REPORTABLE

CASE NO. SA 2/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MWEB NAMIBIA LIMITED	**APPELLANT**
And	
TELECOM NAMIBIA LIMITED	**FIRST RESPONDENT**
THE MINISTER OF WORKS, TRANSPORT AND COMMUNICATION	**SECOND RESPONDENT**
THE NAMIBIAN COMMUNICATIONS COMMISSION	**THIRD RESPONDENT**
THE MINISTER OF TRADE AND INDUSTRY	**FOURTH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**FIFTH RESPONDENT**

Coram	Shivute CJ, Strydom AJA *et* Chomba AJA
Heard on:	21/10/2008
Delivered on:	22/08/2011

APPEAL JUDGMENT

CHOMBA AJA

INTRODUCTION

[1] This appeal judgment is a sequel to an application commenced in the Court *a quo* by way of notice of motion, and the consequential proceedings terminated

unfavourably to the appellant, as the applicant in that Court, thereby triggering appeal proceedings in this Court. As is usual in such litigation, all the evidence in the original proceedings was adduced by way of affidavits which were deposed to, in the case of the applicant, by Mr. Marc Christopher Gregan, its General Manager, who was the sole witness and author of the founding affidavit. There were two answering affidavits the first of which was sworn by Mr. Theodorus Gerhardus Klein on behalf of the first respondent and the second by Mr.Elia Akwaake on behalf of the second, fourth and fifth responents. Mr. Klein was the first respondent's General Manager, Corporate Strategy, while Mr. Akwaake was the Permanent Secretary in the Ministry of Works, Transport and Communication. It suffices to state that two persons swore affidavits confirmatory of Mr Klein's deposition. Mr. Gregan also deposed to the replying affidavit. The third respondent never participated in the proceedings.

[2] The scope of this appeal has been defined in the appellant's own heads of argument in which the following has been stated at the very outset:

> "This appeal concerns two distinct issues; Firstly the unconstitutionality of section 2(2) of the Posts and Telecommunications Act 1992 'the Telecom Act', which does not only prohibit the appellant 'MWeb' from providing telecommunication services without a licence, but indeed enforces it by criminalizing such conduct; Secondly, it concerns the unlawful and unconstitutional conduct (of) Telecom as an organ of State."

I shall deal, and only concern myself, with the said issues and will do so consecutively as laid out by the appellant. In doing so, I may give little or no

attention to other matters raised in the appeal papers which I may consider to fall outside the scope of the two issues.

[3] In instituting its application, MWeb Namibia (Pty) (hereafter "MWeb"), made the following substantive prayers, viz:

> "1. That the applicant's non-compliance with the rules of court be condoned and that this matter be heard as envisaged in Rule 6(12).
>
> 2. That section 2(2) of the Posts and Telecommunications Act, of 1992 'the Act' be declared unconstitutional.
>
> 3. That first respondent be interdicted from offering ADSL services to the public at large, without fees being prescribed in terms of section 22 read with 52 of the Act.
>
> 4. That the first respondent be interdicted from charging rates in respect of its ADSL service, in the manner as set out in annexure 'D' to the founding affidavit (i.e. by not providing for wholesale and retail rates)."

[4] The urgency prayer does not form part of the contentious issues canvassed in this appeal, it having been finally resolved in the Court below. In regard to the remaining prayers, this Court has been urged, in the event that the appeal should succeed, to make orders as follows:

> "(1) Section 2(2) of the Post and Telecommunications Act, 1992, is declared unconstitutional and null and void.

(2) Telecom is prohibited from continuing to render ADSL services to applicant at the same rates as it provides ADSL services to the public at large, and without offering wholesale prices to MWeb.

(3) First to fourth respondents are ordered to pay applicants costs, jointly and severally, the one paying the other to be absolved on a party and party scale, including the costs of two instructed counsel.

(4) Section 2(2) of the Post and Telecommunications Act, 1992, is referred to Parliament to correct the defects in the said section, being:

(4)(1) the defect in the Act in that it does not comply with section 22(b) (*sic*) of the Constitution.

(4)(2) the defect in the section in that it does not comply with article 10, and 21(1)(e) (*sic*) and 21(1)(j) of the Constitution.

(5) The referral in paragraph 4 is subject to the following conditions:

(5)(1) the rectification shall be made within 6 months from the date of this Court order;

(5)(2) nothing herein shall prevent Parliament from enacting a new Communications Bill prior to the rectification referred to in paragraph 4."

[5] I pause here to make some observations on the proposed orders. Firstly, the orders proposed in (1) and (4) are mutually exclusive, having regard to the provisions of article 25(1)(a) of the Namibian Constitution. The article provides as hereunder:

"25 **Enforcement of Fundamental Rights and Freedoms**

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the

> Executive and any agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:
>
> > (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever may be shorter, such impugned law or action shall be deemed to be valid;"

In terms of the above article, reference of an offending legislative provision to Parliament in order to be cured of its defects can only be an alternative, and not an adjunct to, nullification. The obvious reason for that is that once a law is declared null and void, it ceases to exist and therefore there would be nothing to refer to Parliament. I shall, therefore assume that in this case the appellant's proposed prayers in (1) and (4) are alternatives in conformity with article 25. Secondly, the reference to "section 22(b)" of the Constitution would appear to be an obvious error as it was certainly intended to be a reference to article 22(b). And thirdly, the reference to article 21(1)(e) is another error and I shall take it to be a reference to article 21(1)(j), since the debate in this regard concerns the fundamental freedom to practise any profession, or carry on any occupation, trade or business. The freedom articulated by article 21(1)(e) pertains to freedom of association, which is irrelevant to the current appeal.

[6] The chequered history of this matter shows that it was initially struck off the roll in the Court below owing to the unusual prayer made by the appellant that the matter be treated as partially urgent, since Rule 6(12) of the Rules of the High Court does not appear to cater for partially urgent procedures. However, it was subsequently re-enrolled, but even then, after a full hearing, and by unanimous decision of Mainga, J and Manyarara, AJ, sitting *en banc*, it was dismissed. In the light of that outcome MWeb, as it was entitled to do, sought the intervention of this Court by way of appeal. In the ensuing hearing before us, MWeb was represented by Mr. Heathcote, assisted by Ms Schimming-Chase, while the first respondent was represented by Mr. Smuts, and Mr. Marcus, the Government Attorney, stood in for the second, fourth and fifth respondents. The third respondent never participated in these proceedings.

[7] In this judgment I shall, for the sake of convenience only, or unless a contrary intention is evident, refer to the parties using the designations they bore in the Court below, or by their corporate names. Accordingly the appellant will be either the applicant or MWeb, while the first, second, fourth and fifth respondents will be referred to as such or sometimes respectively as Telecom, the Minister of Works, the Minister of Trade and GRN.

The Arguments

[8] I have had extreme difficulty in discerning the essence and import of the oral submissions of the parties' counsel as captured in the court transcripts. This was because I found the transcripts, by and large, to be sometimes incoherent and disjointed, while at other times the words recorded were evidently malapropisms of

the words actually used by counsel in their submissions, resulting in failure to make sense. In the event, in the preparation of this judgment I chose to rely, and actually relied, on the extremely coherent and comprehensive printed submissions in the heads of argument filed by the parties. That said, I now proceed to consider the respective arguments of the parties.

Equality before the law

[9] One of the cornerstones of this appeal case is predicated upon an alleged infringement of the fundamental freedom of equality before the law as encapsulated in article 10(1) of the Namibian Constitution. It is alleged that that infringement was occasioned by the enactment of section 2(2) of the Telecom Act. It is therefore opportune to start by reproducing these two legal provisions.

> **"Article 10 Equality and Freedom from Discrimination**
> (1) All persons shall be equal before the law
>
> **Section 2 Prohibition on conduct of .... a telecommunication service**
> (1) …
> (2) No person other than the telecommunications company shall conduct a telecommunications service, except under the authority of a licence granted by the Commission."

[10] The arguments submitted on behalf of MWeb are as set out hereunder and are quoted in their fullness:

> "4. Dealing with the constitutionality of section 2(2) of the Telecom Act in relation to the equality provisions of article 10(1) of the Constitution, the court *a quo* stated that Mweb's contention is that "*it and Telecom are not treated as equal persons when Telecom does not have to apply for a licence to provide*

telecommunication services. With respect, this is an oversimplification of Mweb's argument. This question, as posed by the court *a quo*, disregards the entirely different regimes under which Telecom and MWeb can provide telecommunication services. While Telecom is free to roam around beating its monopolistic drum, MWeb does not only have to apply (and pay) under a pain of criminal penalty, for a licence; but once such a licence is granted, MWeb becomes subject to the jurisdiction of Government's specially created watchdog (The Namibia Communication Commission). The unequal treatment is stark, the reasons for such inequality wholly obscure.

5. The court *a quo* correctly identified and quoted (with reference to *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 at 1134J – 1135A) the legal principle applicable as '*the constitutional right to equality before the law is not absolute but that its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object are permissible'.* Unfortunately the Court *a quo* never applied the test so correctly quoted.

6. The court *a quo* also correctly quoted the [time] honoured test which should be used when a court determines whether any unequal treatment is based on a *'reasonable classification'* which is *'rationally connected'* to a '*legitimate object'.* Again, the test was correctly identified and quoted by the court *a quo* as '*A court, in ascertaining the object sought to be achieved by the statute, engages in a process of interpretation of the statute in issue. The question of interpretation is one of law*' and '*The position is, however, different when a court considers matters such as the reasonable intelligibility of the distinctions of the Act, and their rationality of their relation to the object sought to be achieved by the Act. These are largely matters of fact depending upon the circumstances to which the Act applies.'* See *Mwellie***,** *supra,* at 1130J – 1131A.

7. Unfortunately, once again, while all the authorities were quoted, the court, with reference to the affidavit of a certain Mr. Klein and the preamble of the Telecom Act, identified the object of the Act as to provide telecommunication services in '*the public interest.'* This finding transgressed the very disciplines which the court quoted. Firstly, the court stated that, to determine the '*object'* of the Act is a question of law, but then had regard to the factual averments contained in

Mr. Klein's affidavit. Secondly, determining the object of any Act as, to do something '*in the public interest'* nullifies the veracity of any further legal inquiry. Each and every Act of Parliament should be made in the public interest. Therefore, so the argument appears to be, all Acts are constitutional as long as it can be said their objects are to do something in the public interest.

8. While misdirecting itself in the determination of the object of the Telecom Act, the court *a quo* simply concluded:

> *'Parliament chose to exempt Telecom from the licence regime for the legitimate objective of the universal services that are provided by Telecom which differentia is reasonable in a democratic country. The means chosen by Parliament are very closely connected to the ends sought be achieved (provide universal affordable telecommunication service for the public interest). The challenge based on article 10(1) should fail.'*

9. With due respect, the object of the Telecom Act is, as stipulated in its long title, *'To make provision for the regulation of and exercise control over the conduct of ... telecommunication services, to provide for certain powers, duties and functions of .... Telecom Namibia Limited.'* The question is, what rational connection is there between the identified object of the Telecom Act i.e. to provide for regulation (with a watchdog then created for that very purpose) and Telecom's exemption from such regulatory jurisdiction? There is no rationality – only irrationality, which, as the facts of this case demonstrates, permits Telecom to trample on competitor's rights.

10. It is respectfully submitted that the MWeb's challenge based on article 10 should have succeeded. The logical way in which the court should have dealt with this aspect should have been:

> 10.1 MWeb and Telecom are equally situated for the purpose of doing business in the niche market of providing internet services. Once that is determined, the enquiry does not go further. Section 2(2) of the Telecom Act is unconstitutional. To determine whether Telecom and MWeb are equally situated for the purposes of article 10(1) of the Constitution, the manner in which the question is posed, is of fundamental importance. The question must be confined to the relevant legal enquiry. That enquiry is,

Why does section 2(2) of the Telecom Act treat Telecom and MWeb different? *(sic) B*ut, as we submit below, the effect of section 2(2) was to allow Telecom and MWeb to render telecommunication services (other than telecommunication services previously rendered by the Department). Thus, the competition here is competition in the ISP-business. And for that purpose, MWeb and Telecom are situated equally but treated differently. It is accordingly legally impermissible and factually incorrect, to draw Telecom's landline business (for purposes of costs etc) into the enquiry. Shortly put, MWeb does not do landline business. It objects against the effect of section 2(2) in a field other than landline business. Thus landline business should have been kept out of the enquiry.

10.2 even if MWeb and Telecom are not equally situated, the object of the Act must be determined. As pointed out, the object is to regulate and to create a statutory body to render telecommunication services. But section 2(2) of the Telecom Act has nothing to do with achieving Telecom's objects to provide telecommunication services. Telecom has done so since its inception. Indeed, it is clear from its profits that it has achieved that goal. Accordingly, to use the purpose of Telecom's creation to determine that section 2(2) of the Telecom Act is rationally connected to achieving the object (i.e. provide services) is a clear misdirection. Section 2(2) merely prevents Telecom from being regulated. Simply put; What is rational about not regulating Telecom, if Telecom Act's express object is to regulate telecommunication services."

Exposition of the principle of freedom of equality before the law as distilled from case law and law books.

[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. This is because, as the celebrated author, Seervai, states in his work *The Constitutional Law of India* (3rd 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." (see at p.292 paragraph 9.32, *ibid*.). Further, despite its being deep-rooted as a constitutional principle, the fundamental right to equality before the law has been held not to be absolute. (see for example *Mwellie v Ministry of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH); *Chikane and Another v Cabinet for the Territory of Southwest Africa* 1989 (1) SA 349 (A)). And in the work, *International Bill of Rights: The Covenant on Civil and Political Rights* (ed. Louis Henkin), B.G. Ramcharan, in discussing the equality and non-discrimination clauses in the Covenant on universal human rights, says the following at p 252:

> "In adding non-discrimination clauses to supplement the affirmative mandate of equality, the covenant was following the United Nations Charter and the Universal Declaration. In all these instruments a non-discrimination clause was added not merely for emphasis, but from an abundance of caution. Non-discrimination may indeed be implied in mandates of equality. <u>But mandates of equality do not imply absolute equality without any distinction.</u> Equality, it has sometimes been said, means equal treatment for those equally situated and, indeed, equal treatment for unequals is itself a form of inequality. The law, moreover, rarely applies to all situations and involves selections and classifications among objects based on criteria deemed to be relevant. The general requirements of equality or equal protection of the laws, then, does not mean that a State cannot select among objects for regulation or draw distinctions among them. The non-discrimination clauses are designed to make clear that certain factors are unacceptable as grounds for distinction." (The underlining is mine.)

[12] This lack of absoluteness in the equality and non-discrimination clauses is exemplified, in Namibia, by a provision which has created an escape route and which, in effect, legitimizes limitations of fundamental rights and/or freedoms

contemplated in the Bill of Rights contained in Chapter 3 of the Constitution. In this connection, I refer to article 22 which provides as follows:

> "22 **Limitation upon Fundamental Rights and Freedoms**
>
> Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

[13] Case law has also settled the principle that legislation introducing limitations to fundamental freedoms or rights will not be struck down as unconstitutional if it makes reasonable classifications which are rationally connected to its object. It has been said that such classifications are sometimes necessary for the purpose of good governance and protection of those who are unequal.

[14] The benchmarks contained in the preceding paragraphs were applied in the local case of *Mwellie***,** *supra***.** In that case the constitutionality of section 30(1) of the Public Service Act, No. 2 of 1980 was challenged on the basis that it infringed article 10(1) of the Namibian Constitution. Strydom JP, as he then was, had this to say after reciting the said equality provision and after carrying out a wide ranging

survey of decisions on equivalent constitutional provisions in diverse jurisdictions in countries such as Canada, USA, India, South Africa and others:

> "On the strength of the above quotations I think it can be said that the courts, in all the countries referred to by me, accepted that equality before the law is not absolute and that the legislature must, for good and proper government and also for the protection of those who are unequal, legislate. In this legislation reasonable classifications may be made and as long as these classifications are rationally connected to the object of the statute the courts will accept the constitutionality of such legislation...." (see at 1131C-D)

[15] The learned Judge-President also cited with approval the *dictum* of Lord President Salleh Abas, who in the Malaysian case of *Malaysian Bar and Another v Government of Malaysia* (1988) LRC (Const) 428**,** made the following statement at 431 – 2 regarding the equality before the law clause obtaining in that country:

> "The requirement of equal protection of the law does not mean that all the laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, *inter alia, age,* ability, education, height, size, colour, health, occupation, race and religion. Any law made by a legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause."

Evaluation of MWeb's case as regards equality before the law

[16] The case of the applicant as advocated before us and as I understand it, is basically this in a nutshell:

> In as much as both MWeb and Telecom are engaged in the niche market of providing internet services, they are equally situated. Therefore under the constitution they are equals and ought to be treated as such. However, by virtue of the enactment of section 2(2) of the Telecom Act, while MWeb is encumbered by the requirement - which does not affect Telecom - to obtain a licence in order to do that business and is under the threat of penal sanctions if it trades without a licence, further while, even when it secures a licence, the applicant is subject to the jurisdiction of the Government's specially created watchdog, namely the Namibia Communications Commission, "Telecom is free to roam around beating its monopolistic drum". The object of the Telecom Act as provided in the long title of that Act, is: "*To make provision for the regulation of and exercise control over the conduct of … telecommunication services, to provide for certain powers, duties and functions of ... Telecom Namibia"*. What rational connection is there between that object and Telecom's exemption from such regulatory jurisdiction. There is no rationality – only irrationality which, as the facts of this case demonstrate, permits Telecom to trample on the competitors' rights.

On the basis of the stance thus taken by MWeb, I consider that the following questions arise and deserve to be resolved. These are –

1) whether or not MWeb and Telecom ought to be treated as equals;

2) whether, if they ought not to be treated as equals, the enactment of section 2(2) has created a classification between them; and

3) if a classification has been created, whether such classification can be said to be a reasonable classification and if so, whether it is rationally connected to the object of the Telecom Act.

In attempting to answer these questions, I shall start by considering the first question posed above by itself. Thereafter, and since the second and third questions are intertwined, I shall deal with them jointly.

[17] Regarding the first question, it is apposite, as a starting point, to ascertain the purpose for which Telecom was established. It is common cause that Telecom was established by the Posts and Telecommunications Companies Establishment Act, (No. 17 of 1992) (the Establishment Act). I reproduce hereunder only those provisions of section 2 of that Act which are pertinent to this aspect:

"**2 Establishment of successor companies**

(1) There are hereby established three corporate bodies namely –

(a) …

(b) a telecommunications company to conduct a tele-communications service, and which shall be known as Telecom Namibia Limited; and

(c) ..."

[18] According to that section, therefore, its purpose was dual, namely first to establish Telecom as a corporate body and then secondly to charge Telecom with the responsibility of performing telecommunication services. In parenthesis I must underscore the fact that undertaking that responsibility was by no means a matter of choice on Telecom's part. The extent of Telecom's responsibility in conducting those services was spelt out in section 4(1)(b) of the Establishment Act which provided that the telecommunications enterprise formerly carried out by the Post Office was transferred to Telecom. I take judicial notice of the fact that prior to the coming into force of the Establishment Act, the Post Office was required by law to perform telecommunication services nationwide within the mandated territory of Southwest Africa. The take-over by Telecom of the telecommunication services, therefore, meant doing so nationwide within independent Namibia. The Establishment Act also contained provisions to facilitate the performance of Telecom's core function. To that end it provided that the sole shareholder in Telecom Namibia Limited was to be the Namibia Post and Telecom Holdings Limited, which in turn was to have the State as its sole shareholder. (Section 2(8) (a) and (b)). Further, the Establishment Act enacted that Telecom was to be deemed to be a public limited company incorporated under the Companies Act. However, despite its deemed company nomenclature, upon its being registered as such Telecom was not to be required to pay registration fees or any other fees

payable under the Companies Act. (*vide* section 2(2) and (6), Establishment Act). The Act further exempted Telecom from paying any land charges normally levied by the Registrar of Deeds concerning any State land, any servitude, other real right or lease which may be transferred to it; it was also exempted from paying stamp duty, transfer duty or any other tax or levy otherwise payable in respect of transfer to it of the telecommunications enterprise. (see subsections (6) and (14) of section 4, *ibid.*)

[19] It is important, in my considered opinion, to bear in mind this background which preceded the enactment of section 2(2) of the Telecom Act. It is important because it is quite patent that what the Establishment Act did was to create Telecom as a statutory corporate body, confer on it the responsibility of conducting telecommunication services throughout Namibia and absolved it from the obligation of paying government taxes. To all intents and purposes, upon its incorporation Telecom became an organ of State.

[20] The reasons for exempting Telecom from paying taxes are not far to seek. First, as a company wholly owned by the Government, Telecom was going to contribute to the general revenues of the State. (See section 5(6), Establishment Act). Secondly, the very functions it was statutorily required to perform nationwide were, as a successor to the Post Office, State functions, which were otherwise (that is to say, in the absence of Telecom) going to be performed by the Government itself. So it would not have made sense for the Government to levy tax on it by way of payment of licensing or other fees in order for it to perform State functions. Payment of such fees would have been tantamount to the

Government taxing itself. Thirdly, the function assigned to it was to be carried out countrywide, by virtue of it being the successor to the Post Office. Namibia is by no means a small country geographically and therefore that assignment was an enormous and costly responsibility. Fourthly, Telecom had to perform the telecommunication services countrywide per force of law, not by preference, and irrespective of profitability prospects. All these burdens off-loaded onto Telecom were onerous enough and, in my view, being required to pay taxes in addition thereto would have been preposterous.

[21] By way of comparison, MWeb, as a private company, had freedom to make a choice to enter into the business of supplying internet services. In the event of so choosing, as it evidently did, it also had the option to select its operational areas, which it also did. The affidavit evidence given by Mr. Gregan, MWeb's Chief Executive Officer, is testimony to that fact, to the extent that he mentioned the areas of Namibia where MWeb was conducting its business, which include prime areas such as Windhoek, Okahandja and Klein Windhoek. From an entrepreneurial point of view, it would have been myopic to choose to conduct business in areas where profit making was known to be minimal. It is therefore not surprising that MWeb does not claim to be present countrywide business-wise in competition with Telecom. Lastly, as a private company it has no obligation to contribute to State revenues, except by way of paying government taxes like every other private individual person or entity.

[22] In the light of the foregoing differences which intervene between Telecom and MWeb, the answer I have arrived at in regard to the first question is that by

virtue of their respective responsibilities, which are unequal, it would be unreasonable to treat Telecom and MWeb equally. Their interrelationship is a typical demonstration of the settled view taken by courts that equality before the law is never absolute and therefore that you cannot treat equally persons who are not equals. Telecom has an enormous responsibility of providing services countrywide to the well-to-do as well as to the financially vulnerable and in doing so it has no choice. On the contrary, MWeb, as a private company, is profit orientated and therefore can choose its operational areas to suit that orientation. In any event, the fact that MWeb has to obtain a licence while Telecom is exempted from doing so is by no means unusual in a regimented state (in the sense of a state governed by law). Since my answer to the first question is that MWeb and Telecom are not equals, it is otiose at this stage to consider the justification of classifications introduced by section 2(2) of the Telecom Act. Whether or not those classifications are justifiable will be considered in the ensuing paragraphs pertaining to the remaining two questions posed in paragraph [16].

[23] At the cost of repetition, I will summarise the cause of complaint by the applicant. It is that the two combatants in this judicial wrangle are equals in the niche of providing internet services. That being so, it is further postulated on MWeb's behalf, why should MWeb be required to obtain a licence in order to do business in that field while Telecom is exempted from that requirement, and further, why should MWeb have to be rigorously regulated by the Namibian Communications Commission even after obtaining such licence while "Telecom is free to roam around beating its monopolistic drum"? It is also argued that, having

regard to the long title of the Telecom Act, there is no rational connection between that Act's object and the exemption from obtaining a licence.

[24] Arising from the foregoing paragraphs dealing with the purpose for the establishment of Telecom and the facilities it was endowed with in order to effectively perform its functions, the irresistible conclusion I have arrived at is that the object of the Telecom Act goes far deeper than the superficial one carried by its long title. In other words, the object of the Telecom Act is not merely that expressed by its long title, as espoused on MWeb's behalf. In my considered opinion and in reality, the object of the Telecom Act is to be derived from the purpose of the Establishment Act. As I have shown earlier, that purpose was to firstly establish Telecom as a public corporate body and consequentially to impose on it the nationwide responsibility of conducting telecommunication services. As I conceptualise it, therefore, the Telecom Act was in real terms enacted to implement the plan of setting up a national telecommunication service. Looked at from that perspective, section 2(2) can be said to have created the classification which saw Telecom being exempted from being required to obtain a licence, in order to facilitate the achievement of the objective of the Telecom Act. The dual question to be consequentially asked and answered is whether that classification was reasonable and secondly whether it was rationally connected to the object of the Telecom Act.

[25] To my mind the reasonableness of creating the classification is inferable from the explanation I have given in the process of answering the question whether MWeb and Telecom were equals. I have there explicitly stated why it

would have been preposterous to require Telecom to pay taxes in the light of the fact that Telecom was an organ of State established to perform State functions. This explanation also lends support to the trite view propounded in settled cases that it would be unreasonable and discriminatory for the law to treat equally persons who or entities which are unequal. As to the second aspect of the last question posed in the last sentence of the preceding paragraph, it stands to reason to conclude, and I so conclude, that the classification or differentiation created by section 2(2) of the Telecom Act (i.e. by exempting Telecom from obtaining a licence) is rationally connected to the object of the Telecom Act (i.e. the object of implementing the objectives of the Establishment Act).

[26] I have come to this conclusion because it is clear, in my view, that the Telecom Act is inextricably linked with the Establishment Act. The Establishment Act was, no doubt, the precursor of the Telecom Act. The former was assented to on 30 July 1992 and came into force on 31 July 1992, while the latter was assented to on 15 August 1992, and became operational on 5 October 1992. I also stress the fact that the Establishment Act defrocked the Post Office of its responsibility to conduct telecommunication services and vested that responsibility in Telecom. The Establishment Act further made Telecom a State institution. In other words the Telecom Act was consequential, not only in terms of timing but also in essence, to the Establishment Act. Without the pre-existence of the Establishment Act, the Telecom Act would have had no leg to stand on.

[27] Before I wrap up on this issue of equality before the law, let me specifically deal with the applicant’s complaint that when it obtains a licence, as it is required

to do, it consequentially becomes subject to the regulatory regime of the Government's watchdog, namely the Namibian Communications Commission. Courts have recognised that in matters involving a country's economy, it is normal and usual that a government will legislate to regulate the actors, who are usually in the private sector, as to how such actors will carry on a given economic activity. In such a situation, the attitude of the courts is that it is not in their province to interfere – provided that certain conditions are present – on the basis that the courts would have handled the situation differently. That was the view of the High Court in *Namibia Insurance Association v Government of Namibia* 2001 NR 1 (HC). In expressing that view, Teek, JP, sitting in full court with Silungwe, J, had this to say at 12J – 13A:

> "Economic regulation inevitably involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there is no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so."

The learned Judge President then went on and quoted with approval this same principle as it is expounded in Hogg (1976) 26 University of Toronto Law Journal 386 at 396 – 7 (Cf *Ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 (HC) and *Gillich v West Norfolk Health Authority* [1986] AC 112 (HL) at 194 and 206) where it was stated as follows:

> "It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democratic society, it would be a serious distortion of the

> political process if appointed officials (the judges) could veto the policies of elected officials."

Teek, JP, further quoted approvingly the following dictum from *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), a South African Constitutional Court case, to wit:

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element....
> ....(t)he constitutional State in a democratic society is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate Government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for government action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation...."

[28] I fully endorse the view taken by the judges who presided in the *Namibian Insurance Association* case, *supra,* as supported by the quotations from cases they cited. In the circumstances, I also hold that it is improper for this Court to impose its own judicial decision in supersession of the Government's political judgment of legislating for the introduction of the regulatory regime against which MWeb is complaining in this matter.

Whether Article 21(1)(a) and (j) of the Namibian Constitution have been violated

[29] The next leg of the argument as to why it is prayed that section 2(2) of the Telecom Act should be struck down for being *ultra vires* the Constitution is that the said section has violated MWeb's fundamental right and freedom of speech and expression as well as the freedom and right to practise any profession, or carry on any occupation, trade or business. My first comment in this connection is that there have been repeated references to Article 21(1)(e) occurring in the heads of argument appertaining to this issue. However, having regard to the content of the originating notice of motion, the supporting heads of arguments and oral submissions, it is clear that those references were erroneously made as article 21(1)(e) has no relevance to the freedoms asserted since it concerns the freedom of association. The following are the relevant provisions of article 21(1):

> **"Article 21 Fundamental Freedoms**
>
> (1) All persons shall have the right to:
>
> (a) freedom of speech and expression, which shall include freedom of the press and other media;
>
> (b) …
>
> (c) ....
>
> (d) ....
>
> (e) ....
>
> (f) ....
>
> (g) ....
>
> (h) ....
>
> (i) ....

(j) practise any profession, or carry on any occupation, trade or business."

[30] The arguments submitted on behalf of the applicant as regards the subject heading of this part, are contained in paragraphs 11 to 15 of the applicant's heads of argument. At the very outset of the heads it is stated that –

> "(i)n MWeb's application, the environment within which MWeb endeavours to provide its telecommunication services has been described in detail (record p 11 – 19) (thereby explaining how practical effect could be given to its rights of freedom of expression and trade)."

In those pages, embracing paragraphs 11.2 to 11.6.7 of the depositions of Mr. Gregan, the explanation given included: means of accessing the internet; the dial-up system; leased lines; the Asymmetrical Digital Subscriber Line (ADSL) technology; the Digital Subscriber Line Multiplexer technology; and how the connection to the internet is made. In crowning up the explanations paragraph 11.6.5 was included as a summation of the submissions, viz:

> "Any second-tier ISP (i.e. Internet Service Provider) (including Mweb) that wants to enforce its constitutional right as envisaged in Article21(j) of the Namibian Constitution, by offering dial-up and ADSL internet access to individual consumers, is compelled to contract with Telecom as a first- tier ISP that 'hosts' the business of the relevant second-tier ISP's for a fee."

[31] There has been a greater volume of argument and debate regarding the alleged violation of Mweb's fundamental right and freedom enshrined in article 21(1)(j) as compared to the amount of controversy in relation to the right and

freedom entrenched by article 21(1)(a). I, therefore, propose to consider and dispose of the more contentious issue first, and deal with the latter consequentially.

[32] Much was submitted by way of affidavit evidence, as well as through argument before this Court, about how Telecom, as a first-tier ISP, had dominated the telecommunication service delivery. To this end it was shown how the dispensation of internet through the ADSL and DSLAM technologies was under Telecom's control, thereby making second-tier ISPs, including MWeb, to contract with and pay fees to Telecom in order to gain access to those technological devices. The volume of argument notwithstanding, the thrust of MWeb's grievance, as I understand it, was really that Telecom was charging the second-tier ISPs, including MWeb, at retail rate, which is also applicable to non-ISP customers. For that reason, MWeb opines, the latter category of customers did not see the need to obtain internet services from second-tier ISPs such as MWeb, but rather went, and continue to go, directly to Telecom, for the obvious fear that the second-tier ISPs would charge them a higher rate than the retail rate they pay when service is provided directly by Telecom. It is as a result of that situation that MWeb complains that it is losing customers to Telecom. MWeb feels that as a second-tier ISP serving members of the public who or which are not ISPs, Telecom should charge it at wholesale rates, which would then mean that the non-ISP internet customers would feel attracted to do business with it. It is not my understanding that through the alleged violation by Telecom of MWeb's fundamental right to carry on trade, occupation, profession or business MWeb was totally incapacitated from trading in the telecommunications sector. Indeed, section 2(2) itself, which is impugned,

does not bar anyone from engaging in the provision of telecommunication service, but only requires all others, except Telecom, to obtain licences in order to do so. As a matter of fact MWeb concedes, and does not dispute, that it is thus trading via WiMax connectivity and that it even employs ADSL technology.

[33] In essence this issue is replicated in the arguments dealing with the alleged unconstitutional conduct of Telecom as an organ of State. It is therefore convenient to deal with it concurrently with the issue as to how Telecom was allegedly engaging in unconstitutional conduct.

The Issue as to alleged unlawful and unconstitutional conduct of Telecom as an organ of State

[34] The complaint posed under this head together with that relating to article 21(1)(j) of the Constitution is two-pronged. The two sides are firstly that by denying MWeb wholesale rates, Telecom is infringing its fundamental right to trade, carry on an occupation or practise a profession – a right which is entrenched by article 21(1)(j) - and secondly that Telecom as an organ of State is violating MWeb's fundamental right to fair and reasonable action by imposing retail rates thereby breaching the provisions of article 18 of the Constitution.

[35] What emerges after perusing the rest of the paragraphs of this subheading dealing with the alleged unconstitutional conduct of Telecom seems to be crystallised in the *dictum* which has been quoted on the applicant's behalf from the judgment of the Indian Supreme Court in *Yasin v The Town Area Committee, Jalalabad and Another*, (1952) S.C.R. 572 (52) A.SC 115 at p 577, viz:

> "Learned counsel, however, contends – and we think with considerable force and cogency – that although, in form, there is no prohibition against carrying on any wholesale business by anybody, in effect and in substance the bye-laws have brought a total stoppage of the wholesale dealers' business in a commercial sense. The wholesale dealers, who will have to pay the prescribed fee to the contractor appointed by auction, will necessarily have to charge the growers of vegetables and fruits something over and above the prescribed fee so as to keep a margin of profit for themselves but in such circumstances no grower of vegetables and fruits will have his produce sold to or auctioned by the wholesale dealers at a higher rate of commission but all of them will flock to the contractor who will only charge them the prescribed commission. On the other hand, if the wholesale dealers charge the growers of vegetables and fruits only the commission prescribed by the bye-laws they will have to make over the whole of it to the contractor without keeping any profit for themselves. In other words, the wholesale dealers will be converted into mere tax collectors for the contractor or the respondent committee without any remuneration from either of them. In effect, therefore, the bye-laws, it is said, have brought about a total prohibition of the business of the wholesale dealers in a commercial sense and from a practical point of view. We are not op (sic) opinion that this contention is unsound or untenable."

It is additionally asserted that in perpetrating this unfairness Telecom is also breaching the law on monopolies.

[36] The argument on MWeb's behalf is that Telecom, being an organ of State, must act fairly and reasonably in accordance with the dictates of Article 18 of the Namibian Constitution. In buttressing this argument, a number of decided cases have been cited, including *Vaatz v Law Society of Namibia and Others* 1996 NR 272 in which at p 278 E and H the following *dictum* occurs:

> "....The power to make regulations laying down the tariff, is in essence an administrative function or decision. It is in conflict with the fundamental right to action which is fair and reasonable, entrenched in art.18 of the Namibian Constitution. On this ground alone the said tariffs appear to be unconstitutional and null and void. See also Wiechers, Administrative Law 244-5; *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802N3; *Ohlthaver & List Finance and Trading Corporation Ltd and Others v Minister of Regional and Local Government and Housing and Others* 1996 NR 213 (SC).
>
> Article 18, being a fundamental right and not merely a fundamental right to a freedom provided for in art. 21(1), is not hit by possible restrictions provided for in art. 21(2). See *Kauesa v Minister of Home Affairs* 1994 (3) BCLR 1 (Nm) at 16G – 21G. In my view, when a statutory body such as the Regulations Board appointed in terms of the Deeds Registry Act, functions 'to decide on and apply tariffs to attorneys, notaries and conveyancers', not only should art. 18 be complied with but also art. 12 of the Constitution of Namibia. Furthermore, to lay down tariffs vested in a Board, presupposes the existence and proper functioning of such body."

It should be pointed out at the outset that the views expressed in *Vaatz v Law Society of Namibia* above, are *obiter* and that the Court does not approve the *dicta* relied on by counsel in that case since the issues discussed therein were not fully argued.

That notwithstanding, for a better appreciation of this argument, it is necessary to reproduce article 18, which I now do hereunder:

> **"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."

[37] The first respondent has in response put a spirited fight. It has been contended on Telecom's behalf that MWeb is wrong in its assumption that the concept of State monopoly is necessarily in conflict with the constitution. In this regard, Telecom's counsel has prayed *in aid dicta* from both local and South African decided cases. Further, it is submitted that the principles of state policy as set out in Chapter 11 of the Constitution do not preclude the establishment of state monopolies. It is additionally argued that the *laissez faire* approach, which, according to the argument on Telecom's behalf, is at the very root of MWeb's challenge in instituting this action, did not take into account the constitution construed as a whole, and the economic order expressly contemplated by it as well as the context of economic regulation which the Telecom Act involves.

[38] In support of the sentiments expressed in the foregoing paragraph, a number of authorities have been cited, but I think it will suffice to refer to two only. The first is the South African case of *Van Rensburg v South African Post Office Ltd.* 1998(10) BCLR 1307 (E). That concerned a statute which established public companies and vested in them exclusive postal and telecommunication services. An action was instituted challenging its constitutionality by alleging that it conflicted with the equality, expression and economic provisions of the South African Constitution. The case was heard by a single judge who dismissed the action. A full bench of three judges who heard the appeal against the decision of the Court

a quo, unanimously and emphatically dismissed it as reflected in the *dictum* reproduced hereunder:

> "I believe that the aim and intention of section 9 of the Constitution (the equivalent of article 10 of the Namibian Constitution) is not the creation of equality between an individual and a public or quasi public organization designed to provide a specialized service to the public at large. I also believe, for this reason, that section 9 has no bearing on an issue such as the present. The purpose of section 9 is to protect individuals against unequal treatment which is illegitimate or unfair. If that is so, one must look for something illegitimate or unfair in the legislation to be impugned. I can find nothing illegitimate or unfair about the proper implementation of the Post Office Act. Its purpose is to provide for a postal service for the benefit of the public as a whole. In order to promote this aim it gives the postal company an exclusive right. This is monopolistic and, possibly therefore, it may appear contrary to the public good. But only on a simplistic view of the matter. It is in fact designed to promote the public good. Protection from competition enables the postal company to charge uniform affordable rates for the dispatch and delivery of post throughout the country." (See at 1318D – 1318G)(emphasis supplied).

Complementary to the above, the following was quoted from *Namibia Insurance Association v Government of Republic of Namibia*, *supra,* at pp 11G – 12D:

> "The danger for the courts and constitutionalism of the approach to regulatory legislation emerges clearly from the experience of the courts in India, Japan, Germany, Canada and the United States of America. When dealing with the question of the freedom of economic activity courts in these countries proceed from the premise that it is not for the courts to dictate economic policy. This approach is encapsulated in the US case of *Furgeson v Skrupa* 372 US 483 as follows: 'We emphatically refuse to go back to a time where the courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions because they might be unwise, improvident or out of harmony

> with the particular school of thought whether the Legislature takes for its text book Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours'. In other words, it is not for the courts to say that they would do it differently because they do not like the economic structure of a particular provision passed by Parliament because there are economic reasons or reasons of policy which dictate the fact that there may e.g. be a state controlled airline, transport agencies, electrical and water utilities and the like.
>
> It is nowadays the attitude of the courts in a number of countries to allow the elected Legislatures a large degree of discretion in relation to the form and degree of economic regulation selected by a democratic Legislature. Therefore the determination of the merits or wisdom of an Act is the task of the elected representatives of the people wherever applicable. Cf *Reynolds v Sims 377 US 533 (1964).* In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)* at para. [180] the majority of the South African Constitutional Court stated that in a modern state the question whether or not there should be regulation and redistribution (in the public interest) is essentially a political question which falls within the domain of the Legislature and not the courts. It is not for the courts to approve or disapprove of such policies."

[39] I must compliment counsel for the applicant for the very strong and persuasive submissions and arguments they have put up, particularly on the fair and reasonable action expected of administrative bodies and administrative officials as entrenched in article 18 of the constitution. One could be attracted by the grievance that since MWeb, a second-tier internet service provider, is being charged at retail rate for the landline-based ADSL service, just as ordinary members of the public (i.e. non-ISPs) are being charged, the chances might well have been that its potential customers were shunning away from doing business with it. That was the situation portrayed in *Yasin*, *supra.* Therefore, MWeb's prayer that it be charged at wholesale rate may well be justified.

[40] My sympathies notwithstanding, however, I think the scale of justice has to be tipped in favour of Telecom for the reasons submitted on its behalf and for the following additional reasons. The statutes wherewith we are concerned herein were enacted in 1992, two years after Namibia's Independence. Prior to that, the majority of Namibians had suffered from the effects of the policy of apartheid which was imposed on them. It was, therefore, incumbent on the Government of the day to, at that stage, take affirmative action and redress the imbalances which were occasioned by the order of the pre-independence era. There was then need to, among other things, empower those who had been disadvantaged. Hence the inclusion in the Constitution of article 23(2) which states the following:

> "Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of public service, the police force, the defence force and prison service."

[41] I see the cumulative effect of the statutes at the centre of the current dispute as being part of the scheme of redressing imbalances and although those statutes may appear to have a monopolistic effect in economic terms and therefore to apparently be contrary to the public good when viewed simplistically, they were in fact designed to promote the public good, to borrow the words of the *dictum* quoted earlier on from the *Van Rensburg v South African Post Office* case, *supra.* Furthermore, the representatives of the people, sitting in Parliament, saw

the wisdom of not exposing Telecom to the full blast of competition with the economically more powerful private enterprises. So, Telecom was exempted from paying government taxes and was then empowered to raise revenue from those private entities engaged in the same field as it was so that it could be financially enabled to fulfil the task of extending its services to all areas, including the economically depressed zones, of the country. At the end of the day, therefore, telecommunication services, in particular internet services, are brought closer to the people in the economically depressed areas. That was a political judgment on the part of the people's representatives. It would be imprudent for this Court to reverse that judgment on the basis that the matter should have been done better in a different way.

[42] Regarding the alleged violation of article 21(1)(j), I stress the fact that it was not part of MWeb's case that owing to the conduct of Telecom it has been put out of business. The essence of the article is that all persons shall have the right *to practise a profession, carry on any occupation, trade or business.* The indisputable factual situation *in casu* is that MWeb is actively practising the profession and/or occupation and/or trade and/or business in the field of telecommunications. That is the bottom line. Moreover, the argument that MWeb was losing customers to Telecom might have been strengthened had evidence been adduced from some of those who presumably defected. Unfortunately no such witnesses were brought forward. There is only the lone voice of the complainant. This lacuna lends support to the conclusion I have arrived at that MWeb has not, after all, been prevented from conducting telecommunications business.

[43] I now come to the issue touching on the alleged subversion of Mweb's freedom of speech and expression. The crisp question I pose here is whether Mweb has indeed been denied the enjoyment of this freedom. In this connection I want to stress the fact that article 21(1)(a) provides that "(A)ll persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media."

[44] *In casu* Mweb is engaged in the field of conveying messages on behalf of its customers to their intended recipients. In doing so Mweb utilises the internet technology. It is, therefore, an entity which is operating a media within the telecommunications field. Suffice it to state that it emerged from the combined evidence and submissions of both sides in this case, both in the court *a quo* and in this court, that Mweb is actually able to convey the messages by, among others, WiMax, which is mobile and wireless, and ADSL under licence by using land lines. The only complaints which Mweb can understandably raise are those I have already considered when dealing with the issue relating to the right to practise a profession, or carry on any occupation, trade or business, namely being required to obtain a licence, to pay fees to Telecom in order to utilise the ADSL technology and having to use landlines which are controlled by Telecom. However, my view in regard to such complaints are the same as already expressed. Therefore, notwithstanding the restraints it may be unhappy about, and despite the enactment of the impugned section 2(2), it can be asserted emphatically, and justifiably so, that Mweb is still, economically engaged in the business of telecommunications. In other words, it is still able to enjoy and exercise its freedom of speech and expression.

The Issue regarding Article 22(b) of the Namibian Constitution

[45] I have, in discussing the issue of equality before the law, determined that there was justification for treating Telecom differently from the treatment meted out to MWeb. And in the preceding paragraphs I have concluded that MWeb's fundamental rights entrenched in article 21(1)(a) and (j) have not been violated to the extent of MWeb being rendered totally incapable of enjoying them. Equally, I have found that whatever might have been done by Telecom in apparent violation of article 18 has in fact been done for the promotion of the public good. In short, no irreparable injury has been done to MWeb. In the circumstances, even if I were to resolve this issue in its favour, the applicant cannot advance its case any further. It is, therefore, unnecessary to give this issue detailed consideration.

The Issue regarding the application to strike out

[46] This issue relates to the first respondent's application under rule 6(15) of the High Court Rules to strike out certain portions of the applicant's founding and replying affidavits, which was determined unfavourably to the applicant. The evident purpose of raising this issue in this appeal is to have the decision of the Court *a quo* reversed in the applicant's favour so that it could advance its case inclusive of those portions which were struck out. However, in the light of earlier decisions I have arrived at on the bedrock issues of this appeal, I do not think that the applicant's presumptive hopes and expectations can be realised. I do not therefore consider it necessary to decide this issue either.

Conclusion

[47] The inevitable determination I have to arrive at in the final analysis, which I hereby do, is that this appeal has no merit. I unreservedly dismiss it with costs.

Order:

1. The appeal is dismissed.

2. The appellant is ordered to pay the respondents' (excluding the third respondent) costs of the appeal, such costs to include the costs of two instructed counsel and one instructing counsel.

_____
CHOMBA, AJA

I agree.

_____
SHIVUTE, CJ

I agree.

_____
STRYDOM, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Mr. R. Heathcote
Assisted by:	Ms. E.M. Schimming-Chase
Instructed by:	Ellis & Partners
COUNSEL ON BEHALF OF THE 1st RESPONDENT:	Mr. D.F. Smuts, SC
Assisted by:	Ms. S. Vivier
Instructed by:	LorentzAngula Inc
COUNSEL ON BEHALF OF THE 2nd, 4th and 5th RESPONDENTS:	Mr. N. Marcus
Instructed by:	The Government Attorney