



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

Case No.: 2025-045530

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

MINISTER OF FINANCE

First Respondent

**COMMISSIONER, SOUTH AFRICAN
REVENUE SERVICES**

Second

Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Fourth Respondent

Coram: Cloete J, Francis J et Lekhuleni J

Heard: 28 and 29 January 2026

Delivered: 5 March 2026

Summary: Constitutional Law – Section 7(4) of the VAT Act 89 of 1991– impermissible delegation of legislative power to the Minister – Section 7(4) authorising the executive to determine rate of tax that applies across the economy - delegated power not accompanied by express statutory criteria governing the magnitude of the alteration, nor requiring parliament’s ratification within a defined short period after its exercise - No sufficiently defined statutory limits or mechanisms of prompt legislative control to ensure that the balance between executive agility and parliamentary supremacy is maintained - section 7(4) declared unconstitutional and invalid as it constitutes an impermissible delegation of legislative power to the executive.

ORDER

1. It is declared that section 7(4) of the Value-Added Tax Act 89 of 1991 is inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution), and invalid.
2. The declaration of invalidity in paragraph 1 of this order is suspended for a period of twenty four (24) months from the date of this order to afford Parliament an opportunity to correct the defect.
3. In terms of section 172(2)(a) of the Constitution, the declaration of invalidity in paragraph 1 is referred for confirmation or otherwise by the Constitutional Court.

4. The applicant's application for a declaratory order in respect of the first respondent's announcement of 12 March 2025 is dismissed.
5. The first and second respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved, on Scale C (party and party) and including the costs of two counsel where so employed.
6. The Registrar is directed to transmit the record of these proceedings, including this judgment, to the Registrar of the Constitutional Court within 10 court days of the date of this order.

JUDGMENT

FRANCIS J (CLOETE J and LEKHULENI J concurring)

Introduction

[1] This application concerns the constitutional validity of section 7(4) of the Value-Added Tax Act 89 of 1991 ('the VAT Act'). The provision empowers the Minister of Finance ('the Minister'), by announcement in the national annual budget, to alter the rate of value-added tax ('VAT') specified in section 7(1) of the VAT Act. The altered rate takes effect from a date determined by the Minister and remains operative for up to 12 months, subject to Parliament passing legislation giving effect to the announcement within that period.

[2] The applicant, the Democratic Alliance ('the DA'), brings an abstract constitutional challenge. It seeks an order declaring section 7(4)

unconstitutional and invalid, together with declaratory relief concerning the Minister's budget announcement of 12 March 2025.

[3] The Minister and the Commissioner for the South African Revenue Service ('SARS') oppose the application. The Speaker of the National Assembly and the Chairperson of the National Council of Provinces were cited by virtue of their offices and have not participated actively. Accordingly, and for convenience, I will refer at times to the Minister and SARS collectively as "the respondents".

[4] The matter raises questions concerning the separation of powers, the constitutional allocation of taxing authority, and the permissible limits of legislative delegation.

[5] These questions arise against the backdrop of a well-established constitutional principle: that the power to tax is an incident of representative democracy and is reserved for elected legislative bodies. But the content and limits of that principle, and its interaction with the practical exigencies of modern fiscal governance, lie at the heart of the dispute before us.

Factual and legislative background

[6] Section 7(1) of the VAT Act imposes VAT '*for the benefit of the National Revenue Fund*' at a rate of 15 per cent on specified taxable supplies and importations.

[7] Section 7(4) provides that if the Minister announces in the national annual budget that the VAT rate is to be altered, the alteration becomes effective from a date determined in the announcement and continues to apply for 12

months, subject to Parliament passing legislation giving effect to that announcement within that period.

[8] The altered rate thus derives immediate legal force from executive announcement. Parliament's role is confined to subsequently deciding whether or not to confirm the altered rate through legislation.

[9] This provision operates within the broader statutory framework governing the national budget. Section 27(1) of the Public Finance Management Act 1 of 1999 ('PFMA'), requires the Minister to table the annual budget for a financial year in the National Assembly before the start of that financial year or, in exceptional circumstances, on a date as soon as possible after the start of that financial year, as the Minister may determine. Section 7(2) of the Money Bills and Related Matters Act 9 of 2009 ('the Money Bills Act') provides that the budget documentation must include a proposed fiscal framework, which sets out estimates of revenue, expenditure, borrowing and debt-service costs for the ensuing three financial years. Section 7 read with 8 of the Money Bills Act requires Parliament, within 16 days of the tabling of the budget, to adopt or amend the fiscal framework. Once adopted, the fiscal framework becomes the cornerstone of the budgetary process: all subsequent revenue and appropriation bills must be consistent with it.

[10] It is within this legislative ecosystem that section 7(4) operates. The Minister may, as part of the budget, announce a change to the VAT rate. That change is reflected in the revenue proposals underpinning the fiscal framework. Parliament, in considering the fiscal framework, is made aware of the proposed alteration and may, by amending the fiscal framework or by declining to pass confirmatory legislation, express its disapproval. The practical and legal

effectiveness of these parliamentary checks is a matter of sharp dispute between the parties.

[11] On 12 March 2025, the Minister, delivering the national budget, announced an alteration to the VAT rate in terms of section 7(4). The announcement provided for an increase from 15% to 15,5% with effect from 1 May 2025, and a further increase to 16% with effect from 1 April 2026. The announcement was met with significant political opposition. On 21 April 2025, the Speaker of the National Assembly informed the Minister that the adoption of the fiscal framework report was subject to conditions, including that alternative revenue proposals be explored. On 22 and 23 April 2025, the Minister engaged with political parties to seek alternative fiscal measures.

[12] On 24 April 2025, the Minister announced that a Rates and Monetary Amounts and Revenue Laws Bill would be introduced to reverse the VAT increase. On 25 April 2025, he withdrew the Appropriation Bill and the Division of Revenue Bill that had accompanied the March budget. On 27 April 2025, this Court issued an order by agreement suspending the operation of the Minister's 12 March announcement pending the final determination of Part B of this application (which is what we are seized with) or the passing of legislation regulating the VAT rate, whichever occurred first.

[13] On 21 May 2025, the Minister tabled a new budget in Parliament. In his budget speech, he stated: "*And as I have already said, the proposed increases in the VAT rate in 2025/26 and 2026/27 have been dropped*". The Rates and Monetary Amounts and Revenue Laws Bill, which remains before Parliament, contains a clause providing that the 12 March 2025 announcement "*does not come into effect*", effectively providing that the VAT rate will remain unchanged at 15%. The legislative intervention took effect from 1 May 2025, even though

the bill has not yet been enacted. SARS confirmed that it expected the Bill to be enacted in early 2026.

[14] It is against this factual matrix that the parties' legal contentions must be evaluated.

The parties' submissions: an overview

[15] The DA's case, as pleaded in its founding affidavit, rests on two constitutional pillars. First, it contends that section 7(4) delegates to the Minister the power to impose, increase or reduce a national tax – a power that the Constitution reserves exclusively to Parliament and that may not be delegated to the executive. This, it submits, is an absolute prohibition; once a provision is found to delegate a taxing power, it is axiomatically unconstitutional. Second, it contends that section 7(4) delegates plenary legislative power to the Minister to amend section 7(1) of the VAT Act, and that such delegation is impermissible regardless of the presence of safeguards or the limited duration of the power.

[16] In argument, the DA advanced two further contentions. It argued that section 7(4) violates section 77 of the Constitution, which prescribes the procedure for the enactment of money bills. It also argued, in the alternative, that even if there is no absolute prohibition on the delegation of plenary powers, the delegation in section 7(4) fails the context-specific, factor-based test articulated by the Constitutional Court in *Nu Africa*¹.

[17] The respondents raised a threshold procedural objection. They submitted that the DA's founding papers pleaded only an absolutist case, and that the

¹ *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* 2024 (1) SA 587 (CC).

arguments concerning section 77 and the *Nu Africa* factors were not properly before the Court. They contended that the DA could not, in reply or in oral argument, introduce new causes of action that were neither pleaded nor foreshadowed in its founding affidavits.

[18] On the merits, the Minister and SARS drew a sharp distinction between the delegation of the power to impose a new tax and the delegation of the power to alter the rate of an existing tax. They submitted that all the authorities relied upon by the DA – *Fedsure*², *Shuttleworth*³, *Casino*⁴ and *Mohlaba*⁵ – concerned the former, and that section 7(4) falls squarely within the latter, constitutionally permissible category. They further contended that the dominant purpose of section 7(4) is not revenue-raising but sound fiscal management, rendering the power regulatory in nature and outside the prohibition on delegating taxing powers.

[19] In relation to the plenary power challenge, the respondents submitted that there is no absolute rule against the delegation of plenary legislative power. They traced the evolution of the Constitutional Court's jurisprudence from *Executive Council*⁶ through *Mpumalanga Department of Education*⁷ and *Smit*⁸ to *Nu Africa* and contended that *Nu Africa* has definitively settled the matter: the validity of a delegation depends on a context-specific inquiry into the nature, scope and constraints of the power, not on rigid categorisation. They

² *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

³ *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC).

⁴ *Casino Association of South Africa and Others v Member of the Executive Council for Economic Development Environment Conservation and Tourism and Others* 2024 (5) BCLR 611 (CC).

⁵ *Mohlaba and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 2025 (4) BCLR 458 (CC).

⁶ *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC).

⁷ *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

⁸ *Smit v Minister of Justice and Correctional Services* 2021 (1) SACR 482 (CC).

further argued that section 7(4) does not delegate plenary power at all, but merely a limited, temporary power to adjust one component of an existing tax.

[20] The respondents cited international precedent in support of their case. For example, in *Ontario English Catholic Teachers' Association*,⁹ the Supreme Court of Canada upheld a delegation permitting the executive to adjust tax rates in certain circumstances, emphasising that express statutory authority and parliamentary oversight render such delegations permissible under the principle of no-taxation-without-representation (as reflected in section 53 of the Constitution Act, 1867 (Canada)). The Court noted that temporary or conditional delegations do not violate core democratic controls on taxation when confined and subject to legislative confirmation or reversal.

[21] In the United Kingdom, the delegation of rate-setting powers is commonplace and reflects a long-standing practice compatible with parliamentary supremacy and the no-taxation-without-representation principle. In *Wilts United Dairies*¹⁰ the Court of Appeals affirmed that part of the domestic law flows from Parliament and that delegation by Parliament to the Executive of tax or rate-setting powers is permissible in principle, provided that it is done in the clearest terms. The House of Lords reaffirmed this decision¹¹ which is regarded as embodying a fundamental principle.¹²

[22] In the United States, the Supreme Court has addressed delegations involving fiscal or quasi-tax powers under the non-delegation doctrine which has been framed through the requirement that Congress articulate an

⁹ *Ontario English Catholic Teachers' Association v Ontario (Attorney General)* 2001 SCC 15; [2001] 1 SCR 470 (para 73).

¹⁰ *Attorney General v Wilts United Dairies Limited* (1921) (37) T.L.R. 884 (CA).

¹¹ *Attorney General v Wilts United Dairies Limited* (1922) 38 T.L.R. 781 (HL).

¹² *O'Brien & Ors v Independent Association* [2007] UKHL 10 (14 March 2007), dissenting judgment of Lord Roger Earlsferry at para 66.

‘intelligible principle’ to guide delegated authority. Although the Supreme Court invalidated delegations in *Panama Refining*¹³ and *Schechter Poultry*¹⁴ subsequent jurisprudence has adopted a deferential approach, sustaining delegations where guiding standards are discernible. Thus, for example, in *Skinner*¹⁵, the Court upheld a delegation authorising the Secretary of Transportation to establish user fees (with revenue-raising elements) where Congress provided an intelligible principle and the delegation was not excessive (also see, *Mistretta*¹⁶).

[23] The respondents argued that these cases illustrate that even in jurisdictions with strict non-delegation scrutiny, limited delegations of rate-adjustment powers (especially temporary or regulatory in character) are constitutionally tolerable when constrained by statutory limits and parliamentary/executive checks.

[24] The respondents contended that South African jurisprudence, as developed in cases such as *Executive Council*¹⁷, aligns with these foreign approaches by permitting context-specific delegations rather than imposing absolute prohibitions. A blanket invalidation of section 7(4) would diverge from this comparative tolerance for pragmatic fiscal delegations in modern governance.

[25] Finally, the respondents submitted that the relief sought in respect of the March 2025 announcement is moot. The Minister’s announcement on 12 March 2025 is no longer of any force and effect, and it has been overtaken by the announcement withdrawing the proposed VAT rate increase on 21 May 2025.

¹³ *Panama Refining Co. Ryan* 293 U.S 388 (1935).

¹⁴ *Schechter Poultry Corp v United States* 295 U.S 495 (1935).

¹⁵ *Skinner v Mid-America Pipeline Co.* 490 U.S. 212 (1989) (at 223).

¹⁶ *Mistretta v United States* 488 U.S. 361 (1989).

¹⁷ *Executive Council* above n 6 para 63.

[26] We turn now to evaluate these submissions, beginning with the procedural objection, then addressing each substantive challenge in turn, and finally considering the appropriate remedy.

The procedural objection

[27] Before turning to the merits, it is necessary to address a threshold objection raised by the respondents. They contend that the DA's founding affidavit advanced an absolutist case — namely, that the power to tax and plenary legislative power can never be delegated — and that the applicant impermissibly sought in argument to advance alternative grounds based on section 77 of the Constitution (relating to the enactment of money bills) and the contextual approach articulated in *Nu Africa*.

[28] It is a settled principle that an applicant must make out its case in its founding affidavit. Constitutional litigation is no exception. In *My Vote Counts NPC*¹⁸, the Constitutional Court emphasised that a litigant must define the issues in its founding papers and may not raise a new case in argument.

[29] The purpose of that rule is fairness. A respondent must know the case it is called upon to meet. The question, therefore, is whether the applicant's reliance on section 77 and the contextual delegation analysis constitutes a new cause of action or merely a refinement of the pleaded case.

[30] The DA's founding affidavit challenged section 7(4) on the basis that it delegated to the executive the power to impose, increase or reduce a national tax and that it delegated legislative power to amend an Act of Parliament. The

¹⁸ *My Vote Counts NPC v Speaker of the National Assembly* [2016] 1 All SA 1 (CC) para 177.

affidavit referred expressly to the constitutional framework governing money bills and to the principle that only Parliament may impose national taxes.

[31] Although section 77 was not cited by number in every instance, the constitutional principle derived from it was squarely invoked. The respondents addressed that principle fully in their answering affidavits and heads of argument. They cannot credibly claim surprise.

[32] As to the contextual delegation analysis, the factual substratum relevant to that enquiry — including the breadth of the Minister’s discretion, the 12-month duration, the absence of statutory criteria, and the practical irreversibility of VAT — was pleaded in detail. The respondents themselves relied on *Nu Africa* in support of constitutionality and addressed the contextual factors extensively.

[33] The DA’s reliance on section 77 and the contextual approach does not introduce a new factual case. It advances legal argument based on facts already pleaded. Courts have recognised that a point of law arising from the pleaded facts may be advanced provided it causes no prejudice.¹⁹

[34] We are persuaded that the respondents suffered no prejudice. The issues were subsequently fully ventilated in affidavits and oral argument. The procedural objection must therefore fail.

The delegation of the taxing power

[35] The DA’s primary submission is that section 7(4) delegates to the Minister the power to impose, increase or reduce a national tax – a power that

¹⁹ See inter alia *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 12.

the Constitution vests exclusively in Parliament and that cannot be delegated to the executive. This submission rests on a long line of Constitutional Court authority.

[36] In *Fedsure*, this Court held that “*the power of taxation and appropriation of government funds is reserved to the legislature*”²⁰. In *Shuttleworth*, the Court affirmed that “*the power to tax residents is an incident of, and subservient to, representative democracy. the manner and the extent to which national taxes are raised and appropriated must yield to the democratic will as expressed in law. It is the people through their duly elected representatives who decide on the taxes that residents must bear.*”²¹

[37] In *Casino Association*, the Court, interpreting *Shuttleworth*, held that the determinative question is the dominant purpose of the impugned provision or charge. If the dominant purpose is to raise revenue for the general purposes of government, the provision imposes a tax and must comply with the constitutional requirements for money bills. If the dominant purpose is to regulate conduct or defray the costs of regulation, the provision imposes a regulatory charge and may be delegated.²²

[38] Most recently, in *Mohlaba*, Theron J stated:

*"In accordance with these provisions, this Court has repeatedly held that there must be a direct constitutional source for the power to impose a tax. The Constitution only affords a taxing power to the three elected spheres; and the power to tax cannot be delegated to the Executive."*²³

²⁰ *Fedsure* above n 2 para 44.

²¹ *Shuttleworth* above n 3 para 42.

²² *Casino Association* above n 4 paras 49-50.

²³ *Mohlaba* above n 5 para 17.

[39] The DA submits that these authorities establish an absolute prohibition on the delegation of any power that can be characterised as a taxing power. The respondents, in contrast, submit that the prohibition is directed at the delegation of the power to impose a new tax *ab initio*, and does not extend to the delegation of the power to alter the rate of an existing tax that Parliament itself has imposed.

[40] Which reading is correct? The distinction urged by the respondents finds support in the facts of the cases upon which the DA relies. *Fedsure* concerned the delegation by a municipal council of its power to levy rates to a mayoral committee – a delegation of the primary power to impose a tax. *Casino Association* concerned a provincial Act that authorised the MEC to impose a gambling levy by regulation; the tax did not exist until the MEC acted.²⁴ *Mohlaba* concerned the delegation by an Act of Parliament to traditional councils of the power to impose tribal levies. In none of these cases was Parliament, or a provincial legislature, delegating the power to adjust the rate of a tax that it had already fully constituted and imposed.

[41] Nevertheless, we do not think the distinction can be pressed to the length the respondents urge. The power to set the rate of a tax is not a minor or incidental detail. It is, as the Supreme Court of Canada observed in *Ontario English Catholic Teachers' Association*, "*the defining feature of the tax. This must be the case, for if the rate is zero, there is no tax.*"²⁵ By parity of reasoning in the South African context, to delegate the power to set the rate (even if the rate is zero) is to delegate a substantial part of the taxing power itself.

²⁴ *Casino Association* above n 4 para 1.

²⁵ *Ontario English Catholic Teachers' Association* above n 9 para 73 at 520

[42] Moreover, the respondents' characterisation of the dominant purpose of section 7(4) as 'regulatory' or 'sound fiscal management' does not withstand scrutiny. The long title of the VAT Act declares its purpose to be "*to provide for taxation in respect of the supply of goods and services and the importation of goods*". Section 7(1) itself states that the tax is levied "*for the benefit of the National Revenue Fund*". The Minister, in his answering affidavit, described the purpose of section 7(4) as being "*to ensure timely revenue to support anticipated expenditures*". There is no suggestion in the text of the provision, or in the evidence, that its dominant purpose is to regulate conduct or influence behaviour. It is, and always has been, a revenue-raising mechanism.

[43] The more fundamental question is whether the prohibition on delegation is absolute or qualified. The Constitutional Court has consistently used categorical language: "*the power to tax cannot be delegated to the Executive*"²⁶. It has not, in any of the cases relied upon by the parties, articulated exceptions or qualifications to this rule. Yet it has also not had occasion to consider a case factually analogous to the present one – a delegation, by Parliament, of the power to temporarily adjust the rate of a tax it has already imposed, subject to parliamentary override/ oversight? within a fixed period.

[44] We are therefore required to determine, as a matter of first principle, whether the constitutional prohibition on delegating the power to tax extends to the delegation at issue. In doing so, we must be guided by the text and structure of the Constitution, the purpose of the prohibition, and (inevitably in the particular circumstances) the practical consequences of our decision.

[45] Section 77(1) of the Constitution defines a Money Bill as, among other things, a bill that "*imposes national taxes, levies, duties or surcharges*' or

²⁶ *Mohlaba* above n 5 para 17.

‘abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges’. Section 77(3) provides that a Money Bill must be considered in accordance with the procedure established by section 75. In turn, section 75 deals with the passing of national legislation by Parliament.

[46] The Constitution thus expressly contemplates that the imposition, abolition and reduction of national taxes are acts that must be performed by Parliament through a prescribed legislative procedure. It says nothing, in terms, about the delegation of the power to perform these acts. But the clear implication is that such acts are reserved for Parliament itself; they are not matters that may be assigned to the executive.

[47] Does a temporary alteration of the VAT rate constitute an imposition or reduction of a national tax? In our view, it does. When the Minister announces an increase from 15% to 15,5%, he alters the quantum of tax payable on every taxable supply. When he announces a decrease, he correspondingly reduces that burden. The temporary character of the alteration does not deprive it of its substantive effect. For so long as it operates, it determines the amount of tax that must be paid and collected under the Act.

[48] It follows that the power conferred by section 7(4) is functionally equivalent, for the period of its operation, to the power exercised by Parliament when it amends section 7(1). The fact that the alteration is subject to later parliamentary confirmation does not alter the reality that, during the interim period, the applicable rate is fixed by executive announcement rather than by an Act of Parliament.

[49] The respondents submit that section 77 regulates only the enactment of primary legislation and does not preclude Parliament from authorising the

executive, through a money bill, to determine or adjust a tax rate within defined bounds. For this submission, they rely on the minority judgment of Rogers J in *Nu Africa*, where he held that sections 73 to 77 of the Constitution “*in their own terms only govern how legislation is to be enacted by Parliament*”²⁷ and are inapplicable to the exercise of delegated powers by the executive. That submission cannot be dismissed lightly. It is correct that Parliament enacted section 7(4) itself through legislation that complied with the constitutional requirements for money bills.

[50] However, the constitutional question is not whether Parliament followed the correct procedure when enacting section 7(4), but whether the substance of the power thereby conferred is compatible with the constitutional allocation of fiscal authority. Section 77 reflects the principle that decisions to impose, reduce or abolish national taxes must be taken by the elected representatives of the people in accordance with the prescribed legislative process. The permissibility of delegating aspects of that decision must therefore be assessed through the broader doctrine governing legislative delegation.

[51] We therefore do not treat section 77 as establishing an absolute procedural bar to any delegation touching upon tax rates. Rather, it reinforces the constitutional significance of the power in question and informs the intensity of scrutiny required when Parliament confers authority upon the executive to alter the incidence or quantum of a national tax.

The delegation of plenary legislative power

[52] The DA's second submission is that section 7(4) delegates plenary legislative power to the Minister to amend section 7(1) of the VAT Act, and that

²⁷ *Nu Africa* above n 1 para 183 (Rogers J).

such delegation is impermissible regardless of the presence of safeguards or the limited duration of the power.

[53] The concept of plenary legislative power was defined in *Smit* as “*the authority to pass, amend or repeal an Act of Parliament.*”²⁸ The Court in *Smit* held that “*the legislature may not assign plenary legislative power to another body.*”²⁹

[54] The respondents submit that this statement, read in isolation, is misleading. They trace the history of the doctrine from *Executive Council 1*. In that case, Chaskalson P held that “[g]enerally speaking, plenary powers may not be delegated,” but immediately acknowledged exceptions: “*There may be exceptional circumstances, such as a war and emergencies, in which there will be a necessary implication that laws can be made without following the forms and procedures prescribed by sections 59, 60 and 61.*”³⁰

[55] More pertinently, Mahomed DP, in the same case, articulated a context-specific, factor-based approach. He stated that these may include:

*“the constitutional instrument in question, the powers of the Legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally.”*³¹

[56] This nuanced approach was endorsed by a unanimous Constitutional Court in *Mpumalanga Petitions Bill* where Langa DP referred with approval to

²⁸ *Smit* above n 8 para 31.

²⁹ *Ibid* para 35.

³⁰ *Executive Council* above n 6 para 62.

³¹ *Executive Council* above n 6 para 136 (Mahomed DP).

the "factors relevant to a consideration of whether the delegation of a law-making power is appropriate"³² as articulated by Mahomed DP.

[57] The tension between the categorical statement in *Smit* and the contextual approach of *Executive Council* and *Mpumalanga Petitions Bill* was resolved – or at least substantially clarified – in *Nu Africa*. That case concerned section 75(15)(a) of the Customs and Excise Act 91 of 1964 and section 74(3) of the VAT Act, which empowered the Minister to amend schedules to those Acts. The Constitutional Court, per Mathopo J, held:

*"The fallacy in Nu Africa's submission is that it would render every statute that permits a Member of the Executive to amend a schedule unconstitutional without due regard to the nature and extent and scope of the delegation or, indeed, the several factors laid down by Mahomed DP in Executive Council. This absolutist approach is at odds with the rationale of Executive Council."*³³

[58] The Court went on to state:

*"What Nu Africa loses sight of is that to determine whether a delegation constitutes an affront to the Constitution, the inquiry should be context-specific and consideration should be given to the scope of the delegation, the extent of the power, the presence or absence of safeguards and parliamentary oversight, the purpose of the delegation, and the nature of the power delegated."*³⁴

[59] The majority in *Nu Africa* did not purport to overrule *Smit*. It distinguished it on the basis that *Smit* involved a delegation of the power to create criminal offences by amending a schedule – a core legislative function of a qualitatively different order, exercised with no clear and binding framework.³⁵ But the reasoning of the majority is expressed in terms that are not confined to schedule amendments. It repudiates, in clear and categorical language, the

³² *In re Constitutionality of the Mpumalanga Petitions Bill*, 2000, 2002 (1) SA 447 (CC) para 19.

³³ *Nu Africa* above n 1 para 94.

³⁴ *Nu Africa* above n 1 para 95.

³⁵ *Nu Africa* above n 1 paras 91-92.

absolutist approach to delegation. It affirms that the validity of a delegation depends on a context-specific inquiry into a range of factors.

[60] We are bound by this reasoning. It is the most recent pronouncement of the Constitutional Court on the subject, and it is irreconcilable with the proposition that the delegation of plenary legislative power is ‘always’ impermissible. The proper inquiry is whether, in the particular context of section 7(4), the delegation is constitutionally permissible.

[61] Before undertaking that inquiry, we must address the DA's submission that *Nu Africa* is distinguishable because it concerned schedules while section 7(4) amends the body of the Act. This submission elevates form over substance. As the Constitutional Court noted in *De Reuck*, schedules to a statute "*form part of the enactment*."³⁶ The majority in *Nu Africa* expressly relied on this principle.³⁷ The Court did not treat the schedule amendments as qualitatively different from amendments to the body of the Act; it treated them as amendments to the Act itself, but found the delegation permissible because of the *regulatory* nature of the power and the presence of adequate safeguards. The same approach must apply here.

[62] Moreover, the respondents have pointed to numerous other provisions in tax legislation that delegate to the Minister the power to determine or alter tax rates, some of which are located in the body of the relevant enactment and some in schedules. If the location of the provision were constitutionally determinative, Parliament could easily relocate the VAT rate to a schedule and thereby validate the delegation. The Constitution does not countenance such

³⁶ *De Reuck v Director of Public Prosecutions* (WLD) 2004 (1) SA 406 (CC) para 37.

³⁷ *Nu Africa* above n 1 para 91.

formalism. What matters is the substance of the power delegated, not its location in the statute.

Evaluating section 7(4) under the *Nu Africa* framework

[63] We turn then to evaluate section 7(4) against the factors identified in *Nu Africa*, drawing also on the factors enumerated by Mahomed DP in *Executive Council*. We do so cognisant that this is a qualitative assessment, weighing the nature and extent of the power delegated against the safeguards and constraints that accompany it, and considering the context in which the delegation operates.³⁸

(a) The nature and scope of the delegated power

[64] Section 7(4) empowers the Minister to alter the VAT rate. This is a significant power. It directly affects the tax burden borne by every consumer of goods and services in South Africa. It is not a power to make minor, technical adjustments; it is a power to change the central charging provision of the VAT Act. The Minister's discretion is, on the face of the provision, unfettered. There is no statutory cap on the extent of the increase or decrease. There is no statutory guidance on the circumstances in which the power may be exercised, beyond the requirement that the announcement be made in the national annual budget.

[65] We accept, as the respondents submitted, that the exercise of the power is subject to the principle of legality and the requirement of rationality. But these are background constitutional constraints that apply to all exercises of public power. They do not compensate for the absence of specific, statutory constraints

³⁸ *Nu Africa* above n 1 para 95; *Executive Council* above n 6 para 136 (Mohamed DP).

on the delegated power itself. As the DA submitted, the contrast with other jurisdictions – some of which impose caps on the percentage change or require prompt parliamentary ratification – is striking.

[66] The respondents argue that the Minister is the constitutional actor best placed to exercise this power, given his role in public finance and the institutional expertise of National Treasury and SARS. We accept that the Minister is a suitable delegate. But suitability does not answer the constitutional question. The issue is not whether the Minister is an appropriate person to set the tax rate; it is whether the Constitution permits Parliament to delegate that power at all, and if so, under what conditions.

(b) The duration of the power

[67] The alteration operates for a maximum of 12 months. If Parliament does not pass confirmatory legislation within that period, the alteration lapses and the rate specified in section 7(1) revives. The temporary nature of the power is a significant factor in its favour. It distinguishes this delegation from a permanent cession of legislative authority.

[68] However, the temporary nature does not eliminate the constitutional difficulty. For the duration of the 12-month period, the operative tax rate is the Minister's rate, not Parliament's rate. Parliament's failure to act does not invalidate the tax already collected; it merely prevents the alteration from continuing beyond 12 months. The tax imposed during that period is, in every practical sense, a tax imposed by the executive.

(c) Parliamentary oversight and control

[69] Section 7(4) expressly provides that the alteration is “*subject to Parliament passing legislation giving effect to that announcement within that period.*” This is a significant safeguard. It ensures that the Minister’s alteration cannot become permanent without the affirmative approval of Parliament.

[70] The Minister also pointed to Parliament’s power under section 8 of the Money Bills Act to amend the fiscal framework. We accept that this is a further mechanism by which Parliament can express its disapproval of a proposed tax change. However, we do not accept that an amendment to the fiscal framework has the legal effect of invalidating a section 7(4) announcement. The fiscal framework governs the allocation of revenue and expenditure; it does not override the substantive provisions of the VAT Act. The VAT rate remains as announced unless and until Parliament amends the VAT Act itself.

[71] The respondents further rely on the Minister’s ability to reverse an announcement under section 7(4), citing section 10 of the Interpretation Act 33 of 1957³⁹ and *Kruger*⁴⁰. They submit that this adds an additional check and balance, as demonstrated by the events of this case. We accept that the Minister may, in appropriate circumstances, withdraw or reverse an announcement. But this is a matter of executive grace, not of legal compulsion. It does not constitute a parliamentary check; it is a self-imposed restraint. Moreover, the fact that the Minister withdrew the announcement in the face of political opposition does not render the power any less sweeping in its potential exercise.

³⁹ Section 10(3) “Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.”

⁴⁰ *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) paras 60-61.

In our view, the constitutionality of a provision must be assessed on the assumption that the power will be exercised properly, not on the assumption that it will be exercised benevolently.

[72] The reality is that Parliament's primary check on the Minister's power is the requirement of confirmatory legislation within 12 months. This is a meaningful check, but it is an *ex post* check. It operates *after* the tax has already been imposed and collected. The irreversibility of VAT – a feature emphasised repeatedly by the DA – means that even if Parliament withholds approval, the public cannot recover the tax paid during the 12-month period.

(d) The necessity for speed and flexibility

[73] The respondents placed great weight on the need for fiscal agility. They submitted that the mechanism in section 7(4) is necessary to enable the Minister to respond quickly to changing economic circumstances, and that Parliament cannot provide the same speed and certainty due to the inherent delays in the legislative process. They pointed to the unique features of VAT, which cannot be adjusted retroactively, and to the fact that money bills typically take between six and twelve months to pass.

[74] We accept that responsive fiscal management is a legitimate governmental objective, and that VAT's collection mechanism makes retroactive adjustment impracticable. We also accept that the legislative process takes time. However, we are not persuaded that the mechanism in section 7(4) is the only way to achieve fiscal agility, or that its absence would render responsible budgeting impossible.

[75] Other taxes, such as income tax, are adjusted through a mechanism that does not involve immediate, irreversible imposition. Changes are announced in the budget and take effect only if and when Parliament passes confirmatory legislation, often with retrospective effect. While we acknowledge that this mechanism is not directly transferable to VAT because of the impossibility of retroactive collection, the fact that the legislature has chosen a different path for income tax does not mean that no alternative exists for VAT. Parliament could, for example, require that any VAT increase be approved by a parliamentary resolution within a short period, as is the case in some other jurisdictions.

[76] Moreover, the facts of this case demonstrate that the government was able to respond to a revenue shortfall without resorting to an immediate VAT increase. Following the political opposition to the March 2025 announcement, alternative revenue and expenditure measures were identified and implemented. This suggests that the mechanism in section 7(4), while convenient, is not indispensable.

(e) The ubiquity of similar provisions

[77] SARS annexed to its papers a list of 22 provisions in various tax Acts that delegate to the Minister the power to determine or alter tax rates. The Minister also referred to numerous other statutes containing similar powers. This is a relevant consideration. It demonstrates that the mechanism in section 7(4) is not an isolated anomaly but a longstanding feature of South African tax administration. Parliament has repeatedly and consistently chosen to structure tax legislation in this way.

[78] The prevalence of comparable provisions across the statute book underscores the importance of a careful, context-sensitive approach. It does not

follow that all delegations of rate-setting authority stand or fall together. The constitutional assessment must remain attentive to the nature of the tax concerned, the breadth of the discretion conferred, and the safeguards provided. A delegation relating to a narrowly defined or sector-specific levy may raise different considerations from one concerning a broadly based consumption tax that affects the general public. This is not to create a hierarchy of taxes, but to recognise that the practical impact of a delegation may bear upon the adequacy of the safeguards that accompany it.

(f) The nature of VAT and irreversibility

[79] The irreversibility of VAT is a feature that materially affects the weight to be attached to the parliamentary safeguard in section 7(4). The requirement of confirmatory legislation ensures that an alteration cannot endure beyond twelve months without Parliament's approval. It does not, however, require that Parliament approve the alteration before it takes effect. During the interim period, the rate determined by the Minister governs the liability of taxpayers.

[80] In the case of VAT, that interim operation has particular practical consequences. VAT is levied and collected on a transaction-by-transaction basis. Once collected and paid into the fiscus, it is not ordinarily refundable merely because Parliament later declines to confirm the alteration. The parliamentary check therefore operates prospectively, not retrospectively.

[81] The respondents submit that this is no different in principle from other forms of delegated authority subject to later legislative oversight. That submission has force. Yet the combination of immediate operation and practical irreversibility distinguishes section 7(4) from delegations that merely regulate

administrative detail or that operate within a framework capable of meaningful *ex post* correction.

[82] The effect is that, for the duration of the interim period, the financial burden borne by the public is determined by executive act. Parliament retains ultimate control over the continuation of the measure, but it does not exercise prior control over its commencement. Whether that structure is constitutionally permissible must be determined by weighing this feature against the safeguards and purposes identified above.

(g) Weighing the factors

[83] Applying the *Nu Africa* framework to section 7(4), we are driven to the following conclusions.

[84] The enquiry mandated by *Nu Africa* is contextual and evaluative. It requires this Court to assess whether the nature and scope of the delegated authority, viewed together with the safeguards and surrounding statutory framework, fall within constitutionally permissible bounds. Section 7(4) does not confer an open-ended legislative mandate. It operates within an existing tax regime enacted by Parliament and is temporally limited. These are weighty considerations.

[85] At the same time, the provision authorises the executive to determine, with immediate effect, the quantum of a broadly based national tax that applies across the economy. The power is not accompanied by express statutory criteria governing the magnitude of the alteration, nor does it require legislative ratification within a defined short period after its exercise. For the duration of its

interim operation, the applicable VAT rate is fixed exclusively by executive announcement.

[86] The cumulative effect of these features is that Parliament's control over the imposition of the altered rate operates only retrospectively and prospectively — that is, by either confirming the measure or permitting it to lapse after twelve months — but not contemporaneously at the point of imposition. In the specific context of VAT, whose operation is transaction-based and practically irreversible, this structure assumes particular significance.

[87] We therefore hold that section 7(4) constitutes an impermissible delegation of legislative power to the executive. It is inconsistent with the Constitution and invalid.

[88] We emphasise that our conclusion does not rest on a categorical prohibition against delegating rate-setting authority, nor on the proposition that fiscal responsiveness is constitutionally impermissible. It rests on the absence, in the present design of section 7(4), of sufficiently defined statutory limits or mechanisms of prompt legislative control to ensure that the balance between executive agility and parliamentary supremacy is maintained. In our view, the provision in its current form falls outside the range of constitutionally permissible delegation as contemplated in *Nu Africa*.

[89] Before concluding on the domestic analysis, and mindful of section 39(1)(c) of our Constitution, it is perhaps apposite to comment briefly on the comparative foreign jurisprudence cited relating to the delegation of authority to adjust tax rates. As noted elsewhere in this judgment, Canada, the United Kingdom, and the United States all have a shared concern: delegation of rates-setting authority is not per se impermissible, but its validity turns on design —

including articulated legislative policy, defined limits, and meaningful parliamentary supervision. However, the comparative material reveals no uniform constitutional formula. Different systems calibrate the balance between executive flexibility and legislative control in light of their own institutional arrangements.

[90] While these foreign approaches illustrate that structured delegation of rate-setting authority is not inherently incompatible with democratic fiscal control, they do not displace the stricter contextual scrutiny required by *Nu Africa* in our own constitutional setting. The ultimate question is therefore whether section 7(4), assessed within our constitutional framework and in light of the safeguards identified in *Nu Africa*, preserves legislative supremacy in substance while permitting necessary fiscal responsiveness. For reasons already given, section 7(4) does not.

Section 172(1)(a) – the order of invalidity

[91] Having found section 7(4) constitutionally invalid, we are obliged under section 172(1)(a) of the Constitution to declare it so. The further question is the appropriate remedial response under section 172(1)(b), including whether the declaration should operate with immediate effect or be suspended to afford Parliament an opportunity to cure the defect.

[92] In determining the proper remedy, this Court must balance two considerations. On the one hand, the defect we have identified concerns the structure of fiscal authority and the allocation of legislative power — matters of constitutional significance. On the other hand, section 7(4) forms part of a broader and longstanding fiscal framework. Its immediate invalidation could

generate uncertainty in the administration of VAT and potentially affect other statutory mechanisms of a similar kind.

[93] The evidence before us indicates that Parliament has, over time, adopted comparable rate-setting mechanisms in various fiscal statutes. An order of immediate invalidity may therefore have implications extending beyond the VAT Act alone. While the prevalence of similar provisions cannot shield an unconstitutional mechanism from scrutiny, it is relevant to the practical consequences of the remedy.

[94] We have concluded that the constitutional defect lies not in the concept of delegated rate-setting authority as such, but in the breadth and structure of the delegation in its present form — in particular, the absence of defined statutory constraints and prompt parliamentary ratification. It is for Parliament to determine how best to recalibrate the mechanism, whether -for example- by introducing quantitative limits, requiring approval within a defined period, or adopting some other constitutionally compliant design.

[95] In these circumstances, a period of suspension is appropriate. It will permit Parliament to consider and enact remedial legislation without destabilising the fiscal system or creating uncertainty in tax administration.

[96] During the period of suspension of our order, section 7(4) shall thus remain operative. This ensures continuity and fiscal stability while preserving Parliament's responsibility, if our order is confirmed, to enact corrective measures within the specified period.

The Minister's March 2025 announcement

[97] The DA also seeks an order declaring the Minister's announcement of 12 March 2025 unconstitutional and invalid. The respondents submitted that this relief is moot.

[98] The announcement was suspended by this Court's order of 27 April 2025 pending the final determination of Part B of this application or the passing of legislation regulating the VAT rate, whichever occurred first. In addition, the Rates and Monetary Amounts and Revenue Laws Bill before Parliament contains a clause providing that the 12 March 2025 announcement 'does not come into effect'. The Minister's undisputed evidence is that he withdrew the March 2025 announcement on 21 May 2025. The DA has not sought to impugn the Minister's May 2025 announcement.

[99] In these circumstances, the application for declaratory relief in respect of the 12 March 2025 announcement is moot. No useful purpose would be served by granting additional declaratory relief. The application for this relief is accordingly dismissed.

Costs

[100] The DA seeks costs only in the event of success and relies on the *Biowatch*⁴¹ principle to resist an adverse costs order should it fail. The Minister seeks costs against the DA, submitting that the *Biowatch* principle does not

⁴¹ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

protect a political party pursuing a political agenda, and that the DA's constitutional challenge was, as pleaded, frivolous and absolutist. SARS seeks no costs order against the DA irrespective of the outcome.

[101] The DA's constitutional challenge has been substantially successful. It has vindicated an important constitutional principle: that the power to impose, reduce or abolish national taxes resides in Parliament and may not be delegated to the executive in a manner that bypasses the money-bill procedure. The litigation was manifestly not frivolous or vexatious. It raised complex and novel questions of constitutional law on which there was no direct precedent. Although the Minister and SARS were justified, perhaps even duty-bound, to respond to the challenge, upon careful reflection we have concluded that the DA is entitled to its costs.

Order

[102] In the result, the following order is made:

- 1. It is declared that section 7(4) of the Value-Added Tax Act 89 of 1991 is inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution), and invalid.**
- 2. The declaration of invalidity in paragraph 1 of this order is suspended for a period of twenty four (24) months from the date of this order to afford Parliament an opportunity to correct the defect.**
- 3. In terms of section 172(2)(a) of the Constitution, the declaration of invalidity in paragraph 1 is referred for confirmation or otherwise by the Constitutional Court.**

4. The applicant's application for a declaratory order in respect of the first respondent's announcement of 12 March 2025 is dismissed.

5. The first and second respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved, on Scale C (party and party) and including the costs of two counsel where so employed.

6. The Registrar is directed to transmit the record of these proceedings, including this judgment, to the Registrar of the Constitutional Court within 10 court days of the date of this order.

M FRANCIS

Judge of the High Court, Cape Town

I agree

J I CLOETE

Judge of the High Court, Cape Town

I agree

J LEKHULENI

Judge of the High Court, Cape Town

