of farm land in respect whereof an individual surveyor's diagram, approved by the Surveyor-General's office or appearing from a general plan of a township, likewise duly registered as cadastral land

under the provisions of the Deeds Registries Act, Act 47 of 1937, and for which a title deed had been issued by the Registrar of Deeds, can be treated as private property and land capable of being owned privately. All non-private land either belongs to local authorities or to the Namibian State. Consequently, it is alleged, that it is evident that neither the jetty nor the quay, being erected on the sea bed below the high-water mark, could be owned or become owned by private individuals or corporate entities, such as Northerns or Etale, as no cadastral diagram existed or was issued for the sea bed by either the Surveyor-General's offices or the Registrar of Deeds. It is furthermore also clear that the Surveyor-General's diagrams in respect of erven 3690 and 4586 did not go beyond the high water mark and consequently neither the jetty nor the quay formed part of the immovable properties.

13] Kinghorn further pointed out that during the period when Etale leased the property from Northerns, Northerns, in terms

of the lease contract, stated that it acquired the necessary approval to construct the jetty and quay and warranted to Etale that it has unrestricted sole and exclusive use and enjoyment, to the exclusion of all other entities, parties (and including the owner of the seabed on which the constructions stood), for an indefinite period which would, at least, endure for the duration of the lease. A similar warranty was again given by Northerns in terms of the contract of sale concluded by the parties on 7 May 2004. (See annexure “HK4”).

14] In terms of the agreement of sale the property was bought for an amount of N$23,000,000-00. This amount was compiled as follows:

(i) the 3 immovable properties with fixtures and the jetty and quay N$18,000,000-00

(ii) movables of fish factory N$ 5,000,000-00

Total N$23,000,000-00

15] In regard to the sale of the properties, as well as the movables of the fish factory, private valuations were previously obtained. In regard to the movables the open market value was determined as N$6,033,000-00. This figure was reduced by agreement between the parties to N$5,000,000-00.

16] The three immovable properties together with fixtures, and including the quay and jetty, were valued by one de Wit, a sworn appraiser, at N$30,707,400-00.

17] De Wit was then requested to prepare an addendum to his valuation in order to adapt his valuation to the lower purchase price of N$18,000,000-00 paid and to distinguish between the immovable properties and the jetty and the quay in order to determine the price for which transfer duty would

be payable.

18] In order to come up with a value of the various items to adapt to the reduced purchase price of N$18,000,000-00, de Wit first of all determined what percentage of his valuation of N$30,707,400-00 represented each of the items, i.e. the immovable property, the fixtures and the quay and jetty. Once this was accomplished he proportioned the N$18,000,000-00 according to these percentages. This resulted in the following values in regard to each of these items, namely:

(i) The land, comprising the 3 erven N$ 4,998,574-00

(ii) The Buildings on the land N$ 7,095,684-00

(iii) The quay and jetty N$ 5,905,743-00

Total N$18,000,001-00

19] All the parties involved in the sale agreement were satisfied with the methodology applied above in adapting the original valuation to fall into line with the purchase price paid.

20] Accordingly the valuations set out in subparagraphs (i) and (ii) were added together as comprising the value of the land with fixtures which totalled N$12,094,258—00. Declarations by the seller and purchaser were then prepared in which a total amount of N$12,094,258-00 was declared as the value of the land and fixtures and in regard of which the respondent alleged that it became liable to pay transfer duty and stamp duty upon.

21] Notwithstanding that numerous queries, by the office of the appellant, were answered, and explanations given by Kinghorn, the respondent was informed by letter dated 15th September 2004 that the appellant had assessed the payment of transfer duty on the amount of N$18,000,000-00 instead of the declared value of N$12,094,528-00. In order

to acquire transfer of the properties in the name of the respondent the assessment made by the appellant, and stamp duties, were paid under protest.

22] The basis on which the respondent was required to pay transfer duty on the amount of N$18,000,000-00 was set out in a letter dated 15 September 2004, annexure “HK15”, which emanated from the head office of the Ministry of Finance and was signed by the Acting Deputy Commissioner of Inland Revenue, Mr. J.J. Viljoen, of which the relevant part reads as follows:

> “I herewith confirm that transfer duty should be calculated on the value of the property as defined in the agreement of sale, which will *inter alia* include the value of the Jetty and Quay. This confirmation is based on the following, namely:
>
> - The purchase price of the property, as stipulated in the agreement of sale, is in connection with the erven, improvements and the Jetty and Quay;
>
> - The agreement of sale makes a differentiation between the purchase price for the property and equipment but there is no differentiation of the purchase price between the erven, improvements and the Jetty and Quay. The differentiation was only made after conclusion of the agreement of sale by a sworn valuator;
>
> - Transfer duty is normally calculated on the purchase price of the property as stipulated in the agreement of sale. In other words, if the

purchase price is in respect of immovable property and movable property and there is no split of the purchase price between the immovable and movable property, the transfer duty will be calculated on the full purchase price;

- The definition of the Jetty and Quay, as stipulated in the agreement of sale, also provides clearance regarding the ownership and treatment of the two properties. It is clear that it forms an integral part of the immovable property. It is stated that the Quay shall irrebuttably be deemed to be forming part of the land, notwithstanding any possible survey-general's (sic) or deeds office's data to the contrary. The Jetty on the other hand, is attached to the Quay and was constructed by the Seller at its own and sole cost. The seller possesses the unrestricted, sole and exclusive use and enjoyment, to the exclusion of all other entities, parties (including the owner of the seabed on which it stands), for an indefinite period; and

- The definition of property in the Transfer Duty Act refers to the land and any fixtures there on. (Underlined for emphasis)."

[23] As provided for in sec. 18(1) of the Act the respondent then appealed, by Notice of Motion, to the High Court of Namibia and also claimed repayment of the amounts it alleged it overpaid.

The Notice of Motion which, at the time, only cited the second appellant, the Minister, provides as follows:

"1. That the Respondent, acting through its Permanent Secretary or other subordinate official erred in assessing the value for transfer duty purposes of the following immovable property to be N$18,000,000-00 instead of N$12,094,528-00 to wit:

1.1 Erf No. 3690, Walvis Bay, measuring 9326 square metres, (previously held by Government Grant No. T10127/1994);

1.2 Erf 4586 (a Portion of Erf No 4585), Walvis Bay, measuring 1,3313 hectares, (previously held by Deed of Transfer No. T5535/2000).

1.3 Portion 9 of Portion B of the Farm Walvis Bay Town and Townlands No. 1, measuring 1,9998 hectares, (previously held by Deed of Transfer No. 1104/1957).

2. That the Respondent acting through the Permanent Secretary or any subordinate official erred in determining that the sum of the transfer duties payable in respect of the aforementioned immovable properties is N$1,440,000-00 (N$314,960-00 plus N$1,125,040-00), instead of N$967,562-24.

BE PLEASED TO TAKE NOTICE FURTHER that the Applicant will simultaneously with the aforementioned appeal apply for an order in the following terms:

1. Declaring that the stamp duties paid by the Applicant in terms of the Stamp Duties Act, Act 15 of 1993, in the amount of N$59,054-72 were not payable by the Applicant to the

Respondent;

2. That the Respondent be ordered to pay the Applicant the amount of N$59.042-72;

3. That the Respondent be ordered to pay interest on the amount of N$59,054-72 at the prescribed rate of 20% per annum from the 20th of September 2004 to date of repayment, both dates included;

4. That the Respondent be ordered to pay the Applicant the amount of N$472,437-80;

5. That the Respondent be ordered to pay interest on the amount of N$472,437-80 at the prescribed rate of 20% per annum from the 20th of September to date of repayment , both dates included;

6. That the Respondent be ordered to pay the costs of this appeal/application."

(The amount of N$59,054-72 represents the stamp duty paid on the difference between the amounts of N$18,000,000-00 and N$12,094,528-00).

[24] The appellant filed a short answering affidavit which consisted of 8 paragraphs and which did not deal with the allegations of the respondent *ad seriatem.* As a result it followed that most, if not

all, of the respondent's factual allegations were not disputed and should consequently be accepted. (See Erasmus: *Superior Court Practice*, B1-44; *Moosa v Knox,* 1949 (3) SA 327 (N) at 331; *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,* 1949 (3) SA 1155 (TPD) at 1163 and *Tsenoli v State President of the Republic of South Africa,* 1992 (3) SA 37 (D & CLD) at 41 E – F).

[25] The nub of the allegations by the appellant is contained in paragraphs 4 to 7 of the answering affidavit. In paragraph 4 it is stated that all the assets and rights which previously vested in the State in relation to the Walvis Bay Port were transferred to the Namibian Ports Authority on 1st March 1994 by virtue of the provisions of the Namibian Ports Authority Act, Act 2 of 1994.

[26] Paragraph 5 claimed that regardless of whom

the owner of the quay or jetty might be, the right exercised in regard thereof was a real right. This is further explained on the basis that a written agreement of lease existed between the Government of South Africa and Northerns in terms whereof Northerns leased the area over which the quay and jetty were erected. As proof thereof a letter by the South African Department of Public Works, addressed to a firm of engineers, was attached wherein it was mentioned that a lease of the area was approved under certain conditions. It was then alleged that on the re-integration of Walvis Bay into Namibia the Namibian Government or Namport, being the successor in title, ought to be in the position of a lessor *vis-à-vis* Northerns.

[27] However, in paragraph 6 the deponent stated that he was given to understand that there was no lease agreement in existence between the

Government or Namport, on the one side, and Northerns, on the other side. According to the appellant this was so because it was accepted by the parties that the quay and jetty were attached to the area and the right exercised in respect thereof was a real right regardless of whether there was an agreement of lease or not.

[28] In paragraph 7 it was claimed that, in any event, the consideration paid for the quay and jetty was subject to transfer duty in terms of the Act.

[29] The appeal was heard by Muller, J, who allowed the appeal and granted the various orders. As a result thereof the appellant, in turn, launched an appeal to this Court against the judgment and orders made by the learned Judge.

[30] Mr. Coleman, who appeared on behalf of the

appellant, firstly submitted that an appeal in terms of sec. 18 is limited to the exercise of very specific powers by the permanent secretary, namely only where, in terms of sec. 5(7) a decision for the determination of a fair value, a consideration or a declared value was determined by him for purposes of payment of transfer duty; or in the case of a determination by him in terms of sec. 5(8), which allows for a revision of fair value as determined in terms of sec. 5(7); or where a determination in terms of section 8 was made which allows for other considerations to be taken into account. Counsel submitted that if the appeal is not covered by one of the above sections the matter could not be entertained by the Courts, at least not in terms of sec. 18 of the Act. Counsel submitted that any other complaint a respondent may have in respect of a discretion, exercised by the appellant, or any other official, will have to be taken by review

proceedings.

[31] For the above submission Counsel relied on the case of *Holden's Estate v Commissioner for Inland Revenue,* 1960 (3) SA 497 (A) where the following was stated at 502C – 503B, namely:

"However, it does not follow that the executor had a right of appeal in this case. I agree with Mr. Bliss, for the Commissioner, that the position is governed by the principle stated in *Irvin & Johnson (S.A.) Ltd. V Commissioner for Inland Revenue,* 1946 AD 483, in which Schreiner, J.A. giving the judgment of the Court on the point there relevant, said at pp. 492 – 3 :

> 'There is no doubt that even where in terms of a statute a general right of appeal is given from the decisions of a public officer, the language of any particular provision of the statute may, nevertheless, show that the Legislature intended that his decision on the subject-matter of the provision should be final and not subject to appeal. It is usual, in such cases, to speak of the official's having an executive or, to use another term, an administrative discretion…..Now the Legislature may use any one of a variety of expressions in granting an official an administrative discretion.'

To sum up: The executor sought to challenge on

> appeal the Commissioner's opinion that the sale of the property was 'in the course of the liquidation of the estate of the deceased'. I hold that the Commissioner's opinion involved the exercise of an administrative discretion and was not appealable under sec. 24(1)."

32] Simply as a statement of the law, Counsel's submission was no doubt correct. However, it remains to be seen whether that is so in terms of the relevant provisions of this Act.

33] The right of appeal to the High Court, and from that Court to this Court, is governed by sec. 18 of the Act. This section provides as follows:

> "18. Appeals against decisions of Permanent Secretary
>
> (1) Any person who considers himself or herself aggrieved by a decision of the Permanent Secretary under section 5(7) or (8) or section 8 may, within thirty days after the decision became known to him or her, appeal against that decision by way

of application on notice of motion to the High Court on giving security to the satisfaction of the registrar of that court for any costs that may be incurred by the Permanent Secretary in connection with the appeal.

(2) The High Court shall inquire into and consider the matter and shall confirm, vary or set aside the decision of the Permanent Secretary or give such other decision as in its opinion the Permanent Secretary ought to have given, and may make such order as to costs as it may deem fit.

(3) Any judgment given or order made by the High Court in terms of subsection (2) shall be subject to appeal to the Supreme Court of Namibia in the same manner and on the same conditions as a judgment given or order made in any civil proceedings in the High Court.

(4) Any decision by the High Court in terms of subsection (2) or the Supreme Court of Namibia in terms of subsection (3) relating to the fair value of any property or to the value of any

consideration payable in respect of the acquisition of any property, shall for the purposes of this Act, be deemed to be the decision of the Permanent Secretary."

34] The submission by Mr. Coleman necessitates consideration of sec. 5 of the Act. However, it was common cause that the provisions of sec 5(8) and 8 do not apply to this appeal and need not be considered. The relevant parts of the section then provide as follows:

"5. Value of property on which duty is payable.

1) The value on which the duty shall be payable shall, subject to the provisions of this section-

(a) where consideration is payable by the person who has acquired the property, be the amount of that consideration; and

(b) where no consideration is payable, be the declared value of the property.

(2)…
(3)…
(4)…
(5)…
(6)…

(7) If the Permanent Secretary is of the opinion that the consideration payable or the declared value

is less than the fair value of the property in question he or she may, subject to subsection (8), determine the fair value of that property, and thereupon the duty payable in respect of the acquisition of that property shall be calculated in accordance with the fair value so determined or the consideration payable or the declared value, whichever is the greatest.

(8)…

(9) In determining the fair value in terms of subsection (7) or (8), the Permanent Secretary shall have regard, according to the circumstances of the case, *inter alia* to-

a) the nature of the real right in land and the period for which it has been acquired or, where it has been acquired for an indefinite period or for the natural life of any person, the period for which it is likely to be enjoyed;

b) in the case of land situated in the area of a local authority council, the valuation of such land, including any fixtures thereon, as contained in the main valuation roll of the local authority council concerned which is in force in terms of section 72(2) of the Local Authorities Act, 1992 (Act 23 of 1992).

c) Any sworn valuation of the property concerned furnished by or on behalf of the person liable to pay the duty;

d) Any valuation made by any other competent and disinterested person appointed by the Permanent Secretary.

(10)…
(11)…"

35] Reverting to the submission made by Mr. Coleman

based on the *Holden's Estate* – case, *supra,* I am of the opinion that that case is distinguishable from the present case.

36] In the *Holden's Estate*–case, the Court was called upon to interpret sec. 5(1)(a) of the Estate Duty Act, Act 45 of 1955, whereby the Commissioner for Inland Revenue could, in regard to property which was disposed of and which in his opinion represented a *bona fide* purchase and sale 'in the course of the liquidation of the estate of the deceased', determine, for estate duty purposes, the price realised by the sale. No specific right of appeal was granted in regard of the exercise of the discretion by the Commissioner. The only right of appeal was a general right in terms of sec 24(1) of the relevant legislation.

37] In that case the value of a property inherited by two sons was, for estate duty purposes, declared to be £25,000-00. This value was based on a sworn valuation. However,

before the property was transferred to the heirs they again sold it for £50,000-00. Estate duty was thereupon assessed by the Commissioner on the amount of £50,000-00. Objection was then raised to such assessment and by agreement the appeal was brought directly before the Appellate Division.

38] Holmes, A.J.A., who wrote the judgment of the Court, stated that where words such as “in the opinion of the Commissioner” or “if the Commissioner is satisfied” are used in a statute it is generally regarded that they confer an administrative discretion on the person so designated which would then exclude a right of appeal in the absence of other contrary indications in the statute. No contrary indications were found by the Judge and he concluded that the decision of the Commissioner was an administrative decision which was not subject to appeal. In contrast to that the learned Judge referred to other provisions in the same Act (e.g. Sec 54 *dec* (6)) where more or less similar words were used but where the statute granted a specific right of objection and

appeal against the exercise of the discretion of the Commissioner. In those instances the discretion of the Commissioner was subject to appeal.

39] Although sec. 5(7) starts with the words “If the Permanent Secretary is of the opinion…” it seems to me clear that a right of appeal is granted in terms of sec. 18(1) to persons aggrieved by a decision of the Permanent Secretary under section 5(7). In terms of this section the appellant was of the opinion that the declared value of N$12,094,258-00 was less than the consideration paid for the property and he determined the value to be N$18,000,000-00. The appellant therefore considered the consideration paid for the property, including the quay and the jetty, as fair market value on which transfer duty was to be paid. This was done by the appellant in terms of the provisions of sec. 5(7). There is no other section in terms of which he could discard the declared value and determine a value in excess thereof. His decision was therefore in terms of sec. 5(7) and the respondent, being

aggrieved thereby, was entitled to launch an appeal. Contrary to the situation in the *Holden's Estate*-case, *supra*, a specific right of appeal is granted to aggrieved parties where the appellant exercised a discretion in terms of sec. 5(7) of the Act.

40] I therefore agree with Mr. Smuts, assisted by Mr. Dicks, for the respondent, that the decision of the appellant was taken in terms of sec 5(7) of the Act and that the respondent was correct to appeal the decision of the appellant in terms of sec 18(1) of the Act.

41] Turning to the merits of the appeal, Mr. Coleman, with reference to the agreement of sale between Etale and Northerns, pointed out that the description of the property bought included the quay and the jetty. Furthermore one composite price was paid namely N$18,000,000-00 which likewise included the quay and the jetty. The definition or description of the quay was that it "irrebutably be deemed to

be forming part of the land" which showed that it was attached to the property and that it formed an integral part of the factory to which it was fixed for an indefinite period of time. All this, so Counsel submitted, showed that the quay and jetty formed part of the land and complied with the definition of property in the Act. The appellant was therefore correct by including the value of the quay and jetty in his determination of the amount on which transfer duty was payable. This part of Counsel's argument was, so I understood it, based on the letter "HK15", written by the Acting Deputy Commissioner of Inland Revenue, Mr. Viljoen.

42] Mr. Smuts contended that the Act circumscribes the powers of the appellant to levy transfer duty and that those powers cannot be extended by what the parties may have agreed. It was common cause that the quay and jetty were built on the seabed and between the low- and high-water marks and as such were the property of the Namibian Government and incapable of private ownership. As a

general proposition the quay and jetty did therefore not form part of the property acquired and was not liable to attrack transfer duty.

43] I agree that the power of the appellant to levy transfer duty is set out in the Act. He therefore derives his power from the Act and not from the parties to a transaction. The "charging" section, as it was called in South African case law, where similar legislation was considered, is sec 2 of the Act, as amended, and of which the relevant part reads as follows:

> "**Imposition of transfer duty**
>
> 2(1) Subject to the provisions of section 9, there shall be levied for the benefit of the State Revenue Fund a transfer duty on the value of any property acquired by any person on or after the date of commencement of this Act by way of a transaction or in any other manner, or on the amount by which the value of any property is enhanced by the renunciation, on or after the said date, of an interest in or a restriction upon the use of that property, at the rate of-…"
>
> (Section 9 deals with exemptions to pay transfer duty and is not relevant to the issues which must be decided in this instance).

44] From the wording of the section it is clear that a transfer duty can only be levied against the value of property acquired.

45] The meaning of the word property is defined in sec. 1 of the Act as follows:

> "property" means land and any fixtures thereon, and includes –
>
> a) any real right in land, but not any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (b);
>
> b) any right to mine for minerals and a lease or sub-lease of such right;"

[46] The word 'acquire' is not defined in the Act, however, a specific meaning was ascribed to it by the Courts in South Africa where they were called upon to interpret a similar provision such as our sec. 2. This section, also sec. 2, is contained in Act 40 of 1949, as amended, and the Act also contained a definition of property which was very similar to the definition set out in sec. 1 of the Namibian Act.

[47] In the case of *Commissioner for Inland Revenue v Viljoen and Others,* 1995 (4) SA 476, Melunsky, J, said the following at p 479 E-F in regard to the meaning of the word 'acquired' in Sec. 2(1) of Act 40 of 1949, namely:

> "It is necessary to view these arguments in the light of the interpretation of the word 'acquired' in s. 2(1) in the context in which it is used in the Act. The word is not defined in the Act, but it has been construed to mean the acquisition of a right to acquire the ownership of property. (See *Commissioner for Inland Revenue v Freddies Consolidated Mines Ltd,* 1957 (1) SA 306 (A) at 311B-C and *Secretary for Inland Revenue v Hartzenburg,* 1966 (1) SA 405 (A) at 409A-B)

See further *De Leef Family Trust and Others v Commissioner for Inland Revenue,* 1993 (3) SA 345 at 356B and *Commissioner for Inland Revenue v Collins,* 1992 (3) SA 698 (AD) at 707 F – I.

[48] Bearing in mind that the relevant provisions in Act 40 of 1949 are very similar to that in our Act, I

agree with the construction, given to the word ‘acquired’, and I find that the word ‘acquired’, used in sec. 2(1) of the Act, bears a similar meaning to that found by the South African Courts.

[49] In his affidavit the appellant stated that transfer duty on the amount of N$18,000,000-00 was payable because the consideration paid in respect of the quay and the jetty was subject to transfer duty in terms of the Act.

[50] Leaving aside, for the moment, the issue of the existence, or not, of a real right , it seems to me that sec. 2, read with the definition of property in sec. 1 of the Act, empowers the appellant to levy a transfer duty on the right acquired by a person, in terms of a transaction, or otherwise acquired ownership in land and in regard to the fixtures on that land.

[51] In regard to the value of such property the

appellant is empowered to accept the consideration paid or the value declared and, if he is not satisfied, to determine a fair value with reference to the issues set out in sec. 5(9). However, these powers must be exercised in terms of the provisions of sec. 2 which prescribes that the levy of transfer duty is based on the value of the property acquired.

[52] No right to acquire the ownership in the quay and the jetty was acquired by Etale or the respondent. That much was conceded by Mr. Coleman. The quay and the jetty can therefore not be said to be fixtures to the land which they abut, that is erven 3690 and 4586, because then it would become the property of the landowner, in this instance the respondent. It is also common cause that that did not happen and that these structures remained the property of the State. In this regard I agree with what was stated by the learned Judge *a*

quo as to the nature of these rights and that the structures adhering to the seabed and the area between the low- and high -water marks are *res extra commercium* or *res publicae* or a combination thereof.

[53] It can also not be said that the definition of the word ‘transaction’ widened or amplified the powers of the appellant as was contended for by Mr. Coleman. Although of wide import, and including almost any possibility whereby property can be acquired, it remains subject to the provisions of sec 2(1) of the Act and is limited to the property acquired in the sense as set out herein before.

[54] The property acquired by the respondent, which became liable for transfer duty, therefore consisted of the three erven and all or any fixtures to those erven. It did not include the quay and the

jetty because that was not part of the property which was acquired. This was also found by the learned Judge in the Court *a quo.*

[55] It follows therefore that, except for the possibility of a real right, with which I will deal herein after, there is no provision in the Act which would allow the appellant to levy transfer duty on the value of the quay and jetty and no matter how the parties described, for purposes of their contract, these structures, they could not confer powers on the appellant which he did not have in terms of the Act.

[56] In regard to the reliance of the appellant on the existence of a real right I must point out that in the letter of 15 September 2004, which letter informed the respondent that transfer duty was levied on the amount of N$18,000,000-00, it was

set out that the power was exercised on the basis that the quay and jetty formed an integral part of the factory and transfer duty was payable because it became a fixture to the land. However as this is an appeal in the wide sense which amounts to a re-hearing of the issues, I will accept that the appellant could amplify its stance and include grounds which originally did not play a role. (See *Connan v Sekretaris van Binnelandse Inkomste,* 1973 (4) SA 197 at 201F – 202D.)

[57] Although reliance is now placed on a real right that the respondent allegedly has over the quay and jetty, the precise content and nature of such right is uncertain. The appellant suggested that the State ought to stand in the position of a lessor because it was the successor in title to the Government of South Africa. However on the allegations of the appellant there is no lease

agreement either with the Government of South Africa or the Government of Namibia. No further reliance was placed on this point. This is not surprising as the definition of 'property' excludes a lease agreement, other than a lease to mine for minerals and a lease or sub-lease for that purpose. (See in this regard *Bozzone and Others v Secretary for Inland Revenue,* 1975 (4) SA 579 (AD) at 587 B-D). Nothing also turns on the provisions of the Ports Authority Act, Act 2 of 1994, as the Act does not deal with the ownership in the sea-bed and sea-shore.

[58] With reference to the warranty given by Northerns to the respondent in terms of the agreement of sale, Mr. Coleman submitted that there is in existence between the parties a real right which almost amounted to ownership.

[59] Mr. Smuts argued that the warranty was no more than a contractual or personal warranty given by the seller to the purchaser against eviction from the quay and jetty. No real right came into existence.

[60] The quay and jetty was built by Northerns, the predecessor-in-title of the respondent, during 1993 when, in terms of the then constitutional dispensation, Walvis Bay was administered by the Republic of South Africa. The legislation applicable concerning the sea, and rights in connection therewith, was the South African Sea-Shore Act, Act 21 of 1935.

[61] Sec. 2(3) thereof provides:

"The seashore and the sea of which the State President is declared by this section to be the owner, shall not be capable of being alienated or let except as provided by this Act or by any other law, and shall not be capable of being

acquired by prescription."

[62] In its definition clause the "sea" is defined as the water and the bed of the sea below the low-water mark and "sea-shore" as being the water and the land between the low-water mark and the high-water mark.

[63] Section 3 of Act 21 of 1935 further required that before any portion of the sea-shore or sea can be let to anyone, or before any permit could be granted in connection therewith, the Minister was obliged to follow certain procedures. (See sub-sec. (4), (5) and (6)). These subsections provide that where any portion was let, or where a permit was granted in respect thereof, and such portion adjoined a local authority, the Minister was obliged to consult that local authority. Thereafter a notice was to be placed in the Gazette as well as a

newspaper circulating in the area containing certain specific information and such notice was required to specify where and for what period objections to the proposed lease or permit could be lodged. People could object to such letting or the granting of permits, and where objections were raised, they had to be considered by the Minister.

[64] Mr. Smuts submitted that there was no indication that any of these steps were ever undertaken by the relevant Minister which, Counsel submitted, further proves that no lease agreement was entered into at the time with Northerns by the South African Government. Counsel further submitted that apart from any other alienation or letting or permission with regard to the sea-shore or the sea which was authorised elsewhere in Act 21 of 1935, or by any other law, approval therefor could only take place by resolution of the South

African National Assembly. There is also no indication that this has happened. (See sec. 6(1)).

[65] There is no allegation, nor was it argued, that any permit granted, or contract of lease entered into, occurred in regard to the quay and the jetty and I find that there is not in existence any such rights granted. I agree with Counsel for the respondent that the rights of the State, as owner of the seabed on which the quay and jetty are fixtures, could not be restricted, except by following the procedures laid down in Act 21 of 1935.

[66] Mr. Coleman also pointed out that the Sea-shore Ordinance, Ordinance 37 of 1958, an Ordinance of the then South West Africa administration, makes it clear that the sea bed and the sea-shore can be the subject of real rights. I agree that that is so but again nothing specific in

regard to the quay and jetty came to light.

[67] Of importance in this regard are the provisions of the Deeds Registries Act, Act 47 of 1937 (the Deeds Act). According to sec. 16 ownership in land, unless otherwise provided for by the Deeds Act or any other law, can only be conveyed from one person to another by deed of transfer. Real rights in land may also only be conveyed by a deed of cession and registration. (See in this regard *Barclays Western Bank Ltd v Comfy Hotels Ltd,* 1980 (4) SA174 (ECD) at 177E and LAWSA: Vol 14 first re-issue, par 16).

[68] Bearing in mind these provisions in the Deeds Act a further hurdle in the way of the appellant's contention that a real right existed in regard to the quay and jetty is sec. 18(5) of the Deeds Act. This sub-sec. provides:

"No deed (other than a deed of grant conveying ownership) purporting to create or deal with or dispose of any real right in any piece of unalienated state land shall be capable of registration until a certificate of registered state land has been executed in respect of that piece of land."

[69] No such certificate of registered State title has been executed in regard to the quay and jetty, in the absence of which, it would be impossible for any of the parties, to register a real right.

[70] I will accept for purposes hereof, and as was submitted by Mr. Coleman, that there may be real rights which are not registered but if it is a real right over immovable property then at least that right, although not registered, should be capable of registration. Counsel referred the Court to the case of *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others,* 2001 (3) SA 569 (SCA) which, in my opinion supports what has been set out herein before. At p 580 B-E the following was stated:

"Dealing, at 23H – 24E, with the distinction between real rights and contractual rights, in that case unregistered servitudes, Ogilvie Thompson JA referred to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd,* 1918 AD 1, where Innes CJ said at 16:

> 'Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more that a contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram legi loci* by an entry made in the register and endorsed upon the title deeds of the servient property.'

The Grant case is therefore no authority for a proposition that a registered real right is no longer maintainable against the whole world when it is erroneously omitted from a subsequent title deed,"

[71] If I understand this excerpt correctly until a real right is registered it remains a contractual right where the one party to the contract may claim performance by the other but until it is registered it would not be maintainable against *bona fide* third parties. What is also clear is that once the right is registered, it will still be maintainable against the

world at large even though it was erroneously omitted from a subsequent title deed. At p 580 B Streicher JA, who wrote the judgment of the Court, stated that an agreement to grant a servitude gives rise to a real right only when it has been registered.

[72] In the present instance no real right was registered over the quay and the jetty this, so it seems, was common cause. However, with reference to the warranty, given by Northerns, to the respondent Mr. Coleman argued that this is almost akin to ownership and is therefore a real right.

[73] This argument of Counsel is fallacious. It is in my opinion impossible for two parties to create a real right over the property of another without the consent and knowledge of that third party. The warranty given by Northerns is, in the

circumstances of this case, no more than a personal undertaking by it to indemnify the respondent from eviction from the quay and jetty. The warranty is not registerable (See sec. 63 of the Deeds Act) nor would Northerns be able to make good its warranty against legitimate interference by the State, the owner of the sea bed and sea shore. However, the warranty given by Northerns, although of wide import, would certainly not have caused it much anxiety as they could accept that it was hardly possible that anyone could challenge the State's claim to the seabed and sea-shore so that the only possible challenge could come from the State, which, having granted permission to erect the structures, was also highly unlikely.

[74] I am therefore of the opinion that the contention of the appellant that a real right exists in regard to the quay and jetty must also fail.

75] Lastly Mr. Coleman submitted that if the Court should come to the conclusion that the appellant erroneously included the quay and jetty in his determination of the transfer duty payable then this Court should determine transfer duty on the basis of a fair value. This submission was made on the grounds that we are dealing with an appeal in the wide sense which really means that there shall be a re-hearing of the whole matter and that the Court should substitute its own decision for that of the appellant. In doing so Counsel urged us to have regard to the sworn valuation of de Wit who valued the land with fixtures at N$20,632,400.00 Mr. Coleman also criticised the Court *a quo* for not substituting its own decision for that of the appellant.

76] Generally speaking the submission by Counsel, as a legal proposition, is correct. (See *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue,* 1944 AD142 at 150 and the *Conman* – case, *supra.*) (See also sec 18(4) of the Act.)

77] However, in the present instance the appellant did not dispute the computations made by the respondent in arriving at the various values. Not only did the appellant not dispute such computations but he accepted them and accepted the methodology whereby these values were determined. If the appellant had disputed these values the respondent would have been able to put further, and proper, evidence before the Court such as, e.g. the municipal value of the three erven with fixtures.

78] In determining that transfer duty was payable on the amount of N$ 18,000,000-00 the appellant accepted the respondent's computation which included the amount declared by the purchaser and seller, namely the total of N$ 12,094,258-00 in order to arrive at the amount of N$ 18,000,000-00. The appellant's acceptance of the amount of N$ 18,000,000-00 as the consideration paid for the property acquired, was erroneous, as I have tried to show, and he should have excluded the value placed on the quay and jetty. Once the error is corrected the value of the property acquired

is the amount of N$12,094,258-00 as was accepted by the appellant in determining the value of N$18,000,000-00.

79] Under the circumstances we must decline the invitation by Mr. Coleman to determine afresh what we think should be a fair value whereas the declared value was not disputed by the appellant, and in fact accepted by him when he erroneously included the value of the quay and jetty in his computation.

80] This is in my opinion a matter which would justify the employment of two instructed Counsel. Mr. Coleman also did not submit otherwise.

81] In the result the following order is made:

> The appeal is dismissed with costs, such costs to include the costs of two instructed Counsel.

_____
STRYDOM, A.J.A.

I agree.

_____
SHIVUTE, C.J.

I agree.

_____
CHOMBA, A.J.A.

COUNSEL ON BEHALF OF THE FIRST AND SECOND APPELLANTS:	MR. G. COLEMAN
Instructed by:	The Government Attorney
COUNSEL ON BEHALF OF THE RESPONDENT	MR. D.F. SMUTS, S.C. Asst. by MR. G. DICKS
Instructed by:	Engling, Stritter & Partners