**REPUBLIC OF NAMIBIA**

REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2020/00526

In the matter between:

| | |
|---|---|
| **MOBILE TELECOMMUNICATIONS LIMITED** | **APPLICANT** |

and

| | |
|---|---|
| **COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA** | **1ST RESPONDENT** |
| **MINISTER OF INFORMATION AND TECHNOLOGY** | **2ND RESPONDENT** |
| **GOVERNMENT OF THE REPUBLIC OF NAMIBIA** | **3RD RESPONDENT** |
| **ATTORNEY -GENERAL OF NAMIBIA** | **4TH RESPONDENT** |
| **TELECOM NAMIBIA LIMITED** | **5TH RESPONDENT** |

**Neutral citation:** *Mobile Telecommunications Ltd v Communications Regulatory Authority of Namibia* (HC-MD-CIV-MOT-GEN-2020/00526) [2022] NAHCMD 443 (31 August 2022)

**Coram**: GEIER J

**Reserved**: **4 November 2021**

**Delivered**: **31 August 2022**

**Flynote:** Statute – Regulations – Communications Act 8 of 2009 as amended by the Communications Amendment Act 9 of 2020 – Legality of guidelines set by the amended section 23 for the imposition of a regulatory levy to be imposed by Communications Regulatory Agency of Namibia (CRAN) in terms of the amended s 23(1) of the Communications by Act to defray regulatory costs – Section 23 as amended still constituting an unguided outsourcing of plenary legislative power to CRAN – Legislature again failing to guard against risk of unconstitutional exercise of discretionary power – Amended Section 23 and any regulations prescribed thereunder unconstitutional and struck.

**Summary**: Section 23(1) of the Communications Act 8 of 2009 (the Act) as amended authorises the Communications Regulatory Agency of Namibia (CRAN) by regulating to impose a levy to 'defray' its 'regulatory costs' as contemplated under s 23(1) of the Act. After conducting a section by section analysis of the amended section 23 the court concluded that the legislature, also in its renewed attempt, had again failed to delegate sufficiently circumscribed discretionary powers to CRAN – and – by that same token that it has not succeeded in remedying the defects exposed by the Supreme Court in this regard in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* 2018 (3) NR 664 (SC).

*Held :* that the attempted limitations, of CRAN's powers in the enabling legislation, where not successfully attempted, by virtue of the failure to prescribe the parameters within which the discretionary powers are to be exercised with the requisite degree of certainty.

*Held also: w*hile the amended section 23 recognisably constitutes an attempt to avoid the outsourcing of unchecked plenary legislative power to CRAN, that attempt fell short of what was required as it did not succeed in guarding sufficiently against the risk of an unconstitutional exercise of the discretionary powers conferred on CRAN.

*Held, further, that* in its amended form, s 23 of the Act still constituted an impermissible outsourcing of plenary legislative power to CRAN, given the absence of sufficiently circumscribed guidelines and limits for its exercise. The legislature had

again failed to guard against the risk of an unconstitutional exercise of the discretionary powers by CRAN and the result was that also the amended section 23 failed to pass constitutional muster, which rendered it liable to be struck down, as must the subsequently promulgated regulations.

---

**ORDER**

---

1. Section 23 of the Communications Act 8 of 2009, as amended by the Communications Amendment Act 9 of 2020, and any regulations prescribed pursuant to this provision, are hereby declared unconstitutional and null and void and are hereby struck.

2. The first respondent is ordered to pay the applicant's costs, such costs to include the costs of one instructing- and two instructed counsel.

---

**JUDGMENT**

---

**GEIER, J**

[1] This case concerns an attack on remedial legislation passed to correct a constitutional defect found by the Supreme Court in respect of s 23*(2)(a)* of the Communications Act 8 of 2009.[1]

[2] The Supreme Court in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* 2018 (3) NR 664 (SC) summed up the issues for determination serving before it at the time as follows:

---

[1] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd* 2018 (3) NR 664 (SC) para [113].

'[15] On appeal, the following issues have crystallised — whether: (a) the scheme created by s 23(2)(a) of the Act is in the nature of a tax or revenue collection, and (b) whether s 23(2)(a) is an unconstitutional abdication by parliament of its legislative function.

[16] It admits of no doubt that an affirmative answer to either of the issues thus posed would invalidate s 23(2)*(a)*. In respect of the first because — as is common cause — there can be no taxation without representation. In other words, the subject cannot be made to suffer the burden of tax except by law duly enacted by the branch of government wielding the power to make and unmake laws.[2] Article 63(1) of the Namibian Constitution states that:

'The National Assembly, as the principal legislative authority in and over Namibia, shall have the power, subject to this Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia.'

Subarticle 2(b) empowers the National Assembly, subject to the Constitution, 'to provide for revenue and taxation'. The Constitution contains detailed provisions[3] on how the legislature is to go about enacting legislation, including that providing for revenue and taxation.

[17] As for the second, two principles underlie that issue. The first is that although it is permissible for parliament to delegate a legislative power to the executive or an administrative body, it may not delegate plenary legislative power. That approach has been accepted as trite by the South African Constitutional Court and applies with equal force to the interpretation of the Namibian Constitution. As Chaskalson P put it in Executive *Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289; [1995] ZACC 8) para 51:

'In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to

[2] For a comparative exposition of the principle, see the judgment of the South African Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17) para 44 and fn 44.

[3] Most notably, arts 62 (sessions), 64 (withholding of presidential assent), and 65 (signature and enrolment).

make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body . . . .'

[18] The third is the Dawood principle,[4] which has been approved by this court in for example *Medical Association of Namibia and Another v Minister of Health and Social Services and Others*.[5] As the court put it in Medical Association para 85:

`'It is settled jurisprudence . . . that to pass the test of law of general application [as required by art 22(a) of the Constitution] a statutory measure conferring discretionary power on administrative officials or bodies must be sufficiently clear, accessible and precise to enable those affected by it to ascertain the extent of their rights and obligations . . . it must apply equally to all those similarly situated and must not be arbitrary in its application . . . and it must not simply grant wide and unconstrained discretion without accompanying guidelines on the proper exercise of the power. . . .'

And as this court had occasion to say in Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others 2010 (2) NR 487 (SC) para 59:

> "One of the incidents of the rule of law is that the law should be ascertainable in advance so as to be predictable and allow persons to arrange their conduct and affairs accordingly."

[19] In Dawood (para 53) the Constitutional Court recognised circumstances in which broad discretionary powers would be Constitution compliant — the highlighted part representing what Mr Maleka SC for CRAN referred to in oral argument as the 'Dawood exception' his client relies upon:

'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly

---

[4] Based on *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) and see also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3).

[5] *Medical Association of Namibia and Another v Minister of Health and Social Services and Others* 2017 (2) NR 544 (SC).

formulated where the factors relevant to the exercise of discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.' [Own emphasis.]

[20] The two respondents, although not with the same emphasis, rely on one or all of the three principles set out in [16], [17] and [18] above to support the High Court's conclusion that s 23(2)(a) of the Act is unconstitutional.'

[3] The Supreme Court then set aside the order of the High Court and Section 23*(2)(a)* of the Communications Act 8 of 2009 was declared unconstitutional and was struck down. The Supreme Court also ordered that the order of invalidity was to only take effect from the date of this judgment and was to have no retrospective effect in respect of anything done pursuant thereto prior to the said date together with ancillary relief.

[4] Consequent to the statutory amendment a further constitutional challenge was launched by Mobile Telecommunications Company Ltd ("MTC") - the present case - in which the central question for determination is – once again – whether also the amendment of section 23 of the Communications Act 8 of 2009 amounts to " … an unconstitutional abdication by Parliament of its legislative function."

[5] The first respondent, the Communications Regulatory Authority of Namibia ("CRAN"), is the only respondent, which opposed the application.

[6] It is noteworthy that none of the other respondents, particularly those within whose prerogative it would have been to defend the constitutionality of the legislation, elected to participate or actively defend the statutory amendment under attack.

[7] It is against this background that the written argument, mustered on behalf of MTC, by Mr Gauntlett SC QC with Mr Pelser, in support of the challenge, are to be set out.

[8] This argument was conveniently divided into 5 chapters, namely: a) Introduction; b) The Supreme Court's judgment sets the standard governing this case; c) The amended section 23 falls foul of the Supreme Court's judgment; d) CRAN's contentions fail to meet the Supreme Court's judgement; and e) Conclusion and appropriate relief.

The introductory argument on behalf of MTC

[9] It was by way of introduction, in the main, submitted that the amendment under consideration demonstrably fails to comply with the Supreme Court's judgment as the amendment repeats precisely the same constitutional defect, to the effect that the empowering provision still confers an unconstrained discretion on the regulator to prescribe any percentage for purposes of imposing a regulatory levy. Once again "there is no upper threshold beyond which [the regulator] may not set a levy".[6] The amended s 23 repeats virtually *verbatim* the formulation declared unconstitutional by the Supreme Court. CRAN attempts to defend its position by invoking proposed draft regulations – formulated by CRAN itself - pursuant to the impugned empowering provision: s 23 and then contends that these regulations have "introduced" an upper threshold beyond which CRAN may not set a levy.

[10] It was thus pointed out that this contention is clearly self-defeating as it inherently does not address the constitutional defect identified by the Supreme Court, i.e. Parliament's abdication of its own legislative responsibility to constrain discretionary power devolved on an administrative agency to adopt delegated legislation. Instead CRAN concedes that the threshold had to be imposed by itself, on itself, in its own exercise of delegated law-making. CRAN's case accordingly confirms the unconstitutionality for which MTC contends. The unconstitutionality is correctly not contested by the other respondents who do bear the legal responsibility to defend a constitutional challenge to legislation: the Minister and Attorney-General.[7]

---

[6] *Id* para 91.

[7] CRAN explicitly adopts the stance that it "does not have any duty towards the Minister for any legislative process to be initiated" to remedy the unconstitutionality of its own empowering provision (Record p 110 para 104). Yet CRAN attempts to defend the constitutional challenge before this Court despite the Minister's (and Attorney-General's) capitulation. And despite CRAN contending that it "has no obligation to defend the constitutionality of section 23" (Record p 110 para 106).

The argument on behalf of MTC that the Supreme Court's judgment sets the standard governing this case and the analysis of what standard the Supreme Court set

[11] It was then submitted that the Supreme Court's judgment is the correct departure point for any assessment of the amendment's compliance with the Constitution as the judgment is the conclusive standard against which the amendment's constitutionality falls to be assessed.[8] It was thus considered appropriate to summarise its key conclusions and how the Supreme Court arrived at them. These were summarised as follows:

'7. The judgment commences its analysis of CRAN's regulatory competence by holding that the Act provides a "complete and complex regulatory framework".[9] It then sets out the full text of section 23 as it existed prior to its amendment.[10]

8. What is clear from the Court's quotation of section 23 in its initial iteration are five fundamental features. First, the original section 23 too (just as the amended section 23 does)[11] provided for a rule-making process pursuant to which regulatory levies may be imposed on licensees. Second, it too (like the amended section 23)[12] confined the levy to what is needed "to defray its [CRAN's] expenses." Third, it too (like the amended section 23)[13] provided for any combination – combined in CRAN's exclusive and uncircumscribed discretion – of "one or more … forms". Fourth, it too (like the amended section 23)[14] provided for an open-ended list of "forms" in which a regulatory levy may be imposed, explicitly stating that "any other manner" beyond those listed may be devised in CRAN's discretion. Fifth, it too (as the amended section 23 still does)[15] provided in unqualified terms for the imposition of a percentage-based levy. The percentage which

[8] The Supreme Court has repeatedly cautioned against attempts to rummage in foreign caselaw to seize upon the ostensibly helpful (*Attorney-General of Namibia v Minister of Justice* 2013 (3) NR 806 (SC) at para 8 and authorities cited in fn 12; see, too, this Court's recognition of the same principle in *S v Malumo and 111 others In re: Kamwanga* 2012 (1) NR 104 (HC) para 19). Comparative caselaw is valuable, it is now trite, only where there is a sufficient closeness in legal system, factual context, impugned provision, and constitutional text (*Bernstein v Bester NNO* 1996 (2) SA 751 (CC) at paras 127, 132 and 133, cited with approval by the Supreme Court in *Attorney-General of Namibia v Minister of Justice* 2013 (3) NR 806 (SC) at fn 14).
[9] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 6.
[10] *Id* at para 9.
[11] Section 23(1).
[12] Section 23(1).
[13] Section 23(1).
[14] Section 23(1)(e).
[15] Section 23(1)(a).

CRAN was purportedly empowered to impose is (like the amended section 23)[16] not restricted by any threshold imposed by Parliament.

9. Thereupon the Court confirmed its established case law, and demonstrated the extent to which it adopted *dicta* contained in comparative case law.[17] Thus, after noting *Dawood* and the eponymous principle it spawned,[18] and the principle's earlier manifestation in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*,[19] the Supreme Court referred to its own judgments on this topic. The Namibian *locus classicus* is *Medical Association of Namibia v Minister of Health and Social Services*.[20] It holds that the Legislature is not constitutionally competent to confer "wide and unconstrained discretion without accompanying guidelines on the proper exercise of the power."[21] The Supreme Court's earlier judgment in *Rally for Democracy and Progress v Electoral Commission of Namibia*[22] was also cited, serving as precedent for the principle that it is a rule of law requirement that law should be ascertainable in advance and sufficiently predictable to enable people to arrange their conduct accordingly.[23]

10. In concluding its overview of the governing legal principles the Supreme Court quoted with approval a *dictum* from *Dawood* recognising that the scope of discretionary powers may vary.[24] The question for the Supreme Court's determination (and, in the current case, this Court's consideration) was whether section 23 complied with the *Dawood dicta* adopted in Namibia. Hence the significance of the Supreme Court's judgment for the current case: whereas the *Dawood* principle may (by virtue of its flexibility) apply differently in different statutory contexts, in the current setting the Supreme Court already ruled on the correct application of the principle.

11. What the Court considered "crucial" in this regard, quoting MTC's counsel's argument with approval, is that section 23 "contains 'no requirement that the percentage be within a prescribed range".[25] Instead a discretion was purportedly conferred on CRAN, as the Court summarised MTC's argument, "to itself on a discretionary basis decide what 'percentage to

---

[16] Section 23(1)(a).
[17] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at paras 17-19.
[18] *Dawood , Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[19] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 51.
[20] *Medical Association of Namibia v Minister of Health and Social Services* 2017 (2) NR 544 (SC).
[21] *Id* at para 85.
[22] *Rally for Democracy and Progress v Electoral Commission of Namibia* 2010 (2) NR 487 (SC).
[23] *Id* at para 59.
[24] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 19, citing *Dawood supra* at para 53.
[25] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 51.

impose".[26] The empowering provision provided no "method for computing the percentage",[27] nor did it impose any requirement "that the percentage be approved by Parliament, debated by Parliament, or even tabled in Parliament".[28]

12. In its analysis of this aspect of the case, the Supreme Court adopted MTC's arguments, describing CRAN's powers under section 23 as "rather draconian, limitless and unchecked … when it comes to determining a levy under section 23(2)(a) [i.e. the equivalent of section 23(1)(a) in the amended form]".[29] Damaseb DCJ concluded

> "[i]n my view, what is striking about the provision is the absence of any guideline as to the limit of the percentage on annual turnover that CRAN may impose. For example, there is no upper threshold beyond which CRAN may not set a levy, nor the permissible circumstances under which, if at all, that threshold can be exceeded."[30]

13. The Supreme Court probed whether it could be constitutionally permissible to confer on CRAN unchecked discretion without any ascertainable limitation to determine what the percentage should be.[31] The answer it gave was No. Otherwise licensees cannot "know what percentage exceeds the legislative competence of CRAN".[32] The rule of law requires, the Supreme Court held, that the law be ascertainable, and "section 23(2)(a) fails that test."[33] Absent guidelines and limits confining the percentage imposable by CRAN, section 23(2)(a) constituted the outsourcing of plenary legislative power to CRAN.[34] Thus the Legislature had failed to guard against the unconstitutional exercise of a discretionary power by CRAN.[35] Accordingly section 23(2)(a) was unconstitutional, the Supreme Court concluded.[36]

14. The Supreme Court therefore struck down section 23(2)(a) of the Act. Since it was the *empowering* provision for the regulations, any regulations prescribed pursuant to the unconstitutional provision "must", the Court held, also be struck down.[37]'

---

[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid*.
[29] *Id* at para 91, specifically cross-referring to paras 51-52 in which the Supreme Court quoted MTC's argument with approval.
[30] *Ibid*, emphasis added.
[31] *Id* at para 92.
[32] *Ibid*.
[33] *Ibid*.
[34] *Id* at para 93.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*.

MTC's argument that the amended section 23 falls foul of the Supreme Court's judgment

[12] In this regard it was contended that Section 23, in its amended form, essentially reproduced section 23(2)*(a)* - which the Supreme Court had declared unconstitutional[38] - and that this was done – at best for CRAN – in indistinguishable terms from the previous text [39]. There were, however, at least two additional features which further compounded the unconstitutionality of the amended version:

'17. The first additional feature was - unlike its predecessor – that section 23(1)(a) now confers on CRAN the – equally uncircumscribed – discretion to impose the percentage of its choice on "all or a prescribed class of" licensees. Thus CRAN can under the amendment now also determine a "class" of licensees to which the percentage applies. This yet further broadens CRAN's discretion. It is an added instance of a purported devolution of Parliament's power – which it simply may not do. This further devolved power could also impact disproportionately harshly on whosoever is included in such nebulous class. As this amounts to conferring on CRAN the discretion to reduce the size of the affected group (by including only some licensees in the "class"), the percentage thus eventually imposed will invariably apply to a limited class membership. Thus fewer licensees will have to bear the brunt of the percentage-based levy – which is likely to be higher since it applies to fewer firms, but must nonetheless serve to defray regulatory costs required by CRAN.'

18. Secondly, section 23's predecessor contained words in parentheses qualifying "income" in section 23(2)(a). It read: "whether such income is derived from the whole business or a prescribed part of such business". It is compounding that this provision's successor (the presently impugned section 23(1)(a)) does not contain the same qualification. This is because the effect is that the percentage perforce applies to a wider category: the

[38] The full text of the amended section 23 is at Record pp 55-59.

[39] Section 23(2)(a) of the Act prior to its amendment read: "a percentage of the income of providers of services concerned (whether such income is derived from the whole business or a prescribed part of such business) specified in the regulation concerned". Regulation 23(1)(a) now reads: "a percentage of the turnover of all or a prescribed class of providers of communications services". Since the *chapeau* of section 23(2)(a) already referred to the percentage-based levy being imposed "by regulation", the words "specified in the regulation concerned" in section 23(2)(a) was redundant and in any event provide no basis for distinguishing the previous provision from its reincarnation in the amended version contained in the current section 23(1)(a). There is also no basis for any legally-relevant distinction between the concepts "income" and "turnover" used in the respective versions. It is not because "turnover" was of any particular significance that the Supreme Court held that the provision was unconstitutional. It was unconstitutional because the "percentage" could be imposed in CRAN's discretion, which discretion was unconstrained by any threshold.

*entire* turnover of the firm is struck (whether or not the licensee engages also in other business), not only the turnover relating to the licensed "portion" of the "business". Thus also in this respect the unconstrained discretion conferred by section 23 now have even more potential for prejudice.'

[13] On this basis it was thus submitted by counsel for MTC that the previous unconstitutional features have been exacerbated rather than ameliorated by the amendment required by the Supreme Court. This was so as the two new features apart, section 23, in its current form, repeats precisely what MTC attacked successfully before the Supreme Court, namely the simultaneous unconstitutional vagueness of the provision, a violation of the separation of powers, the unlawful abdication of Parliament's own legislative function to an administrative authority, and an infringement of the rule of law. And again, just as the struck-down section 23(2) *(a)* did, the current section 23(1)*(a)* purports to confer a discretion on CRAN to decide for itself *whether* to impose a regulatory levy;[40] *which* one of an unlimited list of "forms" the levy may assume;[41] *what* combination of "forms" of levy to impose cumulatively or otherwise;[42] *what* percentage to impose (anything from zero to 100; unconstrained by any range, threshold or ceiling capping the percentage; and without imposing any methodology for computing it);[43] *what* CRAN's expenditure (i.e. "regulatory costs") encompasses;[44] and *what* factors to consider in specifying the percentage.[45]

---

[40] Section 23(1) provides that CRAN "*may* … impose a regulatory levy" (emphasis added).

[41] Section 23(1)*(a)(iv)* provides that CRAN may impose a levy "in any other form that is not unreasonably discriminatory".

[42] Section 23(1) provides that the levy imposed by CRAN "may take one or more of the following forms".

[43] Section 23(1)*(a)* allows CRAN, as mentioned, to impose "[a] percentage", entirely unlimited to any maxima.

[44] Section 23(1), read with section 23(5)(a)(i) which does *not* cap CRAN regulatory costs or required income by any amount approved by any other authority – least of all Parliament.

[45] Section 23(5) is the only potential provision purporting to refer to factors which CRAN must consider. We address each more fully in the text below. For present purposes it suffices to summarise the three "factors" as follows. The first concerns the income CRAN requires. It is self-referring. CRAN determines the income it requires, and it only has to "take into consideration" plans submitted under the Public Enterprises Governance Act, but is not bound by such plans for purposes of determining for itself the "income it requires". And even then CRAN can further determine for itself "the proportion of such income which should be funded from the regulatory levy". The second "factor" is not a factor guiding or constraining CRAN's discretion at all. It simply states that the levy should not be increased more frequently than annually, unless "good reason" exists. The third factor defeats the entire point of legislating discretion-confining guidelines. It explicitly unfetters CRAN to "consider any other matter" which CRAN "deems relevant". Thus CRAN is rendered the author of the criteria which – on the approach adopted in its answering affidavit – are supposed to constrain its discretion.

[14] It was pointed out that CRAN's answering affidavit does not negate any of the features rendering section 23(1)*(a)* as unconstitutional as its predecessor. Instead, as mentioned, it invokes a constitutionally-flawed approach by attempting to invoke its own regulation-making power.

[15] It was argued that this attempt is, firstly, circular. It is CRAN's regulation-making power which the empowering provision had to circumscribe. Parliament had to do so by imposing an upper threshold on the percentage.[46] It did not do so. CRAN cannot defend this failure on the part of Parliament by invoking the product of its (CRAN's) own (unconstitutionally-delegated) "competence" to regulate. CRAN cannot lift itself by its own bootstraps. First principle (and high precedent, to which we refer below) dictates differently.

[16] Secondly it was highlighted forcefully that CRAN's resort to regulations, (prescribed by itself, or intended to be so prescribed) is also otherwise unprincipled. The court was reminded that before the Supreme Court, in its unsuccessful attempt to impugn the High Court's previous declaration of unconstitutionality, CRAN incorrectly criticised the High Court for interpreting the empowering provision with reference to the regulations prescribed pursuant to that provision. CRAN accused the High Court of acting "fundamentally at odds with the well-established elementary rule of statutory construction that one cannot rely on the provisions or effect of a subordinate legislation to interpret and assess the validity of an enabling legislation."[47] Yet CRAN now attempts to defend the unconstitutionality of the amendment on precisely this basis. It wants to reverse-engineer the problem of unconstitutionality: to fix the problem on the higher level (Parliament's failure to set the clear limits) by invoking the lower plane (the framing of subordinate legislation).

<u>CRAN's contentions fail to meet the Supreme Court's judgment</u>

---

[46] As the Supreme Court confirmed in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at para 89 (quoting with approval *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at 559B-F), "the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."

[47] Paras 4.3-4.4 of CRAN's head filed in the Supreme Court, dated 5 March 2018.

[17] MTC's counsel then focussed their attention on CRAN's pleaded case with reference to which it was not only contended that CRAN does not meet the Supreme Court's judgment but that, instead, its answering affidavit serves, remarkably, to concede that the amendment falls foul of the judgment as it appears from CRAN's answering affidavit that CRAN accepts the crucial conclusion by the Supreme Court which CRAN partially paraphrases and partially quotes, as follows:

'the absence of any guidelines as to the limit of the percentage on annual turnover that CRAN may impose, e.g. absence of an 'upper threshold beyond which CRAN may not set a levy or permissible circumstances under which, if at all, that threshold may be exceeded', makes it an unchecked discretion by the legislature which makes it difficult for licensees to know what percentage exceeds the legislative competence of CRAN. The Supreme Court ruled that the legislature failed to limit the risk of an unconstitutional exercise of discretionary powers and that section 23(2)(a) in that 'form' constituted an 'impermissible outsourcing of plenary legislative powers'."[48]

[18] Thus CRAN correctly concedes the need for guidelines. This would be dispositive.

[19] Nevertheless, so CRAN contends, "[s]ection 23(2)(d)-(g) sets [sic] out the needed guidelines".[49] It was however submitted that CRAN is incorrect for at least two reasons, as:

'27. First, CRAN's contention is inconsistent with the text of section 23(1)(a) itself. Section 23(1)(a) provides that it is "subsections (4) to (8)" – not any part of subsection (2) – to which CRAN must have "due regard" in imposing a regulatory levy.

28. Second, section 23(2)(d)-(g) in their own terms do <u>not</u> at all provide guidelines as required by the Supreme Court. Section 23(2)(d) gives CRAN an open-ended discretion to determine (i) which parts of turnover should be included or excluded; (ii) which period must operate in respect of turnover, services or business; and (iii) the manner in which the regulatory levy is to be calculated. Section 23(2)(e) provides that CRAN may prescribe the

[48] Record p 78 para 10.
[49] Record p 83 para 22.

periods and methods of assessment, and the due date for the payment of the levy. Section 23(2)(f) provides that CRAN may prescribe the information to be provided by licensees to itself for purposes of assessing the levy. Section 23(2)(g) provides that CRAN may prescribe penalties …'

[20] It was thus argued that it appeared that the supposed "guidelines" pleaded by CRAN instead of providing for the necessary parameters yet further confer an open-ended discretion on CRAN to determine the methodology for determining the levy and even penalising any failure to comply with the modalities of payment CRAN itself may identify in its own interest.

[21] What followed was a 'section by section' dissertation of CRAN's arguments, which are best quoted verbatim:

'29. CRAN then recites the objects clause contained in subsection (3).[50] This provision firstly repeats what the *chapeau* of subsection (1) already states, namely that the objective of the regulatory levy is to defray regulatory costs.[51] Secondly it provides in the vaguest of terms, and in any event only "insofar as it is practicable" (another open-ended concept), for "a fair allocation of cost among the providers of communication services".[52] Thirdly, it introduces another redundancy by cross-referring to the objects already stated in sections 2 and 5.[53]

30. Demonstrably nothing in section 23(3) is intended or capable of providing the required guidelines, least of all imposing a threshold on the percentage. What it does, in fact, is revealed by CRAN's self-contradicting argument on "sufficiency". CRAN argues that section 23(3) – to which section 23(1) does not even refer – somehow limits the levy to what is "sufficient";[54] but that CRAN is in any event entitled to "exceed" regulatory costs, resulting in "over-recoveries".[55]

31. Moreover, CRAN's argument in any event also elides a further aspect. It relates to the now expanded definition of the new operative concept: "regulatory costs". The amendment introduces a newly minted statutory meaning which exceeds any notion of

[50] Record p 84 para 23.
[51] Section 23(3)(a).
[52] Section 23(3)(b).
[53] Section 23(3)(c).
[54] Record p 84 para 24.
[55] Record p 85 para 24.

ordinary operating "expenses" (the concept contained in the version the Supreme Court considered), and explicitly includes actual *and* estimated "capital costs".[56] Therefore even if it could competently be contended that these or any other provisions imply that the percentage must be calculated working back from the sum of all capital and operating costs which CRAN might estimate it could require, then this is itself a discretionary exercised *not* constrained by section 23. And it now encompasses a far greater sum and scope for maladministration.

32. CRAN's answering affidavit thereupon quotes *verbatim* subsections (4) and (5).[57] Why, is left unclear: neither of these provisions creates the required guidelines or threshold.

33. Instead, sub-clause (4)(a) provides for a *post hoc* recalibration of an unreasonable levy. Thus unreasonableness is recognised as a result flowing from the exercise of the unconstrained discretion. Yet the empowering provision seeks to address this merely by providing for a retroactive remedy, not a proactive guideline as required by the Supreme Court.

34. For its part, sub-clause (4)(b) begs the question which Parliament had to answer in legislating the empowering provision: *how* are the open-ended normative considerations (predictability, fairness, equitability, transparency and accountability) to be "ensured" by the delegee.

35. Similarly sub-clause (4)(c) is silent on *how* the levy is to be "aligned" with regional and international "best industry practices" (again the lack of statutory clarity the Supreme Court has warned is anathema to the rule of law), and fails to meet the Supreme Court's requirement for thresholds. Indeed, some equally comparative countries impose no percentage-based levy at all, others impose a percentage but reserves the determination of the percentage to the Legislature which stipulates the percentage in the empowering provision, and other jurisdictions impose in the empowering provision a range (i.e. an upper and lower threshold) within which a percentage may be determined.[58]

---

[56] Section 1(a) of the Amendment Act at Record p 54.

[57] Record pp 85-86 para 26.

[58] As MTC already argued in its heads of argument before the Supreme Court, the Ugandan example – to use only one of the comparators on which CRAN relies (Record p 91 para 35) – demonstrates that CRAN's purported reliance on at least some of the African countries to which it refers defeats its case. Under the Uganda Communications Act 1 of 2013 levies are governed by section 68. It imposes levies only on one basis: as a percentage calculated on the gross annual revenue of operators. The section itself sets the parameters of the levy. The parameters are very confined: the minimum is 2% and the maximum is 2.5%. Moreover, under the Ugandan Act it is the Minister who sets the percentage, not the Commission or even its Board (section 67(2) of the

36. Significantly, sub-clause (5), which deals with the determination of *inter alia* any percentage, does not even refer to regional or international best practice. This would have revealed that it is not best practice to relegate to the regulator the prerogative to determine for itself what percentage to impose absent any thresholds contained in the empowering provision. Crucially, even had any such "best practice" been established (which CRAN has failed to do), then this would still contravene the Supreme Court's judgment – which is based on the Namibian Constitution. The Legislature therefore was in any event not authorised to confer a discretion on CRAN to resort to foreign practices which are inconsistent with the Constitution and the highest Court's binding precedent.

37. Sub-clause (5)(a)(i) in turn introduces additional discretionary indeterminacy. Far from providing guidance, any appropriate limitation or imposing a threshold, it allows CRAN to determine not only the income it requires but also the *proportion* of such income which should be funded from the regulatory levy. Thus CRAN determines a gross amount (i.e. the amendment's expansively defined "regulatory costs"). Thereupon it determines a proportion (thus yet another *percentage*) of the gross amount to be funded by levies. And then it determines the percentage of levies if a percentage-based levy is elected under section 23(1)(a), as CRAN indeed elected to do. In imposing the section 23(1)(a) percentage CRAN is moreover at large to impose different percentages on different licensees.

38. Accordingly sub-clause (5)(a)(i) increases the constitutional defects. Even at its most benign (if viewed favourably from CRAN's perspective) it is redundant, because it refers to the need to consider CRAN's required income. Such reading is otiose, since only the most irrational exercise of a discretion (to impose a levy *required to defray CRAN's costs*) would have resulted if CRAN could somehow have ignored its income and budget. Thus, at best for CRAN, sub-clause (5)(a)(i) cannot constitute a constraint on its discretion compliant with the Supreme Court's judgment.

---

Ugandan Act). All of this is quite clear from the actual text of the operative statutory provision, which MTC quoted in its Supreme Court heads, but which CRAN does not disclose in invoking *inter alia* Uganda as comparator in its answering affidavit before this Court. The full text of section 68 reads

"(1) The Commission may levy a charge on the gross annual revenue of operators licenced under this Act.

(2) The levy in subsection (1) shall be the percentage specified in schedule 5.

(3) For avoidance of doubt, the levy in subsection (2) shall not be less than two percent.

(4) The levy shall be shared between information and communication technology development and rural communication in the ratio of one to one."

Schedule 5 provides "The rate of gross annual revenue payable by an operator to the Commission under section 68 shall not be less than 2 percent and shall not exceed 2.5 percent."

39. The same applies to sub-clause (5)(a)(ii), which refers to "income derived from any other source". Self-evidently this must be taken into account in determining CRAN's capacity to commandeer licensees' financial resources. But self-defeatingly sub-clause (5)(a)(ii) does not provide that – or *how* – this income should *reduce* CRAN's income derived from what it decides to impose as a regulatory levy. This is significant in the light of sub-clause (7), which explicitly refers to setting off over-recoveries. Thus subsection (5)(a)(ii)'s studious silence on set-off or a similar result is problematic.

40. Sub-clause (5)(a)(iii) refers to "the need to ensure business continuity". Whose business continuity is contemplated is not stated. It appears to be CRAN's.[59] But it is a statutory regulator; its own perpetuity cannot be conflated with its businesses continuity. Concern for licensees' business continuity or even their survival is, at best for CRAN, left to retrospective remediation of "unreasonable negative impact". But by then the "business continuity" of the licensee on which the levy had "an unreasonable negative impact" (in section 23(4)(a)'s euphemistic terms) may be beyond resuscitation.

41. Sub-clause (5)(a)(iv) refers to avoiding "as far as is reasonably possible or predictable" receiving income *from the regulatory levy* in substantial excess of what is required to cover the regulatory costs. This provision, too, demonstrably does not impose a guideline or threshold. Least of all one with any coherent content. It is, at best for CRAN, a redundant repetition of section 23(1) – which already contains the words "in order to defray regulatory costs". Thus any contended limitation based on CRAN's requirements is already contained elsewhere. And the version of section 23 considered by the Supreme Court – held to be unconstitutional – contained the same qualification in the equivalent of the current section 23(1). Thus such qualification or limitation cannot render the amendment constitutionally compliant. In fact, the formulation in sub-clause (5)(a)(iv) compounds the unconstitutionality. This is in that it does not require CRAN to impose a levy which avoids over-recovery when the regulatory levy income is considered cumulatively with other sources of income. This is significant since the rest of section 23 explicitly refers to other sources where so intended.[60]

42. Similarly sub-clause (5)(a)(v) is singularly ineffectual – and, indeed, self-defeating – as a guideline. It, moreover, clearly does not purport to impose any threshold. It reads: "the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy". This postulate clearly cannot assist a licensee to know

[59] This is implicit in the reference to "its plans contemplated in sub-paragraph (i)". The contemplated plans are CRAN's.
[60] See e.g. subclause (5)(a)(ii) and (vi).

when the percentage imposed exceeds the legitimate limit. Therefore it compounds the constitutional conundrum which CRAN could not explain away before the Supreme Court arising from the previous iteration of section 23 – which did not even contain this problematic provision. Since the imposition of a regulatory levy is explicitly recognised by the Legislature as being "associated" with risks in the communications industry, the Legislature itself had to guard against those risks when conferring discretionary delegated law-making powers on CRAN under the impugned empowering provision. Instead, what should have been a provision guiding and constraining CRAN's discretion (and imposing a threshold on any percentage CRAN can conjure) only codifies a concession concerning the risks resulting from the exercise of the unconstrained discretion in question.

43. Subsection (5)(a)(vi) suffers from the same defect identified above in the context of subsection (5)(a)(ii). It is the failure to provide that the "other fees, levies or charges which the providers of communications services are required to pay under this Act" must *reduce* the regulatory levy. Like subsection (5)(a)(ii), subsection (5)(a)(vi) simply requires CRAN to "consider" this. Furthermore, CRAN is not even required (or perhaps even *permitted*)[61] to consider any fees, levies, charges or other impost required by any other law to be paid by licensees.

44. Subsection (5)(a)(vii) permits CRAN to consider "any other matter deemed relevant" by itself. Not only is this open-ended, therefore further expanding the already unconstrained discretion conferred on CRAN. It is also one-sided in that it permits CRAN to consider any other consideration "in order to ensure that the income derived from the regulatory levy is sufficient to defray its regulatory costs". It does not permit CRAN to consider any other consideration for purposes of ensuring that the levy is not oppressive or excessive.

45. Subsection (5)(b) purportedly requires "predictability and stability". No guidelines are provided for purposes of achieving this objective other than *permitting* annual increases in the regulatory levy or the introduction of a new levy. And if "good reason to do so" exists in CRAN's uncircumscribed discretion, then increases and the introduction of new levies may be made by CRAN as frequently as it feels fit. Even annual increases and innovations in levies fail to provide predictability and certainty.[62] More frequent increases and innovations *a fortiori* frustrates predictability and certainty, especially if the basis for breaching the mere

[61] As the Supreme Court held in *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) at para 70, if an empowering provision "has not been assailed it is binding on the administrative actor who must enforce it to the letter."

[62] Significantly the Public Enterprises Governance Act 1 of 2019, which both CRAN and the amendment invoke, itself recognises a five-year period as appropriate for purposes of planning (see e.g. section 13(5)(c)).

12-month malleable moratorium on amendments is left in CRAN's uncircumscribed discretion.

46. Finally subsection (5)(c) crowns CRAN's uncircumscribed discretion by adding an additional tier of indeterminacy. Over-and-above all other open-endedness, this provision adds that CRAN "may consider any other matter" which it "deems" relevant. This formulation, the Supreme Court held (in a different matter), deploys "very wide language".[63] Clearly it cannot constrain, but instead expands, the discretion conferred on CRAN.

47. Finally CRAN "reproduce[s]" – "[f]or the sake of completeness" it says – the text of sub-clauses (6), (7) and (8). CRAN correctly does not contend that any of these provisions assists it. Demonstrably they don't.

48. Subsection (6) permits CRAN to allow a levy to endure for five years. Accordingly CRAN is (for purposes of supposedly "ensur[ing]" the levy's compliance with section 23 and to avoid *inter alia* "continued" "over-recoveries") at large to leave a levy in place for five years. Yet CRAN can *increase* the levy annually or even more frequently under subsection (5)(b). The self-serving discretionary disjunct wrought by the empowering provision is patent.

49. Subsection (7) adds to this by permitting CRAN to retain over-recovery until the next regulatory levy is determined and imposed, which may – under subsection (6) – be five years hence. Interest is not provided for. Nor any interim recompense or dispensation to a licensee on which "an unreasonable negative impact" is imposed pending the five-year discretionary *spatium deliberandi* conferred on CRAN. The "set off" in any event is never repaid to licensees, and their own future levies are never reduced by this amount. All that the overpayment is "set off" against in future is against CRAN's "projected regulatory costs" used for the next regulatory levy potentially imposed five years later. This provides no respite for unreasonably impacted licensees in the interim; and they are in any event not ensured that the new levy imposed after the five-year period would be revised in terms which could conceivably compensate them for the overpayment, which the amendment concedes could be unreasonably negative in its impact.

---

[63] *Expedite Aviation CC v Tsumeb Municipal Council* 2020 (4) NR 1126 (SC) at para 778. See, too, *S v Guruseb* 2013 (3) NR 630 (HC) at para 6: "[t]he expression 'any other matter' is extremely wide". In that matter the High Court held that the words had to be "interpreted in the light of the principle that a condition must be related to the offence in question". There is no similar limiting principle applicable to the text in the current statutory context.

50. Subsection (8) permits what amount to a retrospective top-up in favour of CRAN in the event of any under-recovery. Licensees may be required in CRAN's absolute discretion – again absent any guidelines, and irrespective of the reason for the under-recovery (which may be attributable to CRAN itself, or to a rogue licensee) – to pay a higher levy over the entire period to which the adjusted levy applies,[64] or to pay a "once-off higher regulatory levy for the first period during which the next regulatory levy will apply."[65] Self-evidently also subsection (8) is correctly not contended by CRAN to constrain its discretion. Instead, it compounds the overbroad discretion conferred by the amendment.

51. It follows that far from confining CRAN's discretion as required by the Supreme Court, the statutory provisions to which CRAN's answering affidavit refers by rote exacerbates the constitutional concerns.'

[22] Counsel then went on to argue that CRAN's answering affidavit embarks on an attempt to defend the constitutionality of the Act with resort to the regulations purportedly prescribed under the impugned provision and that the highwater mark of its arguments in this regard culminate in the contention that "[t]he amended section 23, read with the regulations, now incorporates guidelines, limits and executive oversight as to the exercise of the discretionary legislative powers of CRAN".[66] Demonstrably on CRAN's own case section 23 does not impose any thresholds – not even if read with the regulations. It is, CRAN contends, "the proposed regulations [which] introduces [sic] an upper threshold beyond which CRAN may not set a levy and circumstances under which such threshold may be exceeded."[67]

[23] In this regard it was then submitted that this is, firstly, factually incorrect as the regulations which CRAN purportedly proposed or imposed do *not* set an upper limit on the percentage to which section 23(1)(a) refers. Nothing in the regulations purport to rewrite section 23. Its text remains unaltered. Any attempted alteration of the text of an empowering provision would, moreover, have been not only *ultra vires* the Act,[68] but also a serious violation of the separation of powers.[69] Parliament is the

[64] Subsection (8)(a).
[65] Subsection (8)(b).
[66] Record pp 96-97 para 51.
[67] Record pp 96-97 para 51, emphasis added.
[68] *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) at para 71.
[69] See e.g. *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 218 and the Supreme Court's confirmation in *Kauesa v Minister of*

constitutionally competent Legislature,[70] not the Executive – and even less so sub-ordinary administrative authorities like CRAN.[71] Nor do the regulations set out circumstances under which the threshold may be exceeded. No regulation was identified in CRAN's answering affidavit which is contended to have this effect, and none indeed exists.

[24] Secondly it was pointed out that, more importantly, from a legal perspective, ' … CRAN's resort to regulations for purposes of imposing the required threshold is constitutionally incompetent as regulations cannot even be used to interpret the text of the legislation pursuant to which the regulations have been prescribed.[72] *A fortiori* they cannot be used to introduce a requirement which the Supreme Court held must be imposed by Parliament itself: "a statutory provision cannot be measured against regulations … to decide whether it is … consistent with the Constitution".[73] An administrator, the Supreme Court held, "cannot turn itself into an *ad hoc* legislature".[74] And the Legislature cannot delegate the power to legislate.[75] Thus the purported imposition of a threshold in regulations – which was, the Supreme Court held, required to be imposed in the Act by the Legislature – is *per se* unconstitutional.'

[25] MTC's Counsel then noted that in spite of this the remainder of CRAN's affidavit continuously reiterates the same unconstitutional refrain. It pleads that the "limited range" required by the Supreme Court's judgment "is sufficiently catered for in the proposed regulations",[76] not the impugned empowering provision. Again, reverse-engineering (and question-begging). CRAN reiterates that this

---

*Home Affairs* 1995 NR 175 (SC) and *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) of the application of the same constitutional principle in Namibia.

[70] *Itula v Minister of Urban and Rural Development* 2020 (1) NR 86 (SC) at para 70.

[71] The power to regulate under the Act and prescribe regulations is inherently subordinate power exercised by the executive arm of government (*Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC) at para 46).

[72] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) at para 286 and authorities cited in fn 267. The Supreme Court confirmed this principle in a case concerning the hierarchy between the Constitution and ordinary legislation (*Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) at para 59).

[73] *Ibid*. We have omitted (as indicated by the ellipsis) the words "under different legislation" (and "rational or") since the same clearly applies to regulations prescribed under the same legislation.

[74] *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) at para 71.

[75] *Visser v Minister of Finance* 2017 (2) NR 359 (SC) at para 13.

[76] Record p 99 para 62.

unconstitutional "aspect … pointed out by the Supreme Court …has since been addressed in the draft regulations",[77] not in the empowering provision itself by Parliament. This despite CRAN correctly conceding that the Supreme Court required that the "guidelines and limits" within which CRAN must exercise its powers to prescribe fees" must be provided by the Legislature.[78] Yet, on CRAN's own showing, this has not been done.

[26] It was then submitted that it is indeed, on CRAN's own case, "[s]ection 23 and *the proposed regulations*" which cumulatively conduces, on CRAN's argument, to a regime which is "sufficiently predictable" and "clearly defined".[79] Thus the "proposed regulations" form a necessary part of the legal regime in order to result in the proposition for which CRAN contends, namely "CRAN does therefore not enjoy uncircumscribed discretionary powers."[80] It was argued that the conclusory assertion is incorrect, and its logic is constitutionally contrived as CRAN's "logic" is this: pursuant to the empowering provision CRAN exercised subordinate legislative power which constrains its discretion, *ergo* no uncircumscribed discretion was conferred by the empowering provision. The correct position is this: since it is, on CRAN's own case, "the proposed regulations" which create "clearly defined" "mechanisms",[81] and that it is thus untenable to contend (as CRAN inconsistently does) "that the *legislature* has sufficiently guarded against the risk of an unconstitutional exercise of discretionary power in the form of section 23."[82]

[27] The argument was then made that it appears that it is in fact – as CRAN continues to contend – "the proposed regulations [that] sets [sic] out the maximum threshold of 1.65% over which CRAN may not set a regulatory levy"[83] and that CRAN repeats that "[t]he proposed regulations introduce an upper limit of 1.65%".[84] CRAN reiterates that it is "because of Annexure B to schedule 1 of the Notice" (thus the regulations prescribed under section 23) that "section 23(1)(a) does not permit any imposition of 'any' percentage", since "the upper limit for the percentage of the

[77] Record p 100 para 62.
[78] Record p 100 para 63.
[79] Record p 100 para 66, emphasis added.
[80] Record p 100 para 66.
[81] Record p 101 para 66.
[82] Record p 101 para 67, emphasis added.
[83] Record p 104 para 79.
[84] Record p 105 para 86, emphasis added.

regulatory levy is proposed to be 1.65%".[85] CRAN is emphatic: on its version "[t]he proposed regulations ensures [sic] that the percentage does not exceed the maximum 1.65%".[86] It is *not* the empowering provision which ensures what CRAN concedes is required. Thus it is, on the best case for which CRAN contends, when section 23 is "read with the proposed regulations" that CRAN is not permitted to impose just "any percentage".[87]

[28] It was thus contended that CRAN's self-defeating main argument – repeated throughout its answering affidavit – is not tenable.

[29] Also, 'CRAN's extra-textual resort to the Public Enterprises Governance Act 1 of 2019 does not assist it.[88] It is CRAN's own Act, comprising (as the Supreme Court held) "a compete and complex regulatory framework",[89] which provides the regulatory regime which must confer a constitutionally competent discretion on CRAN. The predecessor of the current Public Enterprises Government Act equally applied to CRAN at the time of the Supreme Court's judgment. This was correctly not contended to constitute an extraneous constraint on CRAN's discretion conferred by section 23 of the Act. Whether section 23 in its current or previous form explicitly refers to CRAN's obligations under other legislation is legally irrelevant. CRAN is bound by all legislation applicable to it. But its discretion under section 23(1)*(a)* is not constrained by any extraneous legislation, and no executive control (even had this been separation-of-powers compliant)[90] over the prescribed percentage is imposed by the Act.[91] The Act does *not* require even executive confirmation, ratification, approval or consideration of the percentage (or other form of levy) imposed by CRAN.'

---

[85] Record p 111 para 107.
[86] Record p 112 para 113.
[87] Record p 112 para 113.
[88] See e.g. Record p 99 para 60; Record p 102 para 70; Record p 107 para 94.
[89] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 6.
[90] As MTC's replying affidavit submits, Parliament's failure to acquit itself of its own constitutional competence to legislate appropriately – *inter alia* by circumscribing discretions conferred on other arms of Government to adopt subordinate legislation – cannot be cured by subjecting the exercise of subordinate legislative power to a branch of Government other than the Legislature (Record p 298 para 42). The constitutionally correct approach available to Parliament is the one which it adopted in e.g. section 76(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995. It requires that the impost on agricultural land to fund land restitution be approved by Parliament.
[91] Indeed, CRAN contends for an own independence which contradicts any argument that it is subject to any sufficient degree of executive oversight (Record p 34 para 93; Record p 304 para 58).

[30] Secondly, so it was pointed out that also CRAN's contention, that "the rule-making procedure" renders CRAN's exercise of its discretion "ascertainable and predictable"[92], is a subset of its primary argument, which was equally flawed. As mentioned, a rule-making procedure was also required to be followed under the version of section 23 which the Supreme Court condemned. It is the empowering provision itself which must, the Supreme Court held, provide for the necessary ascertainability and predictability. Since Parliament devolved an unconstrained discretion on CRAN to adopt subordinate legislation, neither the process adopted by CRAN nor the result of that process can redeem the empowering provision.

[31] Thirdly it was pointed out in this regard that there is no merit in CRAN's attempt to distinguish section 56 from section 23 for purposes of complying with the Supreme Court's judgment.[93] Clearly an upper limit for any percentage could have been legislated in section 23(1)*(a)*, as Parliament did in the same amendment Act in respect of section 56.[94]

[32] Finally it was pointed out that CRAN's claim to a policy-formulating competence raises a yet further constitutional defect.[95] This Court has already repudiated a similar attempt.[96]

---

[92] Record p 106 para 89.
[93] Record p 108 paras 97-98.
[94] See Record p 59. It contains section 5 of the amendment Act, which introduces in paragraph (c) a new section (3A). The new subsection reads: "The universal service levy imposed on a provider of telecommunications services may not exceed an amount which is more than five percent of the annual turnover of that service provider."
[95] Record p 111 para 110.
[96] *Theron v Village Council of Stampriet* 2020 (2) NR 524 (HC) at paras 5-7, holding that "policy by a public authority is not law: It is not subordinate or subsidiary legislation. There is no need to cite authority in support of such elementary and incontrovertible rule. In the instant case, the aforementioned policy is not a regulation, within the meaning of s 94 of Act 23 of 1992.
The power of a public authority (administrative body or official) to act must be traceable only to an enabling Act or a subordinate (or delegated) legislation made thereunder. The Supreme Court stated in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) thus:
'[23] The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its "Supreme Law", it demands that the exercise of any public power should be authorised by law – either by the Constitution itself or by any other law recognised by or made under the Constitution. "The exercise of public power is only legitimate where lawful."'
It follows inevitably that in the instant proceeding, the exercise of public power by first respondent against applicant is unlawful, and so, it is not legitimate. That administrative action is unlawful and invalid."

Conclusion and appropriate relief

[33] It was then in conclusion eloquently submitted that *'Talleyrand had said of the Bourbon kings of France on their restoration that they had learnt nothing and forgotten nothing…'* and 'that the same applies to the unfortunate amendment impugned here. This despite the clearest lessons by the Supreme Court. The defects of the provision struck down have been repeated – and made worse' – and - that for the reasons provided above, MTC's constitutional attack on the reintroduction of an unconstrained discretion to impose a regulatory levy on the basis of an uncapped percentage should, as the Supreme Court confirmed, succeed.

[34] In addition the court was reminded that ' … in the wake of a declaratory order to that effect, it follows unavoidably that a similarly declaration of invalidity must be made in relation to the regulations purportedly prescribed pursuant to the invalid empowering provision. This, too, the Supreme Court's judgment confirms.[97] The Supreme Court upheld CRAN's argument also in this regard, and its approach (to which this Court is, with respect, bound) is indeed supported by well-established principles' as regulation-making, like the exercise of other administrative action, depends on the legal validity of the empowering provision.[98] Once the authorisation is set aside, action taken pursuant to it (and whose validity depends on the authorisation) is also invalid.[99] This is because its legal foundation is both in law and in fact non-existent, and the rule of law does not permit illegalities to be perpetuated in such circumstances.[100] In such circumstances a regulatory authority cannot recover levies prescribed and imposed pursuant to an invalid empowering provision.[101] Hence a licensee cannot be compelled to pay levies pursuant to regulations prescribed under an empowering provision set aside for being

---

[97] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 93.
[98] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 37. The Supreme Court approved the correctness of *Oudekraal* in *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* 2017 (2) NR 340 (SC) at paras 43, 63 and 65.
[99] *Seale v Van Rooyen NO* 2008 (4) SA 43 (SCA) at para 13. The Supreme Court approved *Seale* in *Minister of Mines and Energy v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC) at para 22.
[100] *Ibid*.
[101] Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) at 548, citing *inter alia Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) and *S v Smit* 2008 (1) SA 135 (T) at 179-181.

unconstitutional.[102] It follows *a fortiori* in this case, since even where the subsequent act does not rely for its legal validity on the legal validity of the authorisation (but only on its factual existence), then the subsequent act still only survives for as long as the authorisation itself has not been set aside.[103]

[35] As far as costs were concerned it was contended that CRAN's conduct in this litigation warrants an appropriate costs order. Despite MTC's extensive prior engagements with the relevant respondents in an attempt to prevent this litigation and remedy the unconstitutionality perpetuated in the amendment,[104] CRAN – and only CRAN – required that this matter proceed and be heard on an opposed basis. It opposed this case strenuously, adopting an *ad hominem* approach inconsistent with its statutory role as regulator, and even elected to refuse withdrawing its CEO's scurrilous, vexatious and scandalous accusations advanced under oath against MTC.[105] CRAN even disclosed without-prejudice correspondence – without providing any basis for doing so.[106] It sought to defend the legislation – despite disavowing any responsibility for its constitutionality – on a basis it itself contended before the Supreme Court was an elementary error of law, incorrectly accusing the High Court of perpetrating that error. And it failed to disclose in its answering affidavit the correct legal position under comparative jurisdictions which CRAN attempts to invoke before this Court, despite MTC having previously corrected (before the Supreme Court) CRAN's prior erroneous reliance on the same contended comparator: Uganda.

[36] It was thus submitted that, in these circumstances, MTC should not be out of pocket[107] as it has litigated prudently and based its case on sound constitutional principles confirmed by the Supreme Court. In doing so it acted not only in its own

---

[102] *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at para 31, holding that "the grounds upon which the first certificate was challenged – namely that because the approval of the plans was unlawful, any issue of a temporary certificate of occupation in reliance upon the legal validity of the plans would itself be unlawful – are logically unassailable."
[103] *Oudekraal supra* at para 31.
[104] Record p 12 para 24; Record pp 17-23 paras 39-54.
[105] Record pp 305-306 para 62.
[106] Record p 307 para 65.
[107] The principles governing costs in constitutional litigation, as articulated by the Supreme Court in cases like *Standard Bank Namibia Ltd v Maletzky* 2015 (3) NR 753 (SC) and *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement* 2018 (3) NR 800 (SC), apply *a fortiori* in this case in favour of MTC.

interest, but also the public interest and the interests of the telecommunications industry which provides an important service to Namibians and the Namibian economy.[108]

[37] Counsel accordingly asked that the application be upheld, that section 23, as amended, be declared unconstitutional, that any regulations prescribed pursuant to section 23 be declared unconstitutional and set aside and that CRAN be ordered to pay MTC's costs on the scale as between attorney and client, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners.[109]

Argument on behalf of CRAN

[38] Mr Namandje, who appeared with Ms Ambunda-Nashilundo also structured their argument in support of the first respondent's case in a number of chapters which contained an introduction, understanding the Supreme Court judgment, the amended section 23 and the regulations, the regulations, whether section 23 delegates unguided legislative powers and costs and conclusion.

[39] After presenting an interpretation of MTC's case, argument, on behalf of the first respondent, commenced with a reminder to the court that an onus rests on an applicant, who raises a constitutional challenge, to show that the enactment is unconstitutional. This was so because of the well-established presumption of constitutionality of legislation or of executive action which may only be declared unconstitutional by a competent court of law.[110] In addition, the onus rests on the applicant who is seeking an order of unconstitutionality of legislation to not only precisely identify the impugned provisions, but the challenge upon them must also be substantiated and specified so that the respondents are fully appraised of the

[108] Record p 7 para 7.

[109] This is the basis on which MTC's notice of motion sought costs in the event of opposition (Record p 1 prayer 3), and for which MTC's founding affidavit provides an uncontested basis (Record pp 24-25 para 57; not contested at Record p 41 paras 120-122). CRAN's answering affidavit in fact confirms the appropriateness of costs on this basis (Record p 41 para 122).

[110] See *MWEB v Telecom* 2011 (2) NR 670 (SC) at 679E-F, para. 11:

*"[11] It is settled law that in an action hinging upon a challenge of unconstitutionality of any enactment, the burden rests upon him or her who raises the challenge to show that the enactment is unconstitutional. F This is because, as the celebrated author, Seervai, states in his work The Constitutional Law of India 3 ed: '(T)here is always a presumption in favour of the constitutionality of an enactment and the burden lies upon him who attacks it to show that there has been a clear transgression of the constitutional principles.' ... ."*

case to be met and the evidence which may be relevant to it. [111] It was in this regard conceded that the onus on CRAN was merely to establish that the provisions of section 23 are constitutionally compliant.[112] It was thus submitted that until the court sets aside the amended section and the regulations promulgated thereunder, the section and consequential regulations are deemed constitutionally valid and compliant and the appellant would be bound to comply with the law.

[40] Counsel for CRAN then endeavoured to set out the correct import and effect of the Supreme Court decision, followed by an interrogation of whether or not the amended section 23 passes constitutional muster.

Understanding the Supreme Court judgment

[41] In this regard counsel where of the view that the SC on appeal dealt with two issues: a) whether the scheme created by s 23(2)(a) of the Communications Act is in the nature of a tax or revenue collection, and (b) whether section 23(2)(*a*) is an unconstitutional abdication by parliament of its legislative function. Section 23(1) empowered CRAN to, by regulation after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services, such as the applicant, in order to defray its expenses. Section 23(2)*(a)* stated that the regulations made in terms of subsection (1) may impose the regulatory levy as a percentage of the income of providers of the services concerned specified in the regulations concerned. The regulations, regulation 3, Annexure B, imposed a minimum levy of 1.65% on the "*annual turnover of service providers*".

[42] Having stated this CRAN's counsel were of the view that on the first issue, the SC disagreed with the HC that section 23 constitutes the imposition of a tax by CRAN as opposed to the levying of a regulatory levy for the purpose of 'defraying expenses'. The SC held that the Act introduces a complete, complex and detailed code of regulation with a regulatory purpose to influence behaviour and in the process CRAN is expected to extend to licensees, such as the applicant, substantial

[111] *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement and Others* 2018 (3) NR 800 (SC) at 806B-C, paragraph [13].
[112] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* 2018 (3) NR 664 (SC) at 673A-B, paragraph [21].

privileges through licencing, enforcement and prevention of anti-competitive practices. The fact that revenue (in the broad sense of the word) is generated by the regulator is only incidental. It was held that section 23(2)*(a)* of the Act is not a form of tax.[113]

[43] As regards the second issue that was given for determination on appeal, the applicant's arguments against section 23(2)*(a)* and the regulations were captured by the SC in paragraph 51-53 of the judgment as follows:

*'[51]. . . s 23(2)(a) of the Act offends the Dawood principle because it confers 'uncircumscribed discretion' on CRAN in levying 'revenue and taxation' without representation. . the 'content of the law is not ascertainable by reading it' and gives CRAN the discretion, amongst others, to itself on a discretionary basis decide what 'percentage to impose: it could be anything from zero to 100%'. . . .that the provision contains 'no requirement that the percentage be within a prescribed range'. Nor is any method for computing the percentage provided, or any requirement imposed that the percentage be approved by Parliament, debated in Parliament, or even tabled in Parliament.*

*. . . . ., the legislature failed 'to limit the risk of an unconstitutional exercise of discretionary powers*

*[53] The net result of the statutory scheme of s 23(2)(a), MTC's argument concludes, is that CRAN has been impermissibly granted plenary legislative powers under the section. ."* [114] *(Own emphasis)*

[44] Counsel then made the observation that the applicant's complaints in the SC, particularly repeated in these proceedings, seem to be the unguided delegation of legislative powers to CRAN in the exercise of its discretion. The applicant's case was stated by the SC[115] to be that the section in its present form grants subordinate legislative authority to an administrative body, CRAN, to, on a discretionary basis, determine levies in the absence of guidelines informing the exercise of that power. (The so-called *Dawood* principle.). The applicant therefore appreciated the fact that

---

113 CRAN at 686B-D, para. 86.

114 *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* 2018 (3) NR 664 (SC) at 679I-J – 680A-E.

115 CRAN at 686G-H, paragraph 89.

CRAN has a discretion to exercise which was not subjected to guidelines by the legislature.

[45] It was observed further that based on the alleged draconian, limitless and unchecked powers enjoyed by CRAN, the SC stated in paras. 91 to 93 [116] as follows:

*'[91]. . . In my view, what is striking about the provision is the absence of any guideline as to the limit of the percentage on annual turnover that CRAN may impose. For example, there is no upper threshold beyond which CRAN may not set a levy, nor the permissible circumstances under which, if at all, that threshold can be exceeded. Can it really be that, 'Anything goes?*

*[92] Can it be right for CRAN to have unchecked discretion, without any ascertainable limitation (or even as much as oversight by either the Executive or the Legislature), to determine what the percentage levy on 'turnover' should be? What if in one year they decide it is 1.5 % and in another that it be 50%? How are the licensees to know what percentage exceeds the legislative competence of CRAN? Mr Maleka was not able during argument to provide a satisfactory answer to this conundrum! Without a reasonable degree of certainty, regulations made under s 23(2)(a) of the Act are fertile ground for incessant litigation. The rule of law requires that the law is ascertainable in advance so as to be predictable and allow affected persons to arrange their conduct and affairs accordingly. Section 23(2)(a) fails that test.*

*[93] In its present form therefore, s 23(2)(a) of the Act constitutes the outsourcing of plenary legislative power to CRAN given the absence of guidelines and limits for its exercise. The legislature has failed to guard against the risk of an unconstitutional exercise of a discretionary power by CRAN and the result is that s 23(2)(a) of the Act is unconstitutional and liable to be struck down, as must the impugned regulation*.' (Own emphasis)

[46] It was then pointed out that the above analysis should be appreciated in light of what the SC noted at paragraph [17] to the effect that although *it is permissible for parliament to delegate a legislative power to the executive or an administrative body*, it may not delegate plenary legislative power. It was highlighted therefore that there is nothing unconstitutional for Parliament to delegate legislative powers to other bodies. Such delegation must just be confined, limited and guided so that it does not

[116] CRAN at 687A-E.

amount to a delegation of plenary legislative functions and to ensure that there is no abuse of the delegated powers. That is why the SC relied on the principles stated in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*[117] para 51 and the well-established case of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*[118]. In *Justice Alliance of South Africa v President of the Republic of South Africa and Others*[119] the South African Constitutional Court appropriately stated at paragraph [53] that:

> *'[53] This court has frequently recognised that the Constitution sometimes permits Parliament to delegate its legislative powers and sometimes does not.48 Shortly after the advent of our constitutional democracy, in Executive Council I, Chaskalson P made plain:*
>
> > *"In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . . ."* (Own emphasis)

[47] It was then pointed out that the SC, in deciding the constitutionality of section 23, did not only consider the wording of the section as the enabling legislation. The SC also looked at the regulations as forming part of the body of regulatory rules to which the licensees are subjected.[120] In fact, it is from the consideration of the minimum 1.5%, as contained in the impugned regulations, that the SC ruled that the

---

[117] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289; [1995] ZACC 8)
[118] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8)
[119] *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC)
[120] CRAN at 687B-C, para. 92.

licensees would not know what percentage exceeds the legislative competence of CRAN as there is no threshold or limit on the setting of the levy, and hence the uncertainty created by the regulatory scheme. The regulatory scheme considered by the SC was therefore both the Act and the regulations.

[48] Reference was then made to the so-called trite principle in administrative law that administrative bodies should exercise their discretion within the parameters and the guidance as provided in the enabling legislation. Absence of these guideline constitutes uncircumscribed discretionary powers. Failure to act in terms of these guidelines and requirements results in invalid administrative actions/*ultra vires,* hence the resort to Article 18 of the Namibian Constitution.[121]

[49] It was then submitted that MTC argues that the SC had ruled that the limitation or the threshold of the percentage of the regulatory levy should have been contained in section 23 itself. Accordingly, parliament was not supposed to have delegated its legislative powers to CRAN[122] as the administrator cannot turn itself into an *ad hoc* legislator.[123] The applicant's case is that section 23, in its amended state, reproduces section 23(2)(*a*) which the Supreme Court declared unconstitutional. The applicant's stance on unconstitutionality is sustained on the premise that the "limits and guidelines" should have been contained in the amended section 23 itself, which was not done.[124] And further that the applicant had brought these proceedings in anticipation of CRAN's intention to prescribe the licence fees and regulatory levies through the regulations as contained in the Notice of 9 October 2020.[125] The challenge to the envisaged regulations is on the basis that since CRAN is unable to defend the constitutionality of the amended section 23, any regulations purportedly prescribed pursuant to section 23 are similarly unconstitutional and null and void. In its current form therefore, the applicant submits that section 23 and the envisaged

---

[121] **Article 18- Administrative Justice.**

> *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."*

[122] See para. 17, 52-55 of the Applicant's heads of argument.
[123] Para. 54 of the Applicant's heads of argument.
[124] Para. 56 of the Applicant's heads of argument.
[125] Annexure CRAN 14 to the answering affidavit.

regulations are uncertain as they do not provide for a limit to the upper threshold of the regulatory levy. This argument is based on the fact that in fact no regulations were promulgated.

[50] In contradiction of these arguments CRAN's counsel contended that the SC never ruled that the upper threshold on the regulatory levy should be contained in section 23. Such could also not have been the intention of the SC due to what has been stated at paragraphs [17] - [20] of the judgment. It was further clear, so the argument ran, that at no point did the SC hold that the discretion to regulate the industry should be taken away from CRAN but should vest in the legislature, which would be the effect of having the legislature set the upper threshold itself in section 23.

[51] It was thus argued that all that the legislature did in section 23 was to give a discretion to CRAN to, by regulations, impose a levy by means of a percentage. In fact, the SC held at 686E-F that the alleged unconstitutionality of s 23(2)*(a)* of the Act does not lie in the fact that it authorises a levy on 'annual turnover' or that it does not require CRAN to base the levy on the cost of its service relative to a particular industry or licensee being regulated. No mention was made of regulations being an improper tool to exercise its administrative discretion, provided that it is guided. The SC therefore did not rule that the section was unconstitutional because the limitations were not contained in section 23 itself.

[52] Counsel further argued that the SC was in essence concerned about unchecked powers of CRAN when it determines the levy under section 23(2)*(a)* and that the SC thus noted the absence of guidelines in the section to guide CRAN in setting the percentage of the levy on annual turnover. It by no means ruled that the limit itself (the %) must be in the section because such a position would relieve CRAN of its discretionary powers as the regulator. Counsel reiterated that it is because of the absence of guidelines that the discretion is unchecked and it is because of the absence of a limitation, in determining the percentage on the turnover, that the SC had ruled that the regulations were uncertain. It is on these grounds that the SC held that section 23 constituted an outsourcing of plenary legislative power to CRAN because the discretion was unguided.

[53] On behalf of CRAN it was submitted therefore that the SC did not rule that the upper threshold must be determined by the legislature in section 23, and that this was rightly so. The applicant's position that section 23 ought to contain the actual threshold is misplaced. What section 23 should contain is the guideline and the limitations to guide the setting of the upper threshold. Section 2 of the Act has, as its object, the regulation and control of telecommunications services and networks in Namibia by CRAN and the regulatory body. The SC acknowledged that from the extensive mandate of CRAN as provided for in the enabling Act, 'Namibia's telecommunications, broadcasting, postal and radio spectrum landscape represents a complete and complex regulatory framework'.[126] This is the regulatory framework within which CRAN exercises its powers as contained in the provisions of the enabling Act and the subordinate legislation in the form of regulations as authorised by section 129 of the Act. It is in terms of these legal instruments that the guidelines and limitations on the exercise of CRAN's discretion should be contained in accordance with the *Dawood* principle. Because of the highly technical and uniquely specialized communication sector CRAN as a specialized regulator would in any event be entitled to some relatively wide discretionary powers to enable it to regulate the communication industry.

[54] Reliance was then placed on the South African Supreme Court of Appeal decision in *South African Reserve Bank and Another v Shuttleworth and another*[127] stated at para. 68:

*'[68] But even if parliament's delegation of regulatory authority to the President here is conspicuously abundant, I consider that its exceptional nature is warranted in the field in which it occurs. This case requires us to consider the constitutional validity of a statute vesting authority on the President to regulate specifically the export of currency. We are not concerned with the competence of an exercise of that power in relation to banking or exchanges. The authority at issue here was exercised by the promulgation of reg 10(1)(c) which prohibited, except subject to the Minister's conditions, the export of capital from the Republic.*'

---

126 At 668F-H, para. 6.

127 *South African Reserve Bank and Another v Shuttleworth and another* 2015 (5) SA 146 (CC)

And at para. 70:

*'[70] That the Constitution affords an express mandate for protecting the value of the currency demonstrates the exceptional significance of the issue. Currency moves with lightning speed. Money has long ceased to be a hand-held commodity or physical article of trade for exchange purposes. The internet and electronic communications enable it to be moved from and between locations and jurisdictions almost instantly. Hence the need for special regulation. Hence also the need for special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide, but its unusual width meets the unusual circumstance of the subject-matter*.'

[55] It was then pointed out that, furthermore, the power to make regulations is an administrative function or decision vested in CRAN, which is permissible under the Constitution. The applicant adopts a stance that such administrative function is improper or not constitutionally permissible and that only the legislature should set the limits for the discretion. It was opportune to adopt the words of the Supreme Court in the case of *Kambazembi Guest farm cc t/a Waterberg Wilderness v Minister of Lands and Resettlement and Others*[128] wherein the court at 813B-D stated that:

*'This is inherently an exercise properly left for technical and expert determination in accordance with a fair procedure established in subordinate legislation, …. This forms part of the administration of the land tax system based on value and established by parliament. This structure accords with the widely accepted approach recognised and accepted by this court, that the complexities of the administration of a modern welfare state, particularly in technical fields, means the passing of legislation setting principles and standards which are left to subordinate legislation for greater particularisation for their administration and implementation*.'

[56] It was thus argued that Section 23 of the Act makes it clear that CRAN may, by regulation, after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services in order to defray its regulatory costs. The administrative authority to, by regulation, impose a regulatory levy has not

[128] *Kambazembi Guest farm cc t/a Waterberg Wilderness v Minister of Lands and Resettlement and Others* 2018 (3) NR 800 (SC).

been challenged and the applicant sets out no legal justification why CRAN may not regulate. It is submitted therefore that to the extent that the applicant persists that the upper threshold should rather be contained in section 23 of the Act and not the regulations, is misconceived as it is constitutionally permissible for the legislature to delegate legislative powers and provide principles and standards against which such legislative powers is to be exercised.

[57] It was added that the applicant's position, that the guidelines should be contained in section 23 itself, is therefore at odds with the SC position and it cannot be expected that only the legislation, should deal with particularisation of a complex and complete regulated framework. How is the legislature expected to know and to be able to quantify the actual or estimated costs of complex and detailed regulated industry?[129]

[58] It was further argued that the SC does not support the applicant's position as the SC at para [17] emphasised that:

*'(A)lthough it is permissible for parliament to delegate a legislative power to the executive or an administrative body, it may not delegate plenary legislative power. That approach has been accepted as trite by the South African Constitutional Court and applies with equal force to the interpretation of the Namibian Constitution. As Chaskalson P put it in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289; [1995] ZACC 8) para 51:*

> *In a modern State detailed provisions are often required for the purpose of implementing and regulating laws. Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the*

---

[129] See *South African Reserve Bank and Another v Shuttleworth and Another-supra* at para. 71

*framework of a statute under which the delegation is made, and assigning plenary legislative power to another body."*[130]

[59] It was accordingly submitted that allowing the legislature to determine the threshold will be an inappropriate fettering of discretionary powers that the legislature itself entrusted in CRAN. CRAN is still vested with the power to regulate by setting the regulatory levy as a percentage. What is emphasised by the SC is that CRAN must be guided in setting the levy. We submit that the present section 23 (as amended) has provided the required guidance.

The amended section 23 and the regulations

[60] Counsel for CRAN considered it is worth noting that in the SC case, the challenge was not directed at the fact that the limits were not contained in section 23 itself but to a lack of guidance in the exercise of discretionary powers of CRAN both from the Act and the regulations. In these proceedings, the applicant seems to have taken both approaches in challenging the constitutionality of section 23: that section 23 does not have the upper threshold itself; that there are no guidelines provided and that the principles as contained in the amended section 23 are too broad and vague. It was submitted that such an approach is self-destructing.

[61] It was however submitted that no delegation of unguided powers occurred but in fact a delegation of guided and limited powers on principles and considerations contained therein to inform the exercise of CRAN's discretion in setting the regulatory levy. The main concern of the SC was the absence of any guideline as to limit the percentage on annual turnover that CRAN may impose, for example, there was no upper threshold beyond which CRAN may not set a levy, nor the permissible circumstances under which, if at all, that threshold could be exceeded.[131] The findings were made in the wake of the old regulations which imposed a minimum levy of 1.5% on the "annual turnover of service providers" and which the SC opined that it does not limit the risk of an unconstitutional exercise of discretionary powers. The fear was that CRAN may exceed its powers if unguided or if not limited.

---

130 *Kambazembi* at 812A-E, para. 41.

131 At 687A-E.

[62] With reference to what the Supreme Court had held at para [93] that the "form", that section 23 was in, constituted an outsourcing of plenary legislative powers to CRAN, given the absence of guidelines and limits for its exercise, it was submitted further that the new amended section 23 is certainly not a *duplication* of the previous section 23. The objects of the amendment Act are to:

> *'inter alia*, *define what constitutes "regulatory costs" and "turnover"; to circumscribe the power to impose a regulatory levy to cover regulatory costs of the Authority and to provide requirements and guidelines regarding the determination and imposition of the regulatory levy*' …

and that it so appeared from these objectives of the Act, that the legislature had aimed at addressing the absence of guidelines and limitations on the exercise of CRAN's discretion. It was submitted that such a defect has been addressed in the impugned section.

[63] It was further considered necessary to examine in detail how these guidelines and limitations on the determination of the size and amount of the regulatory levy have been incorporated by the legislature into section 23.

[64] After quoting section 23(1):

> '23 Regulatory levy
>
> (1) With due regard to subsections (4) to (8), the Authority may by regulation, after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services in order to defray its regulatory costs, which levy may take one or more of the following forms -
>
> (a) a percentage of the turnover of all or a prescribed class of the providers of communications services;

(b) a fixed amount payable by a prescribed class of providers of communications services in respect of a prescribed period;

(c) a fixed amount payable by a prescribed class of providers of communications services in respect of any customer to whom a prescribed class of service is rendered during that period;

(d) as a combination of the forms referred to in paragraph(a), (b) or (c) together with provisions prescribing the circumstances under which a prescribed form of the levy is payable;

(e) any other form that is not unreasonably discriminatory.'

the arguments in defence of the newly amended section 23(1) were the following:

a) In this regard it was then firstly contended that authorizing a regulatory levy to defray CRAN's expenses as a percentage of annual turnover of a licensee is constitutionally permissible as contained in section 23. The SC did not state that the percentage itself must be stated in the Act and therefore the SC appreciated the fact that CRAN has a discretion on setting the percentage which can be provided for in the regulations. The industry is regulated by the Act and the regulations. It is therefore not correct for the applicant to contend that the SC reflected that the legislature must set the limit.[132] On the contrary the court expressly stated that the legislature must set guidelines to inform the limit to be set by CRAN. Correctly so to avoid abuse of administrative powers by CRAN. That, it is submitted, is the whole thrust of the *Dawood* principles.

b) In support of this argument it was then pointed out that Sections 23(2)(a)-(c) identify factors that may affect the decision on whether to impose the levy in a form of a percentage or in a specific amount. It allows CRAN a level of flexibility in setting the levy in order to accommodate various service providers, i.e. meaning that each provider can have its own unique levy or can be treated differently or different providers or license holders can be divided ininto categories with the same levy for everybody within that category. Once again, these are guidelines worked into the impugned

---

[132] Para. 30 of replying affidavit.

section to assist CRAN in determining whether to impose a levy in a form of a percentage or a fixed amount, which is permissible. It reads:

> ‘(2) When imposing the levy, the Authority may by regulation -
>
> (a) impose different percentages or different fixed amounts depending on -
>
> (i) the amount of turnover of the provider;
> (ii) the category of communications services rendered by the provider;
> (iii) the class of licence issued to the provider; or
> (iv) any other matter that is in the opinion of the Authority relevant for such an imposition;
>
> (b) impose a fixed minimum amount payable by providers of communications services irrespective of the form of the regulatory levy as set out in subsection (1);
>
> (c) impose different forms of the regulatory levy, as set out in subsection (1), depending on –
>
> (i) the amount of the turnover of the provider;
> (ii) the category of communications services rendered by the provider;
> (iii) the class or type of licence issued to the provider; or
> (iv) any other matter that is in the opinion of the Authority relevant for such an imposition.”

c) In addition Sections 23(2)(d)-(g) set out guidelines, limitations and a framework within which CRAN must determine the levy to be imposed on the turnover and the manner in which that should be done. Subsection (d)-(g) guide and compel CRAN to set out the ambit of turnover, the assessment thereof; periods of assessment; the documents needed for such an assessment as well as the manner for calculating the levy. This section compels CRAN to establish a clear and transparent procedure for the determination of the levy which is to be imposed on a clearly defined turnover. Most importantly, retrospectivity is expressly prohibited herein. It reads:

> ‘(d) prescribe –

(i) with regard to the turnover of the providers of communications services, or with regard to their services or business, regulated by this Act, received or provided by the providers of communications services, the aspects thereof which are included or excluded for purposes of determining the regulatory levy or calculating the turnover of the provider concerned;

(ii) the period during which turnover, services or business must be received or provided to be considered for the calculation of the regulatory levy; and

(iii) without limiting the aforegoing, the manner in which the regulatory levy is to be calculated:

Provided that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the Gazette;"

(e) prescribe the periods and methods of assessment of the regulatory levy and the due date for payment thereof which may include payment in prescribed instalments: Provided that the regulatory levy may not be imposed on turnover, or services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the Gazette;

(f) prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy payable by the providers of communications services;

(g) prescribe penalties, which may include interest, for the late payment of the regulatory levy, or for providing false information or for the failure to provide information to the Authority relating to the assessment of the levy.'

d) It was then pointed out that the applicant submits that the 'supposed guidelines' confer further an open-ended discretion on CRAN, without indicating how the open-endedness is created.[133] However the objectives of the regulatory levy are set out in section 23(3) as follows:

[133] Para. 28 of the applicant's heads of arguments.

‘(a) to ensure income for the Authority which is **sufficient** to defray the regulatory costs thereby enabling the Authority to provide quality regulation by means of securing adequate resources;

(b) insofar as it is practicable, a fair allocation of cost among the providers of communication services;

(c) to promote the objects of this Act set out in section 2 and the objects of the Authority set out in section 5.”

e) It was then stated that the Applicant avers that section 23(3) is incapable of providing the required guidelines, least of all imposing a threshold on the percentage[134] in answer to which it was then submitted that section 23(3) incorporates the important aspect of “sufficiency” of the levy to defray the regulatory expenses. CRAN is, in terms of this provision, under an obligation to impose reasonable levies in as far as it is necessary and sufficient to defray the regulatory costs. The aim is to permit CRAN to impose a regulatory levy to defray its regulatory expenses. Section 23(8) ensures that at any point, CRAN has sufficient funds to be able to carry out its mandate under the Act. It is therefore submitted that this is, with respect, the first threshold against which CRAN determines its regulatory levy. CRAN’s regulatory levy cannot exceed its regulatory costs and CRAN, may as a result, not impose a levy to generate a surplus above the demands of the regulatory expenses. It is therefore not “anything goes” as pointed out in para [91] of the Supreme Court judgment. The imposition of the levy is to this extent limited by the aspect of ‘sufficiency’.

f) In regard to the argument that CRAN may inflate its regulatory costs and the levy imposed would not necessarily cover the regulatory expenses only it was pointed out that this argument was similar to the rationality requirement that was raised by the fifth respondent in the SC case[135] and to which the SC held that since the levy in terms of section 23 is connected to a regulatory scheme[136], once it is established that the pith and substance (or the dominant purpose, in the language of

---

134 Paras. 30 and 31 of the applicant’s heads of argument.
135 CRAN at 679A-B, para. [46].
136 CRAN at 685C-D, para. [82].

Shuttleworth) of a legislative measure is to raise revenue to carry out the policy objectives of legislation aimed at affecting behaviour through regulation, it is not necessary to show that income is directly 'tied to', 'connected to' or 'adhesive to' the service provided by the regulator. Accordingly, it will be just as acceptable if the levy is related to a regulatory scheme in the sense that the monies realised are used to pursue the policy objectives and requirements of the Act.[137]

g) In CRAN's counsels' view it was therefore surprising that the Applicant still raises pointless arguments against vagueness and broadness of the regulatory costs as defined by the Act, even after the SC pointed out that there is no merit in such arguments on the specification on levies and the use thereof.

h) It was further contended that with the imposition of a regulatory levy to defray the regulatory expenses, section 23(3)*(b)* incorporates the aspect of 'fair allocation' of these costs on licensees. In accordance with the SC's judgment, it was submitted that CRAN is not obligated to strictly apportion to each licensee a proportionate share of the costs of regulation linked to it or that each licensee would pay their due share of the regulatory cost; rather it should aim at a fair allocation. In fact, at present, CRAN cannot determine and impose a levy which is strictly proportional because of a lack of resources and capacity. It was submitted that the development of such a methodology would be time-consuming, human resource intensive and expensive resulting in an even higher regulatory cost to be covered. In the absence thereof, CRAN is to consider the impact that the individual regulatory levy may have on the sustainability of the business of providers and to be able to mitigate any negative impacts on such sustainability while aiming at a fair allocation.

i) Subsections (4)-(5) – so it was argued - contain the most important yardsticks and guidelines imposed by the legislature to avoid unchecked plenary legislative powers to CRAN. The provisions are couched in peremptory terms to signify the importance of their consideration and compliance by CRAN. They read:

'(4) The principles to be applied with relation to the imposition of the regulatory levy are -

---

137 Ibid at 686A-B, para. 85.

(a) that the impact of the regulatory levy on the sustainability of the business of providers of communications services is assessed and if the regulatory levy has an unreasonable negative impact on such sustainability, that the impact is mitigated, in so far as is practicable, by means of the rationalisation of the regulatory costs and the corresponding amendment of the proposed regulatory levy;

(b) that predictability, fairness, equitability, transparency and accountability in the determination and imposition of the regulatory levy are ensured;

(c) that the regulatory levy is aligned with regional and international best industry practices.

(5) When determining the form, percentage or amount of the regulatory levy, the Authority -

(a) must duly consider, in view of its regulatory costs -

(i) the income it requires and the proportion of such income which should be funded from the regulatory levy in accordance with the objectives and principles set out in subsections (3) and (4) respectively, as projected over the period during which the regulatory levy will apply, and taking into consideration its relevant integrated strategic business plan and annual business and financial plans, including the operating budgets and capital budgets as set out in its annual business and financial plans, as contemplated in sections 13 and 14 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);

(ii) income derived from any other sources;

(iii) the necessity to ensure business continuity by, amongst others, providing for reasonable reserves as set out in its plans contemplated in sub-paragraph (i);

(iv) the necessity to avoid, as far as is reasonably possible or predictable, the receiving of income from the regulatory levy in substantial excess of what is required to cover the regulatory costs;

(v) the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy;

(vi) any other fees, levies or charges which the providers of communications services are required to pay under this Act;

(vii) any other matter deemed relevant by the Authority in order to ensure that income derived from the regulatory levy is sufficient to defray its regulatory costs;

(b) must, in order to maintain reasonable predictability and stability, avoid, unless there is good reason to do so, an increase in the regulatory levy or the introduction of a new regulatory levy in any period of 12 consecutive months;

(c) may consider any other matter the Authority deems relevant."

j) In CRAN's view Sections 23 (4) and (5) set out the guidelines, limits and considerations that should guide CRAN in determining and imposing the levy. The applicant is of course of the contrary view. In fact all that the applicant submits is that sections 23 (4) would provide for an unreasonable levy and that the considerations are open ended[138] and that there is no clarity to which international best practices they are to be aligned to. The applicant, so it was argued further, makes all the criticisms without giving particulars on how the limitations or guidelines ought to be. It was submitted that such an approach does not afford the applicant an avenue to challenge the constitutionality of statutory provisions on the basis of mere criticisms.

k) With reference to that the Supreme Court had highlighted that section 23 lacked guidelines and limitations for the exercise: the exercise of a discretion to set the percentage of the regulatory levy[139] CRAN's counsel felt that it beats logic how the Applicant can still sustain the argument that section 23 in its current form is a delegation of unchecked legislative powers to CRAN, even noting that the new section has more sections than the old section 23. Factors such as the need to mitigate any negative impact that the regulatory levy may have on the business sustainability of providers of communications services are limitations and guidelines on the powers of CRAN not to impose "any amount or percentage" which will bring a negative effect on business sustainability.

---

138 Paras. 33-35 of the applicant's heads of arguments.

139 At 687D-E.

l) The rationality element between the levy and scheme was rather solidified by subsection (5) which requires of CRAN to calculate or estimate its expenses, revenue from other sources, the fund reserves and the shortfall that needs to be covered by the levy. Only thereafter, and based on the calculations, would CRAN determine a levy sufficient to defray the estimated costs. This establishes a relationship between the charge (levy) and the scheme itself, thus making it a rational and reasonable levy. Again, all this must be based on CRAN's integrated strategic business plan and annual business and financial plans, including operating budgets and capital budgets as set out in its annual business and financial plans.

m) In regard to the applicant allegation that the impugned amendment purportedly confers on CRAN the power to impose a regulatory levy in its own discretion, without any parliamentary or other oversight (whether by the Minister or other executive authority)[140] it was pointed out that CRAN is a State- owned Enterprise. In terms of sections 13 -15 of the Public Enterprises Governance Act 1 of 2019, a public enterprise must develop an integrated strategic business plan for a period of five years (section 13(1)) which must encompass and include all the businesses and activities as well as, *inter alia*, a five-year business implementation plan to include, a marketing plan, an operations plan, an investment plan, financial projections, work force plan and skills development plan, financing plan and risk management plan. Section 14 (1) requires of CRAN to annually, at least 90 days before the commencement of its next financial year, to submit an annual business and financial plan to the relevant Minister. Section 14(5)(b) states that the annual business and financial plan must contain the operating budget and the capital budget of the public enterprise for the next financial year, with a description of the nature and scope of the activities to be undertaken, including commercial strategies, pricing of products or services and personnel requirements. Unless the integrated Strategic Business Plan and the Annual Business and Financial plan has been approved by the relevant Minister for Public enterprises, in consultation with the Minister of Information, CRAN may not incur any expenditure except in accordance with an estimate of expenditure approved in terms of section 15 of the Public Enterprises Governance Act 1 of 2019.

---

[140] Para. 8 of the founding affidavit.

n) It was further pointed out that an approval would not be made unless CRAN acts within the statutory framework imposed by the Communications Act. It is therefore denied that CRAN imposes a regulatory levy in its own discretion, without any parliamentary or other oversight. There is substantial Ministerial and/or Executive oversight and control on the exercise of CRAN's discretionary powers and that the concluding provisions of the amended section 23 relate to the powers of CRAN to change and review the regulatory levy to ensure that it still complies with the requirements especially as set out in subsections (4) and (5). This - so counsel's argument ran further - speaks to the SC's concern on the abrupt change in the setting and changing of the levy by CRAN.[141] Section 23 has built in a requirement that the levy be reviewed at least after every 5 years to ensure that it still complies with the requirements especially as set out in subsections (4) and (5). This maintains certainty and would allow affected persons to arrange their conduct and affairs accordingly.

o) With regard to Section 23 (6) – (9) which read:

> '(6) The Authority must before the expiry of five years from the last imposition of the levy or a last review under this section, review the regulatory levy to ensure that the levy is compliant with the requirements set out in this section and that there are no continued under- or over-recoveries.
>
> (7) If the Authority has received regulatory levy income in excess of its regulatory costs, the Authority may retain such over-recovery but must set it off against the projected regulatory costs used for the next regulatory levy determination and imposition.
>
> (8) If the Authority receives income from the regulatory levy less than its regulatory costs in a period during which such regulatory levy applied, or during a specific period, received no income from the regulatory levy for whatever reason, the Authority may, when determining and imposing the next regulatory levy –
>
> > (a) adjust the regulatory levy, and determine a higher regulatory levy, to recover such under-recovery during the period during which the next regulatory levy will apply; or

---

141 CRAN at 687B-C.

(b) determine a once-off higher regulatory levy for the first period during which the next regulatory levy will apply in order to recover such under-recovery and for the remaining period or periods a different regulatory levy in accordance with subsection (5).

(9) The Authority may, subject to subsection (5)(b), withdraw or amend the regulatory levy imposed under this section and, in so far as they are applicable, the provisions of this section apply in the same manner, with the necessary changes, to such withdrawal or amendment.'

it was submitted that the above provisions remedy the concerns of the SC and set out the guidelines to guide CRAN in the exercise of its discretionary powers. The power to legislate given to CRAN is therefore not unguided and it is submitted that the legislature has guarded against the risk of an unconstitutional exercise of discretionary powers within the provisions of section 23. It was submitted that the applicant's stance that the mere fact that section 23 itself does not set the actual percentage makes it unconstitutional is not in conformity with the effect of the SC judgement. The applicant's position that all the considerations in section 23 fail to confine the discretion as required by the SC and merely broaden CRAN's discretionary latitude should be rejected.[142] In fact, this conception is made in the absence of any particularisation by the SC on the extent of the guidelines and limits for the exercise of the discretionary power.

p) It was contended that the applicant misunderstood the meaning and effect of the SC judgement when it alleged that the current amendment merely broadens the powers of CRAN or that the guidelines as contained in section 23(2) are open ended and do not constitute fertile ground to sustain a claim of unconstitutionality of section

[142] Paragraph 36 of the founding affidavit.

23. O'Regan JA in *Dawood and Another v Minister of Home Affairs and Others* [143] in addressing the issue of the absence of guidelines as to the circumstances relevant to a refusal to grant or extend a temporary permit, stated that without such guidance, it would be difficult to determine in what circumstances an exercise of a discretion to refuse a permit would be justifiable.[144] The court at 969, paragraph 53 stated that:

> *'[53] Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner." "The scope of discretionary powers may vary. At times, they will be broad; particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. . .*
>
> *[54]. . . It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable….Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. . . Such guidance could be provided either in the legislation itself or where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority."*

q) These provisions heeded the cautionary remarks made by the court in *Medical Association of Namibia and Another v Minister of Health and Social Services and Others*[145] to the effect that although the conferment of discretionary power to be exercised by administrative bodies or functionaries is unavoidable in a modern state, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power conferred. The court cautioned that broad discretionary powers must be accompanied by some restraints on the exercise of the power and generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives.[146]

---

[143] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 2000* (3) SA 936 (CC) at para 53.

[144] At 967, para. 50.

[145] 2017 (2) NR 544 (SC).

[146] At 560C-E and 564E.

[65] Counsel for CRAN thus concluded that the necessary constraints on CRAN's powers do indeed appear from section 23.

[66] It was conceded that the legislature had the duty to set out clear guidelines so that CRAN would know what was expected of it in the exercise of its discretion. On the test in *Dawood* and in *Medical Association*, all that the legislature needs to do is to provide guidelines to guide and limit the exercise of the discretion. In the light thereof, it was then submitted that CRAN has circumscribed administrative discretion, which is a discretion limited or circumscribed in two respects: firstly, the number of options were limited by the statute and, secondly, the circumstances in which the discretion is to be exercised were also clearly defined in the statute". Section 23 was couched precisely in those terms.

[67] In addition counsel were of the view that it needed to be clarified that CRAN is a self-regulatory enterprise with an extensive and complex regulatory mandate in terms of the Communications Act. This much has been acknowledged by the SC. The Act makes it clear that CRAN does not receive a steady, if any, income from the National Treasury. CRAN therefore is empowered to prescribe fees to generate revenue in order to defray its regulatory costs. Financial independence, coupled with the authority to manage and administer own funds gives regulatory agencies more regulatory certainty in regulating the industry as well as independence which contributes to best practice in regulated industries. It was therefore submitted that the funding mechanism in place is very critical to ensure effectiveness and independence of the regulatory function which should be free from political and private interest influence. Having the budget approved by two Ministers acts as a system of checks and balances that would prevent CRAN from over-spending or even over-charging the regulated entities and establishes executive oversight. It was therefore undesirable that the Minister should solely be empowered to determine the income required by CRAN and the portion of such income which should be covered from the regulatory levy. Hence the requirements and obligations set out in the Public Enterprises Governance Act 1 of 2019.

[68] Finally it was submitted that it appeared from the above that the applicant's stance that the amendment perpetuates the same constitutional defect was misplaced and untenable. On the contrary, the new amended section 23 contains the guidelines and limitations, as required, to inform and guide the exercise of the discretion by CRAN in setting the regulatory levy.

The Regulations

[69] Counsel then focused their attention on the regulations which had been promulgated on 13 September 2012 pursuant to section 23, regarding Administrative and Licence Fees for Service Licences, under GG No.5176, General Notice No.110 ("the regulations"). The regulations – which at the time that the current proceedings were brought were still subject to a consultative process – where passed into law with effect from 22 June 2021 under GN 238 of 2021 - now imposed a minimum levy of 1.5% on the "*annual turnover of service providers*".

[70] It had been noted that these regulations were also under attack in respect of which the applicant's case was that the regulations would suffer the same fate – should the amended section 23 be struck down.

[71] It was stated in this regard that it was of concern to the SC that CRAN originally did not have a maximum cap on the percentage to be charged as a regulatory levy, which made the levy uncertain as CRAN could impose1.5% this year and 50% the next year. It was now submitted that this defect had been remedied by the introduction of 1.0 % as the maximum percentage to be charged on turnover. The regulations now set out that CRAN would use a progressive regulatory formula in terms of which the regulatory levy is based on a formula capping the maximum percentage at 1.65% with a minimum of N$ 500.00. The formula was designed in a way that the percentage levy increases evenly from 0% to a maximum 1% on business turnover ranging from zero to one billion Namibian Dollars. This would mean that licensees with less than one billion Namibia Dollars turnover will pay a

lower percentage and only licensees exceeding one billion Namibian Dollars will pay the full levy of 1%.

[72] It was highlighted that in CRAN's view the adopted progressive regulatory formula would have the following advantages:

a) A single formula can be applied to all sectors and licensees;

b) Smaller licensees and new entrants will pay a smaller levy percentage which would encourage market entry and competition;

c) Once a licensee has reached a turnover of one billion Namibian dollars, then only will the full levy become applicable;

d) The progressive regulatory levy formula would reduce the market exit risk while ensuring income for CRAN which is sufficient to defray the regulatory cost to enable it to provide quality regulation by means of securing adequate resources;

e) The progressive regulatory levy formula is not unreasonably discriminatory and would, in as far as is practical, result in a fair allocation of cost amongst licensees;

f) The proposed regulatory levy is not deemed to have an unreasonable negative impact on licensees' sustainability;

g) The determination and imposition of the proposed regulatory levy would ensure predictability, fairness, equitability, transparency and accountability.

[73] It was submitted that CRAN had adopted the formula above to ensure compliance with section 23 of the Communications Act, as amended, and in order to address the concerns from the SC. It was further submitted that the proposed regulatory levy was comparable and within range with other countries benchmarked.

<u>Whether section 23 delegates unguided legislative powers</u>

[74] It was then contended that the application was without merit and was unwarranted as the amended section 23, read with the regulations, now incorporates the guidelines, limits and executive oversight as to the exercise of the discretionary legislative powers of CRAN. It is neither vague nor broad, it sets the framework within which CRAN is supposed to exercise its regulatory powers; its sets out the requirements for the rationality and reasonableness of the regulatory levy in order to establish a relationship between the charge (Levy) and the scheme itself; it sets permissible guidelines to inform the limits of the percentage on annual turnover that CRAN may impose; the proposed regulations introduce an upper threshold beyond which CRAN may not set a levy and circumstances under which such threshold may be exceeded.

[75] In addition it was contended that the provisions of the Public Enterprises Governance Act 1 of 2019 ensure executive control and oversight to ensure that CRAN acts within the statutory framework as indicated above. All these measures would ensure predictability, certainty, fairness, equitability, transparency and accountability and the amended section 23 is therefore constitutionally compliant and it was a permissible delegation of a circumscribed legislative function by parliament to an administrative body. It was re-iterated that it was not the intention of the SC judgement and it is not CRAN's understanding that the actual amount or percentage must be stated in section 23. The legislature should merely provide guidelines and limits within which CRAN should exercise its powers to prescribe the fees payable to it in terms of sections 23 and 129 of the Act. The rationale behind setting statutory measures is to clearly and precisely define the limits of the exercise of the discretionary power to avoid an abuse thereof and that - in the amended form therefore - the legislature had sufficiently guarded against the risk of an unconstitutional exercise of discretionary power.

[76] Finally the point was made that the amendment effected onto section 23 must be properly viewed in the context that the Act and regulations are a complex statutory scheme properly understood by CRAN itself as the Regulator and industry

players and in respect of which Lorne Neudorf in his article, *Reassessing the Constitutional Foundation of Delegated Legislation in Canada*[147] had said that:

*'5. A note on flexibility*

*While the delegation of lawmaking powers to the executive risks undermining the constitutional role of Parliament as lawmaker in chief, Parliament should retain the ability to delegate its lawmaking powers to others where adequate safeguards are in place. The reality of lawmaking in the 21st century is that the details of complex statutory schemes, which often require the input of experts working in the field, cannot be made by Parliament alone. Regulations are necessary, and desirable, to complement primary legislation. Delegation provides the flexibility needed to do the job of changing detailed rules quickly in response to new circumstances. ... ."* (Own emphasis)

Costs and conclusion

[77] In this regard it was pointed out that it was disputed that section 23, read with the regulations authorises an "unlimited range" for imposing levies. It was further reiterated that the amended section 23, read with the regulations, now incorporated the guidelines, limits and executive oversight on the exercise of discretionary legislative powers of CRAN and that the scope of section 23 and the regulations were not vague or broad as they set the framework within which CRAN is supposed to exercise its regulatory powers; that permissible guidelines to inform the limits of the percentage on annual turnover that CRAN may impose where set; that the regulations now introduced an upper threshold beyond which CRAN may not set a levy and circumstances under which such threshold may be amended or exceeded. The amended section 23 was therefore constitutionally compliant as it conferred a permissible delegation of a legislative function by parliament to an administrative body.

[78] It was also pointed out again that CRAN is a public enterprise which renders services in the public interest, that it is wholly reliant on fees to generate revenue to defray its regulatory expenses in order to enable it to provide quality regulation by

147 Dalhousie Law Journal, Volume 41, Issue 2, Article 8, University of Adelaide.

means of securing adequate resources. Mere litigation, irrespective of the outcome, puts a hold on the imposition of the levy for a number of years, and as a result thereof CRAN is unable to efficiently and prudently carry out its mandate in terms of the Communications Act. This is an intolerable position and unjustified, especially in the face of unmerited litigation such as this one brought by MTC. Continuous litigation is therefore not in the public interest and CRAN is ultimately the entity that is suffering greatly.

[79] It was further argued that CRAN cannot perform its functions efficiently and effectively and cannot fulfil its mandate without regulatory levy income. The applicant submits that it brings this application in the interest of the public and the telecommunication industry purportedly because of the prejudice and the uncertainty posed and created by the amended section 23.[148] From the above exposition of the current form of the amendment and the regulations, it is submitted that the applicant's alleged prejudice does not exist and that the current application is brought only in the interest of the Applicant. Section 23 and the regulations are clear, ascertainable and would allow the applicant and the telecommunications industry at large to plan their operations accordingly well in advance.

[80] Counsel felt that there was no more legal certainty required as the provisions of section 23 and the regulations are self-explanatory. It was submitted that these proceedings are not in the interest of the public but were used as a means by the applicant not to pay the regulatory levies due to CRAN. MTC did not pay the regulatory levy from 2017 onwards and Telecom did not pay its regulatory fees since 2012 when the last regulation was passed. As at 31 March 2019, the Applicant is indebted to the CRAN in the amounts of approximately N$ 97 269 144, while Telecom owes an amount of N$ 123 173 384, excluding interest and penalties. To date, MTC and Telecom collectively owe approximately N$ 308,778,912, including interest and penalties as at February 2021. CRAN has since instituted proceedings for the recovery of the outstanding fees from MTC under case no HC-MD-CIV-ACT-OTH-2019/01367.

---

148 Para. 5 and 6 of founding affidavit.

[81] In conclusion it was then submitted that as the amendment passes constitutional master and as applicant has not set out justifiable grounds to invalidate section 23 it would follow that the application must be dismissed with costs, such costs to include the costs of one instructing- and two instructed Counsel.

Oral argument on behalf of MTC

[82] This was presented by Mr Gauntlett SC QC in his usual eloquent way.

[83] He commenced argument by emphasising that in terms of Dawood and other cases plenary and executive power is to be retained by the lawmaker, which had to map out the 'playing field' for the executive who cannot call whether or not 'the ball was in or out'. The executive also cannot move the boundaries of the 'playing field'. It does not have untrammelled discretion, just like a 'referee', who cannot blow the game at will, but who has to do so within the given rules. He questioned rhetorically that if his client's case was correct there had to be a lower and an upper limit within which lines the operative guidelines had to be set. These parameters, as set by the SC, were not met by the amendment. He acknowledged however that there was a discretion to prescribe a class of business to which the section would apply but that the definitional task in this regard should vest in the legislature.

[84] He pointed out that it was at the heart of MTC's case that the amendment had failed to set the upper and lower thresholds, as was required.

[85] He argued further that CRAN had failed to meet MTC's case as CRAN failed to demonstrate how sections 23(4) to (8) passed constitutional muster. Also CRAN's reliance on the object of the Communications Act did not answer to the SC's concerns. He argued that it became abundantly clear that CRAN was clinging to the impermissible defence that the constitutionality of the amendment was rescued by the amendment read with the regulations. He re-iterated again that CRAN cannot raise itself by its own bootstraps. He emphasised that the legislature had to mark out the playing field and the degree of plenary power and had to confine the discretion to be exercised in this regard as it appeared from the SC judgment that the parameters

had to be set in the governing legislation by the legislative and not by the executive in the regulations, i.e. the regulation could not be left to the 'umpire' He thus posed the question that if CRAN could not say that the act did not have to be read with the regulations to save its constitutionality that would be the end of CRAN's case as it was clear that the upper limit was not set and the guidelines given where vague.

[86] Turning to what he termed to CRANs 'final glory argument', regarding costs, to the effect that MTC was 'very wicket' as it owed CRAN many millions he pointed towards MTC's entitlement to raise the constitutional challenge, which, if it failed, meant that MTC owed and if it did not, MTC was not be compelled to pay levies pursuant to regulations prescribed under empowering legislation set aside for being unconstitutional. He asked that an order in terms of the notice of motion be granted.

Oral argument on behalf of CRAN

[87] Mr Namandje commenced argument by stating that the amended section 23, on its own, passes the constitutional standard set by the SC. He pointed out that the SC had not declared the entire section 23 unconstitutional but only section 23(2)*(a)* but that the current application attacked the entire amended section 23.

[88] He reminded the court of the onus issue as set out in the heads of argument and that the court in the circumstances of the constitutional attack should also consider and be satisfied that the section could not be rescued by the adoption of an interpretation that could save the section. In his view there was confusion as the case was not about the authority of the legislature to delegate but the issue to be determined was a delegation without guidelines. He re-iterated that CRAN did not need the regulations to successfully defend the constitutionality of the amended section. With reference to *Dawood* he submitted that the necessary guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority. This was done as the amended section required that a 'sufficient' levy could be set.

[89] He noted that the main attack was against the absence of guidelines as formerly only a percentage of 1% had been set but that now also an upper cap had

been set in terms of the new regulations together with a formula at 1.65%. The amendment had now introduced elaborate guidelines. This together with the capping set in the regulations rescued the amended section. As far as the necessary oversight as required by the SC was concerned this aspect was now taken care of. There has to be a business plan and a report to the executive and sections 23(4) to (8) introduced the relevant references and guidelines. It appeared that 'sufficiency' was set as a guiding principle and CRAN was told that there would have to be a fair allocation and was required not to 'kill' businesses. There was nothing wrong with the requirement that the levy would have to be aligned to the best standard.

[90] Ultimately his submission was that the guidelines set in the amendment had addressed all the concerns of the SC. The applicant's attack was without discern as the attack was mounted against the entire amended section, whereas in the previous challenge only section 23(2)(a) had been under attack.

[91] He again emphasised that it should be taken into account that CRAN was not relying on the regulations to save the constitutionality of the amended section but that CRAN's case was, with reliance on Dawood, that the upper cap of 1.65% could legitimately be set in the regulations and that the amendment, as read with the regulations, was thus constitutional.

MTC's oral reply

[92] Mr Gauntlett immediately latched on to the last submission in respect of which he pointed out that counsel for CRAN realised he had a point to answer – that answer was to the effect that 'the act with regulations fixes it' and that we were told, selectively, with reference to the last passage from para [54] in Dawood that : ' *… Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority',* in circumstances where regard should also be had to the rest of the relied upon paragraph and from which it appeared that the court had held open a small door that the regulator may take certain aspects further, which would be permissible in

principle, subject to the necessary guidance. He submitted that the said paragraph was not supportive of a general reliance on regulations.

[93] As far as the criticism was concerned that the SC had only set aside section 23(2)*(a)* and that the renewed attack now was aimed at the entire section 23 he submitted that this was simply brought about by the reason that the legislature had replaced the entire section 23. The amendment was attacked because it was considered as a mere 'Band Aid" to the problems which it endeavoured to fix. Severability also did not come into play where the entire provision was defective and in any event it was for the defending party to ask for this and this was not raised on the papers. In respect of the onus argument he submitted that this was only applicable in circumstances where an interpretation is offered that would save the section, but that there was no such engagement in this case.

[94] In response to the argument that section 23 read with the regulation saved its constitutionality he submitted that on any approach it was MTC's case that the upper limit had to be set by parliament and could not be set by CRAN as clearly appeared from para's [91] and [92] of the SC's judgment. Also he posed the question which the SC had asked : *' … could it be right that CRAN has an unchecked discretion, without any ascertainable limit …'* with reference to which he submitted that it would become clear that also the amendment had failed.

[95] He argued further that the amended section did not have sufficient definition as far as the guidelines it endeavoured to set in respect of which it appeared that *' … a lot of adjectives had been used …*'. The regulated entities where entitled to know what was in the 'basket' and he proceeded to illustrate the vagueness with reference to a number of examples and from which it had to be concluded that the 'tramlines' had not been set in the act, within which the regulations would have to be made.

[96] He concluded by submitting that CRAN had failed to provide a direct answer to the challenge in circumstances where it was clear what the SC had said should have been contained in the amended legislation. It was undisputed that the upper limit had been set in the regulations. This fact could not be undone by CRAN. The

upper limit had to be set in the amended section. This was not done and the application, should the court agree, would thus have to succeed.

The Supreme Court judgment

[97] It is common cause that the resolution of also this further dispute between CRAN and MTC is to be governed by the decision made in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* 2018 (3) NR 664 (SC).

[98] It essentially appears from that judgment that in terms of section 23 of the Communications Act of 2009 - Parliament had outsourced plenary legislative power to CRAN[149]. This outsourcing was essentially found constitutionally wanting - as it failed to guard against the risk of an unconstitutional exercise of discretionary power by CRAN.[150] Section 23 was thus declared unconstitutional and was struck[151]. The consequential amended section 23 now faces a similar attack on the bases that the amendment did not only fail to cure the previous defect(s), but that it rather compounds the unconstitutionality.

[99] In the understanding that the Supreme Court set the conclusive standard - on which the constitutionality of the amended section 23 will also hinge - counsel for both parties have devoted an entire chapter in their heads of argument to this leading judgment. They have also submitted detailed argument on how the judgment is to be understood and what standards it set and obviously how it supports their respective cases and disproves that of the opponent. All this has already been extensively summarised above.

---

149 *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* at [93].

150 *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* at [93].

151 *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Others* at [113].

[100] In such premises – and in order to determine which interpretation is to prevail - it would thus in the first instance be helpful to call to mind how the learned Deputy Chief- Justice, writing for the Court, dealt with the relevant facet of that case:

'Delegation of uncircumscribed discretionary power

[89] As I understand the respondents' remaining case, the section in its present form grants subordinate legislative authority to an administrative body, CRAN, to, on a discretionary basis, determine levies in the absence of guidelines informing the exercise of that power. (The so-called Dawood principle.)

[90] In defence, Mr Maleka argued that CRAN is a specialised body and that it was recognised in Dawood that in such circumstances it is permissible for wide discretionary power to be granted to an administrative body. Mr Maleka only made a general observation about CRAN being a specialised body without suggesting how that specialist skill is applied in the determination of the levy. It is not clear to me what specialist endeavour is called for in determining the levy. Certainly it is not demonstrable from the manner in which Item 6 was executed.

[91] On the converse, Mr Gauntlett evocatively described the rather draconian, limitless and unchecked power enjoyed by CRAN when it comes to determining a levy under s 23(2)(a). (As to which see [51] – [52] above.) In my view, what is striking about the provision is the absence of any guideline as to the limit of the percentage on annual turnover that CRAN may impose. For example, there is no upper threshold beyond which CRAN may not set a levy, nor the permissible circumstances under which, if at all, that threshold can be exceeded. Can it really be that, 'anything goes'?

[92] Can it be right for CRAN to have unchecked discretion, without any ascertainable limitation (or even as much as oversight by either the executive or the legislature), to determine what the percentage levy on 'turnover' should be? What if in one year they decide it is 1,5% and in another that it be 50%? How are the licensees to know what percentage exceeds the legislative competence of CRAN? Mr Maleka was not able during argument to provide a satisfactory answer to this conundrum! Without a reasonable degree of certainty, regulations made under s 23(2)(a) of the Act are fertile ground for incessant litigation. The rule of law requires that the law is ascertainable in advance so as to be predictable and allow

affected persons to arrange their conduct and affairs accordingly. Section 23(2)(a) fails that test.

[93] In its present form therefore, s 23(2)(a) of the Act constitutes the outsourcing of plenary legislative power to CRAN given the absence of guidelines and limits for its exercise. The legislature has failed to guard against the risk of an unconstitutional exercise of a discretionary power by CRAN and the result is that s 23(2)(a) of the Act is unconstitutional and liable to be struck down, as must the impugned regulation.'

[101] It will have been noted that the court also seems to have referred with approval to Mr Gauntlett's argument, at the time, when it cross-referenced in paragraph [91] of its judgment to paragraphs [51] to [52] and where after the court then went on to state that '… *In my view, what is striking about the provision is the absence of any guideline as to the limit of the percentage on annual turnover that CRAN may impose …*'. That argument was summarised as follows:

'[51] According to Mr Gauntlett SC QC, counsel for MTC, s 23(2)(a) of the Act offends the Dawood principle because it confers 'uncircumscribed discretion' on CRAN in levying 'revenue and taxation' without representation. The argument goes that the 'content of the law is not ascertainable by reading it' and gives CRAN the discretion, amongst others, to itself on a discretionary basis to decide what 'percentage to impose: it could be anything from zero to 100 %'. Counsel adds crucially that the provision contains 'no requirement that the percentage be within a prescribed range'. Nor is any method for computing the percentage provided, or any requirement imposed that the percentage be approved by Parliament, debated in Parliament, or even tabled in Parliament.

[52] MTC also lays great store by the fact the section permits the imposition of a levy on a percentage based on income in combination with any other form identified in paras (b) – (d) of ss (2) of s 23 of the Act. As Mr Gauntlett put it:

> "Thus a levy based on a percentage of income may be imposed in addition to a levy based on a percentage of profit and to a fixed annual levy and a fixed amount per call. And to these CRAN may add any other form of levy imaginable."

By so doing, the argument goes, the legislature failed 'to limit the risk of an unconstitutional exercise of discretionary powers'.'

[102] In fairness, and to present the complete picture of Mr Gauntlett's argument at the time, it should be mentioned that his argument concluded that:

'[53] The net result of the statutory scheme of s 23(2)(a), … , is that CRAN has been impermissibly granted plenary legislative powers under the section.'

[103] It is against this backdrop then that the parties' interpretation of the judgment will have to be assessed.

[104] It will already also have appeared from the summarised arguments that the parties' respective cases have been built- and thus largely depend on the correctness of their respective interpretations in which regard they differ in a number of material aspects. In my view the resolution of these differences will provide the key to the resolution of this case as it will determine which case will stand or fall.

The fundamental issue: does the enabling legislation have to set the parameters?

[105] MTC's case is essentially that also the amended section 23 *' … is an unconstitutional abdication by parliament of its legislative function …' as the empowering provision again confers an unconstrained discretion on the regulator to prescribe any percentage for purposes of imposing a regulatory levy …'*. CRAN on the other hand contends that *'… the SC's concerns were addressed and that the amendment now guards against an unconstitutional exercise of powers as the amended section provides clear guidelines and limitations as are required to inform and guide the exercise of the discretion by CRAN in setting the regulatory levy …'.*

[106] If one then turns to CRAN's arguments it appears firstly that CRAN accepts that, in terms of the governing case law, parliament may delegate subordinate legislative power to the executive or an administrative body but that it may not delegate plenary legislative power. CRAN also accepts that the delegation in question, if it occurs, has to be confined, must be limited and has to be guided.[152] It also argued that when the SC considered the constitutionality of section 23 it did not

[152] Compare submissions made in heads of argument for CRAN at para 13

only consider the wording of the enabling legislation but also the regulations. This submission was made with reference to para [92] of the SC judgment.[153]

[107] While it is, as a general proposition correct, that the SC also had regard to the regulations[154], I believe that the SC, in para [92] of its judgment, when it said : *' Without a reasonable degree of certainty, regulations made under s 23(2)(a) of the Act are fertile ground for incessant litigation. The rule of law requires that the law is ascertainable in advance so as to be predictable and allow affected persons to arrange their conduct and affairs accordingly …'* made these remarks in the context of its key finding that section 23 - (as opposed to the regulations) - revealed the *' … absence of any guideline as to the limit of any percentage on annual turnover that CRAN may impose …'* in respect of which the SC then went on to conclude that: *' … In its present form therefore, s 23(2)(a) of the Act constitutes the outsourcing of plenary legislative power to CRAN given the absence of guidelines and limits for its exercise …'* intimating thereby that the *'reasonable certainty'* of the regulations, to result in the necessary predictability for instance, was to be achieved through guidelines and limits which had to be set in section 23 of the statute, which it failed to do.'

[108] This conclusion also ties up with the CRAN's further submission that *' … it is a trite principle in administrative law that administrative bodies should exercise their discretion within the parameters and the guidance as provided by the enabling legislation. Absence of these guidelines constitutes uncircumscribed discretionary powers. Failure to act in terms of these guidelines and requirements results in invalid administrative actions/ultra vires …'.*[155]

[109] At the same time it appears that one of the key stances taken by CRAN to the effect *' … that the SC never ruled that the upper threshold on the regulatory levy should be contained in section 23 …'* cannot be upheld. Also CRAN's related submission that MTC's position that section 23 should contain the guideline and limitations is misplaced, as it cannot be founded on the leading judgment.

---

153 Compare submissions made in heads of argument for CRAN at para 14

154 See for instance paras [10] to [11] and [27] to [28] and again at [78], [81] to [82] or [86]

155 Compare submissions made in heads of argument for CRAN at para 15.

[110] In this regard it is pointed out further that CRAN's stance is also contradicted by its own acceptance of the principle ' … *that administrative bodies should exercise their discretion within the parameters and the guidance as provided by the enabling legislation…'.* [156] Parameters set limits and give guidance. So much is clear. Such limits would also impose restrictions. Such restrictions can be provided by an upper and a lower threshold. Limits and restrictions are to be set- and the requisite guidelines are to be provided for in the enabling legislation as was also accepted by CRAN with reference to what the South African Constitutional Court said in *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC).[157] It so becomes clear that all this has to occur within the 'tramlines' set by the legislature, as was submitted on behalf of MTC.

[111] It further appears that although it was correctly contended that *' … the SC was concerned about unchecked powers of CRAN when it determines the levy under section 23(2)(a)* …' - and that - ' *… the SC noted the absence of guidelines in the section to guide CRAN in setting the percentage of the levy on annual turnover …',* it is not so, as was submitted further on behalf of CRAN, that the SC did not rule that *'… the limit itself (the %) must be in the section because such a position would relieve CRAN of its discretionary powers as the regulator…' or that the upper threshold must be determined by the legislature and that MTC's position, that section 23 ought to contain the actual threshold, is misplaced …',* because this position would be at odds with the SC position, which is to the effect that the parameters – which would include an upper threshold - within which the regulatory powers are to be exercised - had to be set in the enabling legislation.

[112] It follows from this interpretation that it also effectively negates CRAN's argument that the amended section, together with the regulations, cumulatively, creates a regulatory regime which is 'sufficiently predictable and defined' , i.e. that it creates a regulatory regime which addresses the SC's concerns.

---

[156] Compare submissions made in heads of argument for CRAN at para 15.

[157] At [53 : ' … There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . . .'"

[113] There was however a further argument raised on behalf of CRAN to the effect that the amended section 23, on its own, did in fact contain all the guidelines and limitations, as required to inform and guide the exercise of the discretion by CRAN in setting the regulatory level. This defence thus requires consideration next.

Does the amended section 23, on its own, set the required parameters with the requisite degree of certainty?

[114] In order to assess whether or not there is substance in this further defence detailed regard will have to be had to the amended section 23. The section commences with the authorisation to CRAN to make regulations for purposes of imposing a regulatory levy. Section 23(1) reads:

*'23 Regulatory levy*

*(1) With due regard to subsections (4) to (8), the Authority may by regulation, after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services in order to defray its regulatory costs, which levy may take one or more of the following forms -*

*(a) a percentage of the turnover of all or a prescribed class of the providers of communications services;*

*(b) a fixed amount payable by a prescribed class of providers of communications services in respect of a prescribed period;*

*(c) a fixed amount payable by a prescribed class of providers of communications services in respect of any customer to whom a prescribed class of service is rendered during that period;*

*(d) as a combination of the forms referred to in paragraph(a), (b) or (c) together with provisions prescribing the circumstances under which a prescribed form of the levy is payable;*

*(e) any other form that is not unreasonably discriminatory.'*

[115] It should possibly also be mentioned that section 23 was amended on 15 July 2020. At the time that the present proceedings were instituted, the regulations were still in the consultative process. In the interim, the regulations prescribing 'Administrative and Licence Fees' made in terms of section 129 of the Act have been put into operation with effect from 22 June 2021 in terms of GN 238 of 2021.

[116] For purposes of assessing CRAN's further defence it would also helpful to just call to mind that MTC in this regard has essentially contended that the amendment – apart from the two additional features - which it claims have exacerbated the unconstitutionality – in its current form repeats precisely what MTC attacked successfully before the SC.

[117] In opposition CRAN defends the constitutionality of the amendment on the following bases:

a) that sections 23(2)(a) to (c) identify certain factors that may affect the decision on whether to impose a levy in the form of a percentage or in a specific amount – this - so it is contended - allows for a level of flexibility;[158]

b) that guidelines, limitations and a framework have been worked into the section – this has occurred in sections 23(2)(d) to (g) - as these subsections guide and compel CRAN to set out the ambit of turnover, the assessment thereof; periods of assessment; the documents needed for such an assessment as well as the manner for calculating the levy. The subsections compel CRAN to establish a clear and transparent procedure for the determination of the levy which is to be imposed on a clearly defined turnover. Importantly, retrospectivity is expressly prohibited herein;[159]

---

[158] 23 (2) When imposing the levy, the Authority may by regulation - (a) impose different percentages or different fixed amounts depending on - (i) the amount of turnover of the provider; (ii) the category of communications services rendered by the provider; (iii) the class of licence issued to the provider; or (iv) any other matter that is in the opinion of the Authority relevant for such an imposition; (b) impose a fixed minimum amount payable by providers of communications services irrespective of the form of the regulatory levy as set out in subsection (1); (c) impose different forms of the regulatory levy, as set out in subsection (1), depending on - (i) the amount of the turnover of the provider; (ii) the category of communications services rendered by the provider; (iii) the class or type of licence issued to the provider; or (iv) any other matter that is in the opinion of the Authority relevant for such an imposition."

[159] (d) prescribe – (i) with regard to the turnover of the providers of communications services, or with regard to their services or business, regulated by this Act, received or provided by the providers of

c) that section 23(3) incorporates the aspect of 'sufficiency', which puts an obligation on CRAN to impose reasonable levies in so far it is necessary to defray regulatory expenses;[160]

d) that section ensures that CRAN, at any point, has sufficient funds to enable it to carry out its mandate, and that importantly this requirement establishes a threshold against which the regulatory levy is determined, which levy should not exceed its regulatory costs; the imposition of the levy is thus limited through the element of 'sufficiency';

e) that subsections (4) and (5) constitute the most important yardsticks imposed by the legislature to avoid unchecked plenary legislative powers to CRAN;[161]

---

communications services, the aspects thereof which are included or excluded for purposes of determining the regulatory levy or calculating the turnover of the provider concerned; (ii) the period during which turnover, services or business must be received or provided to be considered for the calculation of the regulatory levy; and (iii) without limiting the aforegoing, the manner in which the regulatory levy is to be calculated: Provided that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the Gazette;" (e) prescribe the periods and methods of assessment of the regulatory levy and the due date for payment thereof which may include payment in prescribed instalments: Provided that the regulatory levy may not be imposed on turnover, or services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the Gazette; (f) prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy payable by the providers of communications services; (g) prescribe penalties, which may include interest, for the late payment of the regulatory levy, or for providing false information or for the failure to provide information to the Authority relating to the assessment of the levy."

[160] 23 "(a) to ensure income for the Authority which is sufficient to defray the regulatory costs thereby enabling the Authority to provide quality regulation by means of securing adequate resources; (b) insofar as it is practicable, a fair allocation of cost among the providers of communication services; (c) to promote the objects of this Act set out in section 2 and the objects of the Authority set out in section 5."

[161]"(4) The principles to be applied with relation to the imposition of the regulatory levy are - (a) that the impact of the regulatory levy on the sustainability of the business of providers of communications services is assessed and if the regulatory levy has an unreasonable negative impact on such sustainability, that the impact is mitigated, in so far as is practicable, by means of the rationalisation of the regulatory costs and the corresponding amendment of the proposed regulatory levy; (b) that predictability, fairness, equitability, transparency and accountability in the determination and imposition of the regulatory levy are ensured; (c) that the regulatory levy is aligned with regional and international best industry practices. (5) When determining the form, percentage or amount of the regulatory levy, the Authority - (a) must duly consider, in view of its regulatory costs - (i) the income it requires and the proportion of such income which should be funded from the regulatory levy in accordance with the objectives and principles set out in subsections (3) and (4) respectively, as projected over the period during which the regulatory levy will apply, and taking into consideration its relevant integrated strategic business plan and annual business and financial plans, including the operating budgets and capital budgets as set out in its annual business and financial plans, as contemplated in sections 13 and 14 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019); (ii) income derived from any other sources; (iii) the necessity to ensure business continuity by, amongst others, providing for reasonable reserves as set out in its plans contemplated in sub-paragraph (i); (iv) the necessity to avoid, as far as is reasonably possible or predictable, the receiving of income from the regulatory levy in substantial excess of what is required to

f) that factors such as the need to mitigate any negative impact that the regulatory levy may have on the business sustainability of providers of communications services are limitations and guidelines on the powers of CRAN not to impose “any amount or percentage” which will bring a negative effect on business sustainability;

g) that subsection (5) solidifies the rationality element between the levy and the scheme which requires of CRAN to calculate or estimate its expenses, revenue from other sources, the fund reserves and the shortfall that needs to be covered by the levy. Only thereafter, and based on the calculations, would CRAN determine a levy sufficient to defray the estimated costs. This establishes a relationship between the charge (levy) and the scheme itself, thus making it a rational and reasonable levy;

h) that the concluding provisions of the amended section 23 relate to the powers of CRAN to change and review the regulatory levy to ensure that it still complies with the requirements especially as set out in subsection (4) and (5).[162]

---

cover the regulatory costs; (v) the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy; (vi) any other fees, levies or charges which the providers of communications services are required to pay under this Act; (vii) any other matter deemed relevant by the Authority in order to ensure that income derived from the regulatory levy is sufficient to defray its regulatory costs; (b) must, in order to maintain reasonable predictability and stability, avoid, unless there is good reason to do so, an increase in the regulatory levy or the introduction of a new regulatory levy in any period of 12 consecutive months; (c) may consider any other matter the Authority deems relevant.”

[162] (6)The Authority must before the expiry of five years from the last imposition of the levy or a last review under this section, review the regulatory levy to ensure that the levy is compliant with the requirements set out in this section and that there are no continued under- or over-recoveries.
(7) If the Authority has received regulatory levy income in excess of its regulatory costs, the Authority may retain such over-recovery but must set it off against the projected regulatory costs used for the next regulatory levy determination and imposition. (8) If the Authority receives income from the regulatory levy less than its regulatory costs in a period during which such regulatory levy applied, or during a specific period, received no income from the regulatory levy for whatever reason, the Authority may, when determining and imposing the next regulatory levy - (a) adjust the regulatory levy, and determine a higher regulatory levy, to recover such under-recovery during the period during which the next regulatory levy will apply; or (b) determine a once-off higher regulatory levy for the first period during which the next regulatory levy will apply in order to recover such under-recovery and for the remaining period or periods a different regulatory levy in accordance with subsection (5). (9) The Authority may, subject to subsection (5)(b), withdraw or amend the regulatory levy imposed under this section and, in so far as they are applicable, the provisions of this section apply in the same manner, with the necessary changes, to such withdrawal or amendment.”

[118] It was thus ultimately contended that these provisions remedy the concerns of the SC as they set out the guidelines to guide CRAN in the exercise of its discretionary powers. The power to legislate given to CRAN was thus not unguided.

[119] I believe that the stage has now been appropriately set against which the veracity of each of MTC criticisms can now be measured.

Ad sections 23(1) and 23(2)

[120] In the first instance it is highlighted that CRAN, after having correctly conceded the need for guidelines, then goes on to contend that such guidelines are set in sections 23(2)(d) to (g) but that such contention is, in the first place, inconsistent with the text of section 23(1)*(a)* itself which provides that CRAN should 'have due regard' to subsections 23(1)(4) to (8) – as opposed to any part of subsection 23(2) – in imposing the levy.

[121] It immediately appears on a simple reading of the provisions in question that the point is validly made.[163]

[122] Secondly, it was pointed out that the relied upon sections 23(2)(d) to (g) – in their own terms – do not really provide the required guidelines as Section 23(2)(d) gives CRAN an open-ended discretion to determine (i) which parts of turnover should be include or excluded; (ii) which period must operate in respect of turnover, services or business; and (iii) the manner in which the regulatory levy is to be calculated.[164] Section 23(2)(e)[165] provides that CRAN may prescribe the periods and

[163] Compare section 23(1) commences to state: ' …(1) With due regard to subsections (4) to (8), …'.

[164] Compare : " … the authority may(d) prescribe - (i) with regard to the turnover of the providers of communications services, or with regard to their services or business, regulated by this Act, received or provided by the providers of communications services, the aspects thereof which are included or excluded for purposes of determining the regulatory levy or calculating the turnover of the provider concerned; (ii) the period during which turnover, services or business must be received or provided to be considered for the calculation of the regulatory levy; and (iii) without limiting the aforegoing, the manner in which the regulatory levy is to be calculated: Provided that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the Gazette;'

[165] Compare : … the authority may (e) prescribe the periods and methods of assessment of the regulatory levy and the due date for payment thereof which may include payment in prescribed instalments: Provided that the regulatory levy may not be imposed on turnover, or services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are

methods of assessment, and the due date for the payment of the levy. Section 23(2)(f)[166] provides that CRAN may prescribe the information to be provided by licensees to itself for purposes of assessing the levy. Section 23(2)(g)[167] provides that CRAN may prescribe penalties. Thus the supposed "guidelines" pleaded by CRAN further confer yet another open-ended discretion on CRAN to determine the methodology for determining the levy, even penalising any failure to comply with the modalities of payment which CRAN itself may identify in its own interest.

[123] On a consideration of these subsections it appears that it is indeed so that CRAN will have an open-ended discretion to determine which parts of the turnover of service providers should be included or excluded for purposes of determining the regulatory levy and which aspects of their services or business are to be included or excluded in such levy. All this seems, indeed, pretty open-ended. The same holds true for the determination of the period which is to apply.[168] Also the manner of calculation is not circumscribed in any way.[169].The only limitation ostensibly imposed in the latter part of the subsection is that the levy may not be imposed retrospectively.

[124] Also CRAN's submissions made in respect of section 23(2)(e) and (f) do not change that picture. Again the only ascertainable limit in respect of the periods of turnover or services or business received is that the levy may not be imposed prior to the date on which the regulations imposing the levy are published.

Ad 23(3)

published in the Gazette;'

[166] Compare : … the authority may (f) … prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy payable by the providers of communications services; '

[167] Compare : '… the authority may(g) … prescribe penalties, which may include interest, for the late payment of the regulatory levy, or for providing false information or for the failure to provide information to the Authority relating to the assessment of the levy."

[168] Section 23(2)(d)(ii)

[169] Section 23(2)(d)(iii)

[125] With reference to CRAN's reliance on the objects clause[170] MTC makes a number of points:

'a) that it provides in the vaguest of terms, and in any event only "insofar as it is practicable" (another open-ended concept), for "a fair allocation of cost among the providers of communication services";[171]

b) that it introduces another redundancy by cross-referring to the objects already stated in sections 2 and 5;[172]

c) that demonstrably nothing in section 23(3) is intended or capable of providing the required guidelines, least of all imposing a threshold on the percentage. What it does, in fact, is revealed by CRAN's self-contradicting argument on "sufficiency". CRAN argues that section 23(3) – to which section 23(1) does not even refer – somehow limits the levy to what is "sufficient";[173] but that CRAN is in any event entitled to "exceed" regulatory costs, resulting in "over-recoveries";[174]

d) that this relates to a new operative concept: "regulatory costs" which introduces a newly minted statutory meaning which exceeds any notion of ordinary operating "expenses" which explicitly includes actual *and* estimated "capital costs".[175] Therefore even if it could competently be contended that these or any other provisions imply that the percentage must be calculated working back from the sum of all capital and operating costs which CRAN might estimate it could require, then this is itself a discretionary exercise *not* constrained by section 23 with the result that it now encompasses a far greater sum and scope for maladministration.'

[126] On an examination of the provisions in question, and given the nature of the terminology employed in the section, there is very little room for disagreement with MTC's argument. While it may have been a laudable aim to ensure that CRAN

---

[170] In terms of which the Authority is : "(a) to ensure income for the Authority which is **sufficient** to defray the regulatory costs thereby enabling the Authority to provide quality regulation by means of securing adequate resources; (b) insofar as it is practicable, a fair allocation of cost among the providers of communication services; (c) to promote the objects of this Act set out in section 2 and the objects of the Authority set out in section 5."

[171] Section 23(3)(b).
[172] Section 23(3)(c).
[173] Record p 84 para 24.
[174] Record p 85 para 24.
[175] Section 1(a) of the Amendment Act at Record p 54.

always has 'sufficient' resources and that it should thus at all times be placed in funds that are sufficient for its needs, it becomes clear at the same time that this perceived 'guideline' is really open-ended, as it will always beg the question what amount of income will be adequate and when will such income be adequate. Clearly also the aim to achieve – *'as far as is practicable'* – (what is practicable and when does something become impractible) – *a 'fair'* - (what is fair and in whose view) - *allocation of cost – among the service providers* – (of whom there are various categories and classes) – all this is a far cry- and can by no figment of the imagination be regarded as constituting a firm 'guideline' i.e. one that sets fixed parameters as would have been required. While the object to ensure a 'sufficiency' of funds may at best constitute a 'threshold', in the sense that the word can also be understood to signify that the element of 'sufficiency' should be understood as a starting point in the determination of what levy should be imposed also this perceived guideline would still be far removed from setting the required fixed parameters. It should not be forgotten in this regard that also the impugned section had set a minimum percentage.

[127] I also cannot detect that it was incorrectly submitted that the introduction of what is called a 'new operative concept', (the 'regulatory costs'), will not mean that 'actual' and 'estimated capital costs' will now have to be worked out which exercise, in turn, will involve a discretionary determination, unconstrained by section 23, unless it is considered that such constraint is imposed by *'a fair allocation of cost'* amongst the service providers *'insofar as it is practicable'*. Such consideration will however only have to be heard to be rejected, as such 'constraints' cannot impose any real limitations as the concepts employed to achieve such purpose are indeed 'open-ended'.

Ad sections 23(4)(a) to (c)

[128] Contrary to CRAN's view that these sections constitute 'the most important yardsticks and guidelines' this is flatly denied as MTC considers that sub-clause (4)(a)[176] provides for a '*post hoc* recalibration of an unreasonable levy', which

[176] "(4) The principles to be applied with relation to the imposition of the regulatory levy are - (a) that the impact of the regulatory levy on the sustainability of the business of providers of communications services

unreasonableness flows from the exercise of an unconstrained discretion which the empowering provision seeks to address *ex post facto* by merely providing for a retroactive remedy, instead of a proactive guideline as required by the Supreme Court.

[129] The point is well made. It need needs no elaboration. The remedying of the constitutional short-coming of the previous section 23 was all about setting the guidelines which are to instruct the determination of the levy before its imposition and not about remedying or mitigating any unreasonable impact on sustainability by means of rationalisation *ex post facto*.

[130] MTC proceeded to make the following further points : that sub-clause (4)(b)[177] begs the question *how* are the open-ended normative considerations (predictability, fairness, equitability, transparency and accountability) to be "ensured" by the delegee, and that, in similar vein, sub-clause (4)(c)[178] is silent on *how* the levy is to be "aligned" with regional and international "best industry practices" when some equally comparative countries impose no percentage-based levy at all and when others impose a percentage but reserve the determination of the percentage to the Legislature which stipulates the percentage in the empowering provision, and when in yet other jurisdictions the empowering provision imposes a range (i.e. an upper and lower threshold) within which a percentage may be determined.[179]

---

is assessed and if the regulatory levy has an unreasonable negative impact on such sustainability, that the impact is mitigated, in so far as is practicable, by means of the rationalisation of the regulatory costs and the corresponding amendment of the proposed regulatory levy; '

[177] (b) that predictability, fairness, equitability, transparency and accountability in the determination and imposition of the regulatory levy are ensured;

[178] (c) that the regulatory levy is aligned with regional and international best industry practices.'

[179] As MTC already argued in its heads of argument before the Supreme Court, the Ugandan example – to use only one of the comparators on which CRAN relies (Record p 91 para 35) – demonstrates that CRAN's purported reliance on at least some of the African countries to which it refers defeats its case. Under the Uganda Communications Act 1 of 2013 levies are governed by section 68. It imposes levies only on one basis: as a percentage calculated on the gross annual revenue of operators. The section itself sets the parameters of the levy. The parameters are very confined: the minimum is 2% and the maximum is 2.5%. Moreover, under the Ugandan Act it is the Minister who sets the percentage, not the Commission or even its Board (section 67(2) of the Ugandan Act). All of this is quite clear from the actual text of the operative statutory provision, which MTC quoted in its Supreme Court heads, but which CRAN does not disclose in invoking *inter alia* Uganda as comparator in its answering affidavit before this Court. The full text of section 68 reads

> "(1) The Commission may levy a charge on the gross annual revenue of operators licenced under this Act.

[131] Again it does not take much to understand that the principle that the levy is to be aligned with regional and international best industry practices is destined to be problematic in its application and will run into trouble in circumstances where there is no uniformity in such practices, as was demonstrated forcefully by counsel for MTC, never mind the determination of the vexed further question, which, of the regional or international practices to be applied, constitutes the best one, in the wide range of worldwide industry practices.

[132] Not much needs to be added in regard to the principles listed in subsection (4) (b) which have aptly been termed as *'open-ended normative considerations'*, which all have to be determined by CRAN, in its own discretion, in the absence of any firm parameters.

Ad section 23(5)

[133] In respect of the factors CRAN is to consider when determining the form, percentage and amount of the regulatory levy MTC critiques that sub-clause (5)(a)(i)[180] introduces an additional discretionary indeterminacy which, far from providing any guidance, or any appropriate limitation or through imposing a threshold, it allows CRAN to determine not only the income it requires but also the *proportion* of such income which should be funded from the regulatory levy. It was argued that thus CRAN determines a gross amount (i.e. the amendment's expansively defined "regulatory costs"), that it thereupon determines a proportion (thus yet another *percentage*) of the gross amount to be funded by levies and then the percentage of

---

(2) The levy in subsection (1) shall be the percentage specified in schedule 5.
(3) For avoidance of doubt, the levy in subsection (2) shall not be less than two percent.
(4) The levy shall be shared between information and communication technology development and rural communication in the ratio of one to one."

Schedule 5 provides "The rate of gross annual revenue payable by an operator to the Commission under section 68 shall not be less than 2 percent and shall not exceed 2.5 percent."

[180] '(5) When determining the form, percentage or amount of the regulatory levy, the Authority - (a) must duly consider, in view of its regulatory costs - (i) the income it requires and the proportion of such income which should be funded from the regulatory levy in accordance with the objectives and principles set out in subsections (3) and (4) respectively, as projected over the period during which the regulatory levy will apply, and taking into consideration its relevant integrated strategic business plan and annual business and financial plans, including the operating budgets and capital budgets as set out in its annual business and financial plans, as contemplated in sections 13 and 14 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);'

levies - (if a percentage-based levy is elected under section 23(1)(a), as CRAN indeed elected to do). In imposing the section 23(1)(a) percentage CRAN is moreover at large to impose different percentages on different licensees. Accordingly sub-clause (5)(a)(i) increases the constitutional defects. At best for CRAN, sub-clause (5)(a)(i) cannot constitute a constraint on its discretion.

[134] The subsection clearly requires the consideration of a number of aspects. The constraint that has been built into the subsection is that CRAN's consideration of the listed aspects must be *'due'*. What probably was intended was that each aspect listed in the subsection should be 'appropriately' considered. What is 'appropriate' in each case is however not circumscribed. It so appears that also subsection (5)(a)(i) imposes an open-ended guideline.

[135] MTC tellingly points out further that similar considerations apply to sub-clause (5)(a)(ii), which requires "income derived from any other source" to be duly considered as this 'self-evidently must be taken into account in determining CRAN's capacity to commandeer licensees' financial resources', but that - self-defeatingly – sub-clause (5)(a)(ii) does not provide that – or *how* – this income should *reduce* CRAN's income derived from what it decides to impose as a regulatory levy. This according to MTC is significant in the light of sub-clause (7), which explicitly refers to setting off over-recoveries and in which circumstances subsection (5)(a)(ii)'s 'studious silence' on set-off or a similar result is problematic.

[136] The obvious shortcoming correctly pinpointed here is that the subsection read with sub-clause (7) does not say how or to what extent, if at all, the consideration of this income is to impact on the determination given the linked consideration set in sub-clause (7), for as long as the requirement is satisfied that *'it was considered'*.

[137] Sub-clause (5)(a)(iii)[181] refers to "the need to ensure business continuity" and sub-clause (5)(a)(iv)[182] refers to avoiding *'as far as is reasonably possible'* or

[181] The Authority is to duly consider: (iii) …the necessity to ensure business continuity by, amongst others, providing for reasonable reserves as set out in its plans contemplated in sub-paragraph (i);
[182]The Authority is to duly consider : (iv) … the necessity to avoid, as far as is reasonably possible or predictable, the receiving of income from the regulatory levy in substantial excess of what is required to cover the regulatory costs;

'predictable' the " receiving of income from the regulatory levy in *'substantial excess'* of what is required to cover the regulatory costs. MTC claims that this provision, too, demonstrably does not impose a guideline or threshold and that the formulation in sub-clause (5)(a)(iv) compounds the unconstitutionality as it does not require CRAN to impose a levy which avoids over-recovery when the regulatory levy income is considered cumulatively with other sources of income and that this is significant since the rest of section 23 explicitly refers to other sources where so intended.[183]

[138] In defence of these subsections I believe that it should at least be acknowledged that the subsection recognises that business continuity is important and that an over-recovery can occur and that the guideline set in this recognition is that this is to be avoided in so far as this is 'reasonably possible' or 'predictable'. Unfortunately a rider is added to the effect that the income generated should not be in 'substantial excess' of what is required to cover regulatory cost. It is ostensibly once again left to CRAN to determine, in its discretion, what is in 'substantial excess' and what is not. The subsection clearly also considers a 'lesser excess' as legitimate for as long as it is not one that is 'substantial'. How much less would be acceptable is left to anyone's guess.

[139] MTC, similarly, considered sub-clause (5)(a)(v)[184] as singularly ineffectual – and self-defeating – as a guideline, as the subsection clearly does not purport to impose any threshold. It reads: "the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy". This postulate clearly cannot assist a licensee to know when the percentage imposed exceeds the legitimate limit. Instead, what should have been a provision guiding and constraining CRAN's discretion (and imposing a threshold on any percentage CRAN can conjure) this subsection only codifies a concession concerning the risks resulting from the exercise of the unconstrained discretion in question.

[140] I agree.

---

[183] See e.g. subclause (5)(a)(ii) and (vi).

[184] The Authority is to duly consider : (iv) ' the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy;

[141] On behalf of MTC it was pointed out that subsection (5)(a)(vi) suffers from the same defect identified in the context of subsection (5)(a)(ii). In subsection 5(a)(vi)[185] it is the failure to provide that the "other fees, levies or charges which the providers of communications services are required to pay under the Communications Act" must *reduce* the regulatory levy. Like subsection (5)(a)(ii), subsection (5)(a)(vi) simply requires CRAN to "consider" this. Furthermore, CRAN is not even required (or perhaps even *permitted*)[186] to consider any fees, levies, charges or other impost which the providers of communications services are required to pay in terms of any other law.

[142] I have already indicated above that I consider the critique to subsection (5)(a)(ii) as well founded. The same would consequentially hold true for subsection (5)(a)(vi) *mutatis mutandis*.

[143] As subsection (5)(a)(vii) permits CRAN to consider *"any other matter deemed relevant"* by itself it was on the strength of this submitted that this provision was obviously not only open-ended, thereby further expanding the already unconstrained discretion conferred on CRAN but that it is also one-sided in that it permits CRAN to consider 'any other consideration' 'in order to ensure that the income derived from the regulatory levy is sufficient to defray its regulatory costs'. In juxta-position it was noted however that the subsection does not require CRAN to consider any other matter deemed relevant for purposes of ensuring that the levy is not oppressive or excessive.

[144] It does not take much to understand that subsection (5)(a)(vii) was intended to be the catch-all provision enabling CRAN to consider all relevant matters. This as a guideline would be acceptable, in principle, as far as it goes, for as long as the matter would be relevant to ensure that the income generated would be sufficient to defray regulatory costs. It is indeed so that the provision is open-ended and that it

---

[185] The Authority is to duly consider : (vi) any other fees, levies or charges which the providers of communications services are required to pay under this Act;

[186] As the Supreme Court held in *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) at para 70, if an empowering provision "has not been assailed it is binding on the administrative actor who must enforce it to the letter."

unfortunately does not constrain the discretions to be exercised discernibly in any way, save to provide that this should by *'duly'* done.

Ad subsections (5)(b) and (c)

[145] CRAN's position in this regard is that the subsection solidifies the rationality element in that it establishes a relationship between the levy and the scheme itself. MTC on the other hand - noting that while the subsection (5)(b),[187] purportedly, requires *"predictability and stability"* by requiring that increases in levies be avoided in any period of 24 months - points out that the guidelines that are provided for purposes of achieving this objective actually permit annual increases in the regulatory levy or the introduction of a new levy if '*good reason to do so exists*' in CRAN's uncircumscribed discretion. Contrary to the proclaimed objective this provision really increases the opportunity for increasing the levy and/or the introduction of new levies by CRAN in any 24 month cycle as frequently as it feels fit. It was accordingly concluded that this regulation of annual increases and innovations in levies really fails to achieve the purported desired *'predictability and certainty'.*[188]

[146] I accept also in this regard that MTC has exposed the fundamental shortcoming, that is the failure of the section to achieve its self-proclaimed objective to reduce increases of the regulatory levy, during any 24 month cycle, to a minimum, as, on a proper reading, it really affords *carte blanche* to the regulator to increase levies and/or to introduce new regulatory levies at any given time. A *'good reason'* surely can be found at any given time and this hurdle does not really impose an insurmountable obstacle to any such endeavour.

[147] Nothing much needs to be added to MTC's submissions that 'subsection (5)(c)[189] crowns CRAN's uncircumscribed discretion by adding an additional tier of indeterminacy. Over-and-above all other open-endedness, this provision adds that

[187] The Authority : '(b) must, in order to maintain reasonable predictability and stability, avoid, unless there is good reason to do so, an increase in the regulatory levy or the introduction of a new regulatory levy in any period of 12 consecutive months;'

[188] Significantly the Public Enterprises Governance Act 1 of 2019, which both CRAN and the amendment invoke, itself recognises a five-year period as appropriate for purposes of planning (see e.g. section 13(5)(c)).

[189] '(c) may consider any other matter the Authority deems relevant."

CRAN *"may consider <u>any</u> other matter"* which it "deems" relevant. This formulation, the Supreme Court held (in a different matter), deploys "very wide language".[190] Clearly it cannot constrain, but instead expands, the discretion conferred on CRAN.'

[148] Finally, two aspects should still be mentioned.

[149] The first is in regard to the remaining subsections, subsection (6), (7) and (8) which also do not seem to constrain CRAN's discretion in any discernible way, as:

a) Subsection (6) requires of CRAN to review the regulatory levy before the expiry of five years to ensure the levy's compliance with section 23 and to avoid *under- or* over-recoveries. Despite this it will have been noted that the levy can actually be increased annually or even more frequently under subsection (5)(b). Nothing more needs to be said in this regard.

b) Subsection (7) permits CRAN to retain over-recovery until the next regulatory levy is determined and imposed, when it must be set-off (before any 5 year term expires) against projected future regulatory costs. The section however provides for no relief to a licensee on whom the excessive levy was imposed.

c) Subsection (8) permits what amounts to a retrospective top-up in favour of CRAN in the event of any under-recovery. On behalf of MTC it was correctly pointed out that : *' … Licensees may be required in CRAN's absolute discretion – again absent any guidelines, and irrespective of the reason for the under-recovery (which may be attributable to CRAN itself, or to a rogue licensee) – to pay a higher levy over the entire period to which the adjusted levy applies,*[191] *or to pay a "once-off higher regulatory levy for the first period during which the next regulatory levy will apply."*[192]

---

[190] *Expedite Aviation CC v Tsumeb Municipal Council* 2020 (4) NR 1126 (SC) at para 778. See, too, *S v Guruseb* 2013 (3) NR 630 (HC) at para 6: "[t]he expression 'any other matter' is extremely wide". In that matter the High Court held that the words had to be "interpreted in the light of the principle that a condition must be related to the offence in question". There is no similar limiting principle applicable to the text in the current statutory context.

[191] Subsection (8)(a).

[192] Subsection (8)(b).

[150] Secondly mention should still be made of CRAN's reliance on the Public Enterprises Governance Act 1 of 2019 in terms of which it must develop an integrated strategic business plan for a period of five years.[193] Section 14 (1) requires of CRAN to annually, at least 90 days before the commencement of its next financial year, submit an annual business and financial plan to the relevant Minister. Section 14(5)(b) states that the annual business and financial plan must contain the operating budget and the capital budget of the public enterprise for the next financial year, with a description of the nature and scope of the activities to be undertaken, including commercial strategies, pricing of products or services and personnel requirements. Unless the integrated Strategic Business Plan and the Annual Business and Financial plan has been approved by the relevant Minister for Public Enterprises, in consultation with the Minister of Information, CRAN may not incur any expenditure except in accordance with an estimate of expenditure approved in terms of section 15 of the Public Enterprises Governance Act 1 of 2019. CRAN thus submits that an approval would not be made unless CRAN would act within the statutory framework imposed by the Communications Act. CRAN thus does not impose a regulatory levy in its own discretion, without any parliamentary or other oversight as there is substantial ministerial and/or executive oversight and control on the exercise of CRAN's discretionary powers.

[151] The counter argument to this was that 'CRAN's extra-textual resort to the Public Enterprises Government Act 1 of 2019 does not assist it.[194] It is CRAN's <u>own</u> Act, comprising (as the Supreme Court held) "a complete and complex regulatory framework",[195] which provides the regulatory regime which must confer a constitutionally competent discretion on CRAN. Whether section 23 in its current or previous form explicitly refers to CRAN's obligations under other legislation is legally irrelevant. CRAN is bound by all legislation applicable to it. But its discretion under section 23(1)(a) is not constrained by any extraneous legislation, and no executive control (even had this been separation-of-powers compliant)[196] over the prescribed

---

193 section 13(1).

194 See e.g. Record p 99 para 60; Record p 102 para 70; Record p 107 para 94.

195 *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 6.

196 As MTC's replying affidavit submits, Parliament's failure to acquit itself of its own constitutional competence to legislate appropriately – *inter alia* by circumscribing discretions conferred on other arms of Government to adopt subordinate legislation – cannot be cured by subjecting the exercise of subordinate legislative power to a branch of Government other than the Legislature (Record p 298 para 42). The constitutionally correct approach available to Parliament is the one which it

percentage is imposed by the Act.[197] The Act does *not* require executive confirmation, ratification, approval or consideration of the percentage (or other form of levy) imposed by CRAN.'

[152] Two core aspects, apparent from MTC's counter-submission, persuade me that what is termed as CRAN's 'extra-textual resort' to the Public Enterprises Governance Act, was indeed misplaced, the first being that it surely must be CRAN's own regulatory regime, in terms of the Communications Act, that must confer constitutionally compliant discretion on the authority, and secondly, that, in any event CRAN's discretion exercised in terms of the Communication Act is not fettered by any extraneous legislation.

Conclusions

[153] If one then turns and considers what overall picture has emerged from the above section-by-section analysis, it must be concluded that the legislature, also in its renewed attempt, has failed to delegate sufficiently circumscribed discretionary powers to CRAN – and – by that same token - that it has not succeeded in remedying the defects exposed by the SC in this regard.

[154] More particularly the above analysis has, in my view, exposed that the attempted limitations, of CRAN's powers in the enabling legislation, where not successfully attempted, by virtue of the failure to prescribe the parameters within which CRAN's discretionary powers are to be exercised with the requisite degree of certainty.

[155] While the amended section 23 recognisably constitutes an attempt to avoid the outsourcing of unchecked plenary legislative power to CRAN, that attempt has, in my respectful view, unfortunately fallen short of what was required as it did not

---

adopted in e.g. section 76(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995. It requires that the impost on agricultural land to fund land restitution be approved by Parliament.

[197] Indeed, CRAN contends for an own independence which contradicts any argument that it is subject to any sufficient degree of executive oversight (Record p 34 para 93; Record p 304 para 58).

succeed in guarding sufficiently against the risk of an unconstitutional exercise of the discretionary powers conferred on CRAN.

[156] It follows that also the amended section 23 fails to pass constitutional muster which renders it liable to be struck down, as must the subsequently promulgated regulations, in which regard it was correctly submitted:

'Regulation-making, like the exercise of other administrative action, depends on the legal validity of the empowering provision.[198] Once the authorisation is set aside, action taken pursuant to it (and whose validity depends on the authorisation) is also invalid.[199] This is because its legal foundation is both in law and in fact non-existent, and the rule of law does not permit illegalities to be perpetuated in such circumstances.[200] In such circumstances a regulatory authority cannot recover levies prescribed and imposed pursuant to an invalid empowering provision.[201] Hence a licensee cannot be compelled to pay levies pursuant to regulations prescribed under an empowering provision set aside for being unconstitutional.[202] It follows *a fortiori* in this case, since even where the subsequent act does not rely for its legal validity on the legal validity of the authorisation (but only on its factual existence), then the subsequent act still only survives for as long as the authorisation itself has not been set aside.[203]

Costs

[157] Both parties have sought a costs order following the result. On behalf of MTC a strong argument for a punitive costs order has been additionally made. While in the first place the relied upon inclusion of 'without prejudice' documentation should certainly be frowned upon, particularly as this has occurred on the watch of a senior

---

[198] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 37. The Supreme Court approved the correctness of *Oudekraal* in *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* 2017 (2) NR 340 (SC) at paras 43, 63 and 65.

[199] *Seale v Van Rooyen NO* 2008 (4) SA 43 (SCA) at para 13. The Supreme Court approved *Seale* in *Minister of Mines and Energy v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC) at para 22.

[200] *Ibid*.

[201] Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) at 548, citing *inter alia Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) and *S v Smit* 2008 (1) SA 135 (T) at 179-181.

[202] *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at para 31, holding that "the grounds upon which the first certificate was challenged – namely that because the approval of the plans was unlawful, any issue of a temporary certificate of occupation in reliance upon the legal validity of the plans would itself be unlawful – are logically unassailable."

[203] *Oudekraal supra* at para 31.

legal practitioner of this court, and whereas the pre-litigation advances and the failure to concede the contended for unconstitutionality were in the eyes of MTC unmeritorious, an aspect possibly also confirmed by the result, it cannot in my view be said that CRAN's opposition was frivolous to such an extent that a punitive costs order is warranted. A more pro-active approach on CRAN's behalf could most certainly also have helped in shortening the delay and linked monetary prejudice occasioned by this litigation The unprofessional *ad hominem* approach engaged in by CRAN really constitutes the strongest of the advanced factors militating for a special costs order. However CRAN and MTC have been waging a war. This is evidenced by the multiple litigation which the parties have been conducting over the last years. In a 'war' 'the gloves come off'. This is what seems to have occurred also in this case. In such circumstances one should be able 'to take on the chin' and one should not be too oversensitive in this regard. In any event there has been some rapprochement as CRAN has recently publicly stated in the Namibian press that it has settled all litigation between it and MTC. This aspect was followed up by the court's hearing notice of 15 June 2022 to which the parties' responded on 21 June 2022 by reporting that such settlement was only limited to the withdrawal of those cases dealing with CRAN"s claims against MTC for the payment of outstanding levies.

[158] In such circumstances, and on a consideration of these factors, I remain unpersuaded that a punitive costs order is warranted and should follow.

[159] What will follow, as has been foreshadowed, is that I find that a case has been made out by MTC and that it is thus appropriate to grant the orders prayed for in paragraphs 1 and 2 of the notice of motion.

[160] The following orders are accordingly made:

1. Section 23 of the Communications Act 8 of 2009 as amended by the Communications Amendment Act 9 of 2020, and any regulations prescribed pursuant to this provision, are hereby declared unconstitutional and null and void and are hereby struck;

2. The first respondent is ordered to pay the applicant's costs, such costs to include the costs of one instructing- and two instructed counsel.

_____

H GEIER

JUDGE

APPEARANCES:

| | |
|---|---|
| APPLICANT: | J J Gauntlett SC QC (with him F B Pelser) |
| Instructed by: | Palyeenime Inc., Windhoek. |
| | |
| 1st RESPONDENT: | S. Namandje (with him L N Ambunda-Nashilundo) |
| Instructed by: | Sisa Namandje & Co. Inc., Windhoek |