



REPORTABLE

CASE NO: SA 82/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

Appellant

and

MOBILE TELECOMMUNICATIONS LIMITED

First

Respondent

MINISTER OF INFORMATION AND TECHNOLOGY

Second Respondent

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Third Respondent

ATTORNEY-GENERAL OF NAMIBIA

Fourth

Respondent

TELECOM NAMIBIA LIMITED

Fifth

Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: 14 April 2023

Delivered: 13 March 2024

Summary: This Court in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & Others* 2018 (3) NR 664 (SC) (*CRAN v Telecom (2018)*), declared as unconstitutional s 23(2)(a) of the Communications Regulatory Act 8 of 2009 (Communications Act) on the basis that it conferred unchecked discretionary power to the appellant, Communications Regulatory Authority of Namibia (CRAN) to levy 'regulatory levies' for the financing of its statutory functions.

In the wake of *CRAN v Telecom (2018)*, the legislature amended s 23 of the Communications Act. It replaced the old s 23 with a new provision. The new provision was consequently challenged in the High Court where MTC maintained that in light of *CRAN v Telecom (2018)*, any amendment which the legislature had to bring about had to meet the following criteria: (a) It should provide for an upper threshold of the regulatory levy; (b) it should provide limits and guidelines; and (c) primary legislation must set out criteria on how the levy regime is to be implemented. CRAN maintained that the amended s 23 complies with this Court's *ratio* in *CRAN v Telecom (2018)* as it contains sufficient guidelines and limitations for the determination of the regulatory levy and has in-built checks and balances and as per settled rules of statutory interpretation, and then the amended s 23 must be read and interpreted in its totality instead of reading selected provisions in isolation.

The High Court agreed with MTC and set aside the amended s 23 of the Communications Act in its entirety. The present appeal lies against that judgment and order.

On appeal, CRAN alleges that the court *a quo* erred in coming to its decision based on four grounds: (a) it erred when it found that the amended s 23 fails to prescribe the parameters (with the requisite degree of certainty) within which it is to exercise its discretionary powers, (b) in failing to find that the amendments introduced by the Communications Act cured the defects identified by the Supreme Court in *CRAN v Telecom (2018)*, (c) in finding that the constraints imposed upon CRAN by the Public Enterprises Governance Act 1 of 2019 do not limit or constrain CRAN's exercise in its

discretion under s 23(3) and that its only constraints are contained in the Communications Act which are relevant to the determination of the constitutionality of s23(3) and (d) it erred in finding that CRAN is not subject to sufficient executive and legislative oversight, notwithstanding Arts 40(a) to (k) of the Namibian Constitution, ss 27 and 28 of the Communications Act, and the Public Enterprises Governance Act 1 of 2019 (Public Enterprises Governance Act).

Held that, it is undesirable to treat sentences and phrases in a judgment as if they are provisions in an Act of Parliament.

Held that, s 23 read with the relevant provisions of the Communications Act, passes constitutional muster, independent of the provisions of the Public Enterprises Governance Act, in that:

(a) The new s 23 allows for flexibility in the joints of CRAN accompanied by sufficient safeguards against either over-recovery or under-recovery and sets out justiciable criteria on which operators may challenge any unreasonable exercise of discretionary power by CRAN.

(b) The legislature has succeeded in circumscribing and limiting CRAN's discretionary power to set regulatory levies. The most important limitation placed on CRAN in determining the regulatory levy is that it must be solely for the purposes of meeting its regulatory costs.

(c) The changes made to s 23 should have been tested against (a) the statutory preference for a self-funded regulator almost entirely reliant on regulatory levies and performing a regulatory function in one of the most competitive and technical fields of economic activity, and (b) that the setting of regulatory levies under the Communications Act involves the exercise of discretion for which the regulator has a far wider range of information and expertise than the legislature.

(d) The amended s 23 states that CRAN must separate its regulatory functions and costs associated therewith from its other functions and ensure that the power to impose levies is limited to 'raise sufficient income to defray its regulatory costs'; and ensuring a fair allocation of cost among providers of communication services.

Held that, the amended scheme under s 23 establishes objectively justiciable criteria, standards and restrictions which, viewed in their totality, limit CRAN's exercise of discretion so as to remove the possibility of its unconstitutional exercise. In its current form – with a clear methodology for assessing the levy and the circumstances wherein it may be exceeded – the legislature remedied the defect that caused constitutional concern. No plenary legislative power has been delegated to CRAN because Parliament has also established sufficient checks and balances over the process of determining levies *via* Regulations.

The appeal succeeds with costs and the judgment and order of the High Court are set aside.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and SMUTS JA concurring):

Introduction

[1] On 11 June 2018, this Court declared as unconstitutional s 23(2)(a) of the Communications Regulatory Act 8 of 2009 (Communications Act) on the basis that it conferred unchecked discretionary power to the appellant, Communications Regulatory Authority of Namibia (CRAN) to levy 'regulatory levies' for the financing of its statutory functions¹.

¹ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & Others* 2018 (3) NR 664 (SC), hereafter *CRAN v Telecom (2018)*.

[2] The impugned s 23(2)(a) was part of a larger s 23 which reads:

‘Regulatory levy

23. (1) 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 expenses.

(2) Regulations made in terms of subsection (1) may impose the levy in one or more of the following forms:

- (a) A percentage of the income of providers of the services concerned (whether such income is derived from the whole business or a prescribed part of such business) specified in the regulations concerned;
- (b) as a percentage of the profit of the provider concerned (whether in respect of the whole business or in respect of a prescribed portion of such business), calculated in the manner prescribed in the regulations concerned;
- (c) a fixed amount per year in respect of such services as may be specified in the regulations concerned;
- (d) a fixed amount in respect of any call made, any line made available, or a specified amount of capacity or bandwidth made available in respect of a particular service; or
- (e) in any other manner that is not unreasonably discriminatory.

(3) Regulations made in terms of subsection (1) may –

- (a) prescribe the periods and methods of assessment of the regulatory levy;
- (b) prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy;
- (c) prescribe penalties 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.’

[3] The remainder of the section was not challenged and was therefore not the subject of the order of unconstitutionality.

[4] In dealing with the impugned provision, this Court (Damaseb DCJ, Smuts JA and Chomba AJA)² wrote at para 15: 'On appeal, the following issues have crystallised – whether: (a) 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 s 23(2)(a) is an unconstitutional abdication by parliament of its legislative function'.

[5] In *CRAN v Telecom (2018)* we rejected the challenge that the regulatory levy imposed under s 23(2)(a) was tax but concluded that the legislature impermissibly delegated its plenary legislative function to CRAN. The court held:

[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). 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 1,5per cent and in another that it be 50per cent? How the licensees to know what percentage are 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

² *Ibid.*

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. (Underlined for emphasis)

[6] In the wake of *CRAN v Telecom (2018)*, the legislature amended s 23 of the Communications Act. It replaced the old s 23 with a new provision. The new provision reads thus in full:

'Regulatory levy

23. (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) 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.

- (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;
 - (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 foregoing, 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.

- (3) The objectives of the regulatory levy are -

- (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.

- (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 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.

(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.'

[7] After the amended s 23 came into force, MTC successfully mounted a renewed challenge to it, together with the regulations made on the strength of it.³ These regulations are intended to complement the new s 23 by imposing regulatory levies on operators to meet CRAN's regulatory costs. CRAN's case *a quo* was that the regulations provide for the policy framework for the setting of levies, the guidelines and the percentage thresholds on levies. CRAN also stated that the Public Enterprises Governance Act 1 of 2019 subjects it to executive oversight by the Ministers of Information Technology and of Public Enterprises.⁴

[8] In its notice of motion MTC asked the High Court:

'1. That it is declared that section 23 of the Communications Act 8 of 2009 as amended by the Communications Amendment Act 9 of 2020, and any regulations purportedly prescribed pursuant to this provision, is declared unconstitutional and null and void; alternatively, reviewed and set aside'.

[9] In the renewed challenge, MTC alleges that in light of *CRAN v Telecom (2018)*, any amendment which the legislature had to bring about had to meet the following criteria:

- (a) It should provide for an upper threshold of the regulatory levy;
- (b) it should provide limits and guidelines; and
- (c) primary legislation must set out criteria how the levy regime is to be implemented.

³ GG No. 7356 of 9 October 2020 General Notice No. 416 of 2020.

⁴ See s 14 – s15 of the Public Governance Enterprises Act.

[10] The High Court agreed with MTC and set aside the amended s 23 of the Communications Act and the Regulations. The present appeal lies against that judgment and order.

[11] MTC's stance raises the following issues:

- (a) What was this Court's *ratio* for invalidating s 23(2)(a) in *CRAN v Telecom (2018)*?
- (b) Does the amended s 23 pass muster measured against that *ratio*?

MTC's pleadings

[12] In an affidavit deposed to by Head: Corporate Legal Advisor: Ms Patience Kananelo, MTC maintained that this Court in *CRAN v Telecom (2018)* declared s 23(2)(a) unconstitutional specifically on the ground that it granted uncircumscribed plenary legislative power to CRAN due to the absence of guidelines and limits for its exercise and for having granted to CRAN 'unfettered discretion' – a defect still apparent in the amended s 23.

[13] It is said that the amended s 23 suffers from unconstitutional vagueness, violation of the separation of powers, unlawful abdication by Parliament to an administrative body of its legislative function, and infringement of the rule of law.

Reliance on Regulations misplaced

[14] MTC pleaded that in *CRAN v Telecom (2018)*, s 23(2)(a) was the empowering provision for the Regulations made under it. This Court noted that where the empowering provision for the Regulations was held to be unconstitutional, any Regulations prescribed pursuant to it, must also be struck down.⁵ Hence, it was argued that CRAN was incorrectly attempting to reverse-engineer the problem of unconstitutionality by invoking subordinate legislation to remedy Parliament's failure to set clear limits in the empowering provision.

[15] Ms Kananelo added that in relation to regulations passed on the authority of the old s 23(2)(a), this Court in *CRAN v Telecom (2018)* said: '(W)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.'⁶ MTC also asserted that the court made these remarks in the context that s 23, as opposed to the regulations, did not contain the requisite guidelines and limits and hence, in order to remedy that constitutional defect, those limits needed to be embodied within s 23 itself. In other words, a constitutional defect in primary legislation cannot be cured by regulations made under its authority and that an empowering provision cannot be augmented by its offspring. MTC emphasised that regulations cannot be used to interpret the text of the legislation pursuant to which they have been

⁵ *CRAN v Telecom (2018)* para 93.

⁶ *Ibid* para 92.

prescribed.⁷ Therefore, so it was argued, regulations cannot be used to introduce a requirement which the Supreme Court held must be imposed by Parliament.

Reliance on extraneous legislation misplaced

[16] MTC contended that CRAN's extra-textual resort to the Public Enterprises Governance Act 1 of 2019 does not assist it as CRAN's empowering legislation has been held by this Court to constitute "a complete and complex regulatory framework".⁸ According to MTC, just as was the case with the old s 23(2)(a), the new s 23 does not provide for the Executive's ratification, approval or consideration of the percentage levy to be imposed by CRAN.

[17] According to MTC, CRAN's reliance on powers vested in a minister under the Public Enterprises Governance Act to supervise the activities of state-owned enterprises is not an answer to the complaint that there is no political oversight over CRAN's discretionary power under the Communications Act. The argument goes that to the extent that, as required by *CRAN v Telecom (2018)*, s 23 as amended does not provide for executive control over the levies to be imposed by CRAN, s 23 is unconstitutional. It is said that Parliament's failure to acquit itself of its own constitutional competence to legislate appropriately – *inter alia* by circumscribing the discretion 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. The constitutionally compliant approach

⁷ *AB & another v Minister of Social Development* 2017 (3) SA 570 (CC), para 286 and authorities cited in fn 267, cited by the court *a quo*, para 24 recording MTC's pleadings. The Supreme Court confirmed this principle in (*Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) , para 59).

⁸.*Cran v MTC* (2018), para 6.

available to Parliament, according to MTC, is the one which it adopted in for example s 76(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995.⁹ It requires that the tax imposed on agricultural land to fund land restitution be approved by Parliament.

[18] In any event, the argument goes, CRAN's claim that it is subject to sufficient executive oversight is evidently inconsistent with its assertion of independence as a self-regulatory enterprise.

Criticism of amended s 23

[19] According to MTC, the amended s 23(1)(a) is identical to the old s 23(2)(a) and therefore the amended text reproduces precisely the same constitutional defect which was declared as unconstitutional in *CRAN v Telecom (2018)* in that the new provision purports to confer a discretion to impose any percentage conceivable and that no upper limit had been imposed, and no criteria had been set to constrain the discretion. MTC maintains that an upper limit on the percentage levy could have been provided for in s 23(1)(a), just as Parliament did in respect of the universal service levy in the amended s 56(3A) under the Communications Act.

[20] MTC takes issue with subsecs (4) and (8) and states that the concepts of 'sustainability' of operators 'predictability, fairness, equitability, transparency and accountability' are at best vague without any guidance on 'how' they must be applied in practice by CRAN. It is said that in any case, these principles apply by operation of law under Art. 18 of the Constitution and common law.

⁹ See para 127-129 below.

[21] According to MTC, subsecs (8) is even worse because it provides that CRAN may in a subsequent financial year impose top-up levies to compensate for deficits during the previous years' levies. Yet again there is no criterion provided in the provision to constrain the discretionary top-up levy or how the calculations for the increase will be made.

[22] Similarly, subsecs (3) and (5) also fail to provide the necessary guidance by failing to state how the 'proportion of such income which should be funded from the regulatory levy' must be determined. MTC states that instead of providing the guidance required by *CRAN v Telecom (2018)* in primary legislation, Parliament left it to CRAN to determine 'the income it requires and the proportion of such income which should be funded from the regulatory levy'.

[23] Further, s 23(5)(b) provides that while an increase in the regulatory levy or the introduction of a new regulatory levy in any period of 12 consecutive months must be avoided, it can be done if there is 'good reason' to do so according to the subjective opinion of CRAN.

[24] MTC disputes CRAN's contention that s 23(2)(d)-(g) set out the needed guidelines. It states that, firstly, the text of s 23(1)(a) makes reference to only 'subsecs (4) to (8)' – not any part of subsec (2) – to which CRAN must have 'due regard' in imposing a regulatory levy. Secondly, s 23(2)(d)-(g) in their own terms do not, at all, provide guidelines as required by *CRAN v Telecom (2018)*. The criticism is made that s 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 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 . . .'

[25] MTC complains that s 23(3) is not intended or capable of providing the required guidelines and that CRAN contradicts itself in arguing that s 23(3) – to which s 23(1) does not even refer – somehow limits the levy to what is 'sufficient' when CRAN is in any event entitled to 'exceed' regulatory costs, resulting in 'over-recoveries'.

[26] Section 23(5)(a)(vii) permits CRAN to consider 'any other matter deemed relevant' by it in light of its regulatory costs, for the purpose of determining the form, percentage or amount of regulatory levy. Similarly, s 23(5)(c) provides that CRAN 'may consider any other matter' which it deems relevant while determining the form, amount or percentage of the regulatory levy. According to MTC that makes the section open-ended and constitutionally impermissibly expands CRAN's discretionary powers in a manner that this Court had previously disapproved as deploying 'very wide language.'¹⁰

¹⁰ *Expedite Aviation CC v Tsumeb Municipal Council & another* 2020 (4) NR 1126 (SC), para 778. See, *S v Guruseb* 2013 (3) NR 630 (HC), 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

Not only does this section provide high-level factors allegedly guiding CRAN's discretion but also the additional discretion to determine the relevant factors supposedly constraining such discretion.

[27] It is clear that MTC's primary contention is that the amended provision fails to set an upper threshold and/or criteria for any levy that CRAN may impose but that the amended s 23 instead retains – and in material respects – expands the discretionary indeterminacy for which the previous s 23(2)(a) was held to be unconstitutional.

Different Percentages for Different Licensees

[28] Section 23(1)(a) entitles CRAN to impose levies consisting of different percentages for different licensees. According to MTC, that makes fewer licensees bear a greater brunt of the percentage-based levy. Further, the percentage perforce applies to a wider category such that the entire turnover of the firm is struck (whether or not the licensee engages also in other business) and not only the turnover relating to the licensed 'portion' of the 'business'. MTC argues that this amounts to conferral of unconstrained discretion on CRAN and increases the potential for CRAN to act prejudicially.

Potential for over-recoveries

[29] MTC takes issue with the real prospect of over-recovery under the amended s 23. Section 23(5)(a)(iv) provides that receiving income from the regulatory levy in 'substantial excess' of what is required to cover the regulatory costs must be avoided

text in the current statutory context.

'as far as is reasonably possible or predictable.' According to MTC, this leaves it to CRAN's subjective discretion to determine what constitutes 'substantial excess' and what does not. MTC pleaded that as a statutory regulator, CRAN's own perpetuity cannot be conflated with business continuity. In MTC's view, the statutory scheme adopted under the new s 23 relegates the professed concern for licensees' business continuity to a retrospective remediation of 'unreasonable negative impact' even though such impact is capable of rendering licensees beyond resuscitation by the time the remedial adjustment to the levy kicks in. It is claimed that the section does not provide for any interim re-compense for licensees that have been subjected to a levy which has resulted in a substantial over-recovery.

CRAN'S policy formulation function criticised

[30] MTC pointed out that to the extent the new s 23 grants to CRAN the power to formulate policy, it suffers from yet another constitutional defect and that the High Court in *Theron* already made it clear that policy formulation does not constitute regulation and that the latter 'must be traceable only to an enabling Act or a subordinate (or delegated) legislation made thereunder.'¹¹ Similarly, in *Rally for Democracy*,¹² this Court held that the rule of law would be jeopardised if the exercise of any public power is not authorised by law.

CRAN's answer

¹¹ *Theron v Village Council of Stampriet & another* 2020 (2) NR 524 (HC), paras 5-7.

¹² *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC).

[31] CRAN's answering affidavit was deposed to by its chief executive officer, Ms Emilia Nghikembua. According to the deponent, the present challenge is nothing but a gimmick being used by MTC to avoid payment of its outstanding regulatory levies owed to CRAN, standing at N\$ 97 269 143.84 in May 2019.

[32] According to CRAN, the amended s 23 complies with this Court's ratio of *CRAN v Telecom (2018)* as it contains sufficient guidelines and limitations for the determination of the regulatory levy and has in-built checks and balances. It is said that as per settled rules of statutory interpretation, the amended s 23 must be read and interpreted in its totality instead of reading selected provisions in isolation.

Role of regulations

[33] According to CRAN, in the aftermath of the amendment to s 23 in the wake of *CRAN v Telecom (2018)*, it published its notice of intention to make Regulations prescribing license fees and regulatory levies under s 129 of the Communications Act in Government Gazette no. 7356 of 9 October 2020 (the notice) in terms of s 30(3) of the Communications Act, and the Regulations regarding Rule-Making Procedures, General Notice No. 416 of 2020. Schedule 1 thereof contains the proposed licence fees and regulatory levies. Schedule 2 is the concise statement on the purpose and Schedule 3 is the Discussion Paper on license fees and regulatory levies which provides detailed information on the rationale for the proposed license fees and regulatory levies.

[34] According to CRAN, the proposed Regulations introduce an upper threshold beyond which CRAN may not set the levy, and the circumstances under which such threshold may be exceeded.

[35] The notice explained the amended s 23 to provide the following:

'The amended s 23 provides -

- i. the rationale for the regulatory levy;
- ii. as well as the charging considerations to guide CRAN's decision making on an appropriate regulatory levy;
- iii. the charging principles to assist with the design, implementation and review of the regulatory levy . . .

When making a regulatory levy determination in terms of the amended s 23, CRAN will in addition to the principles set out therein, consider aspects such as transparency, efficiency, performance, equity, simplicity and policy considerations. Regulatory charges should be consistent with the policy intent and legislative objectives'.

Relevance of the Public Enterprises Governance Act of 2019

[36] According to CRAN, relevant provisions of the Public Enterprises Governance Act ensure executive oversight over its functions. Section 14(1) of the Public Enterprises Act requires CRAN to submit an annual business and financial plan, containing CRAN's operating budget and capital budget for the next financial year to the

Minister responsible for Communications who decides whether to approve it, in consultation with the Minister of Public Enterprises.

[37] It is said that once CRAN's business plan has been approved, it cannot incur any expenditure except as per an estimate of expenditure approved in terms of s 15 of the Public Enterprises Act. This approval would be granted only if CRAN operates within the limits set by the Communications Act. On that view, that prevents CRAN from over-spending or over-charging the regulated entities.

Fair allocation of regulatory costs via progressive levy

[38] CRAN states that in setting a regulatory levy, it uses a progressive regulatory levy formula in terms of which the percentage of turnover payable as a regulatory levy is based on a formula that caps the maximum percentage at 1.65 per cent. The formula applied is designed such that the percentage levy increases evenly from 0 per cent to 1.65per cent of turnover ranging from zero to one billion Namibian dollars. Licensees with less than one billion Namibian dollars turnover will pay a lower percentage and only licensees exceeding one billion Namibian dollars in turnover will pay the full levy. The formula is as follows:

'Levy per cent = MAX (500, MIN) (1.65%, 0.000000000165*Turnover) *Turnover).

The formula selects the lower value out of N\$ 500 or 1.65% and 0.000000000165*turnover.

Examples:

- a) 5 million turnover: Minimum (1.65%, 0.000000000165*5,000,000) =0.01 %
- b) 500 million turnover: Minimum (1.65%, 0.000000000165*500,000,000) =0.0%.
- c) 2 billion turnover: Minimum (1.65%, 0.000000000165*2,000,000,000) =1, 65 %'.

[39] According to CRAN's CEO, that allows a single formula to be applied across all sectors and licensees while allowing smaller and newer players to pay a smaller levy percentage to encourage market entry and competition, and reduce market exit.

[40] It is said that CRAN is not required to strictly apportion to each licensee a proportionate share of the costs of regulation linked to it but that it aims at a fair allocation of these costs.¹³ It cannot develop such a methodology because of capacity constraints since this would only increase its regulatory costs. Hence, it aims at fair allocation of costs without being unreasonably discriminatory while being bound to consider any potential negative impact of the levy on the sustainability of the providers.

Benchmarking

[41] CRAN further pleaded that they embarked on a benchmarking exercise, aligning with regional and international best practices on regulatory costing in countries such as Zambia, Uganda, Botswana, Zimbabwe and South Africa. In Zambia, the regulator (ZICTA) charges a maximum regulatory fee of 3per cent on gross annual turnover; Uganda charges 2per cent of gross annual revenue; Botswana charges 3per cent on net operating revenues, ie service revenues. Zimbabwe's regulatory levy consists of an annual fee of US\$ 60 000 or 3per cent of the audited annual gross turnover plus VAT. South Africa's regulator, ICASA, has lower regulatory levies than CRAN because ICASA is not funded by the levies alone but receives subsidies from the Department of Communications.

¹³ *CRAN v Telecom (2018)*, paras 84-88.

[42] In contrast, CRAN is financially dependent on regulatory levies and fees, with the former typically constituting close to 80per cent of CRAN's revenue. The authority to manage and administer its own funds is crucial for CRAN's financial independence which contributes to best practice in regulated industries.

Rationalisation of regulatory levy: relation to regulatory costs

[43] CRAN states that the amended s 23 clearly provides for a broad definition of regulatory costs in s 23 which are to be defrayed via the regulatory levy, a simplified basis for imposition of such levy, and sufficient flexibility for the imposition of different levy amounts for different service providers. Thus, the levy should not act as a barrier to CRAN's fulfillment of its objectives under the Act, including the promotion of universal access. Section 23(5) requires 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 while determining a reasonable and rational levy.

[44] CRAN pleaded that it can neither perform its regulatory functions effectively nor fulfil its mandate without regulatory levy income. Thus, the levy should be sufficient to cover CRAN's anticipated expenses and CRAN's discretion would be constrained via existing provisions for adjustment of the levy in case of under and over recoveries.

[45] The term 'turnover' was defined as gross revenue or income derived from services or business which may be regulated by the Act in order to allow for a wide and flexible period within which CRAN may prescribe the levy. This would allow CRAN to

prescribe the levy from the date the Regulations would come into force and not wait for the completion of an 'annual' turnover period. This was required because, CRAN argued, it was already functioning at a sub-par level due to prolonged litigation as a result of which service providers had not paid up the significant levies they owed to CRAN. CRAN's existing initial start-up funding was fast depleting, and it merely had funds to remain operational but not enough to cover its regulatory costs. Thus, CRAN contended that the specific period for the turnover can be prescribed in the levy regulations and need not be prescribed in the Act itself.

[46] Prolonged litigation irrespective of outcome puts a hold on the imposition of the levy for several years, eventually affecting the functions that CRAN discharges in public interest. The outstanding levies owed by MTC and Telecom would make a significant injection in the regulatory scheme and if paid to CRAN may result in the levy being reduced to even 1per cent.

[47] CRAN CEO stated that even if the regulatory levy was to be increased to 3per cent per annum, the annual financial statements indicate that it would lead to an under recovery of approximately 40 million in the next three years starting 2021/2022. This under recovery may, in terms of the new s 23, be clawed back during the next period under review. Furthermore, CRAN's budget increases are attributable to its increased mandate. Future budget increases are meant to provide for projects that could not be started or finalised during the previous periods due to lack of funds.

[48] The Communications Act requires certain services to be self-funded and not cross subsidised. The fact that those costs are included in CRAN's budget does not imply that it is to be funded from the regulatory levy.

[49] It is stated on behalf of CRAN that s 23(3) obligates it to impose reasonable levies as far as is necessary and sufficient to defray its regulatory costs. Consequently, CRAN cannot impose a levy to generate a surplus above its regulatory costs. Further, s 23(5)(a)(iv) provides 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.' Thus, while over-recovery is discouraged under the new s 23, the possibility of an over-recovery is not strictly prohibited, and ss 23(7) and (8) make provision for off-setting over-recoveries.

[50] To sum up, CRAN submitted that the amended s 23 read with the regulations now incorporates the guidelines, limits, and executive oversight required to curtail its discretionary power. It sets the framework within which CRAN can exercise its regulatory powers. It sets out the requirements for rationality and reasonableness of the regulatory levy in order to establish the relationship between the levy and the scheme itself.

Removal of uncertainty and unpredictability

[51] CRAN contended that s 23(5)(b) removes uncertainty and unpredictability in levy imposition by requiring that any increase in the levy or introduction of a new levy must be avoided in any period of 12 consecutive months unless there is good reason to do

so. This allows service providers to align their businesses with the set levy. Therefore, the levy is forward-looking and allows licensees to plan their costs and subsequent tariff charges accordingly, so that the regulatory levy should be a pass-on cost to end consumers.

[52] CRAN pleaded that s 23(5) provides that CRAN's budget must guide the determination of the levy and s 23(6) ensures that the levy is reviewed at least once every 5 years to ensure that it complies with the requirements of the section and there are no continued under- or over-recoveries. Thus, any amendment to the levy is done via an ascertainable and predictable rule-making procedure, ensuring that those regulated can plan their conduct accordingly.

[53] CRAN submitted that it was incorrect to compare the set provisions related to a levy for the universal service fund under section 56 to the regulatory levy imposed by CRAN since the former has a sole determinative purpose, limited to a prescribed category of service providers which is vastly different from CRAN's regulatory levy and extensive mandate.

[54] According to CRAN, there exists a rebuttable presumption of constitutionality for the amended s 23 and the onus was on MTC to prove otherwise.

[55] CRAN also contended that while framing regulations, it has to have regard to certain policy considerations because the legislature cannot be expected to provide detailed provisions for a complex regulated industry like telecommunications.

[56] CRAN's revised Discussion Paper clarifies that though CRAN is not required to ring-fence its income and expenditure, for the calculation of the proposed levies, it did a costing exercise for each revenue stream to try as far as possible to allocate the costs to the specific revenue stream. For instance, spectrum fees will cover the cost of spectrum and numbering fees the cost of the numbering, etc. Within the specific stream too, the imposition of different percentages on different players in the form of a progressive levy is consistent with fair allocation of costs.

The High Court

[57] The High Court was called upon to determine whether the amended s 23 amounts to an unconstitutional abdication by Parliament of its legislative function. The court *a quo* after conducting a section by section analysis of the amended s 23 concluded that the legislature recognisably tried to curtail the outsourcing of unchecked plenary legislative power to CRAN but failed again to sufficiently circumscribe CRAN's discretionary powers. According to the High Court, the amended s 23 fails to remedy the defects identified by this Court in *CRAN v Telecom (2018)*. Parliament had failed once again, according to the High Court, to guard sufficiently against the risk of an unconstitutional exercise of the discretionary powers conferred on CRAN.

[58] The High Court therefore struck down the amended s 23 for failing to pass constitutional muster. It also held that the regulations promulgated under the section

were liable to be struck down as well since their validity depended upon the validity of the empowering provision.

[59] To reduce the length of the judgment it is undesirable to set out in any greater detail the reasoning of the High Court. The judgment is available online on the High Court's website.¹⁴In due course I will refer to certain portions of the court *a quo's* specific findings and reasoning.

The appeal

[60] The appeal is against the court *a quo's* judgment and order including the costs order.

Grounds of appeal

[61] CRAN alleges that the court *a quo* erred in finding that s 23 of the Communications Act, as amended, fails sufficiently to prescribe the parameters within which it is to exercise its discretionary powers, and also fails to prescribe those parameters with the requisite degree of certainty in that it failed to take into consideration the amended s 23 in its entirety.

[62] CRAN maintains that the court *a quo* erred in failing to find that the amendments introduced by the Communications Act cured the defects identified by the Supreme Court in *CRAN v Telecom (2018)*.

¹⁴ *Mobile Telecommunications Ltd v Communications Regulatory Authority of Namibia* (HC-MD-CIV-MOT-GEN- 2020/00526) [2022] NAHCMD 443 (31 August 2022).

[63] The court further erred in finding that the constraints imposed upon CRAN by the Public Enterprises Governance Act 1 of 2019 do not limit or constrain CRAN's exercise of its discretion under s 23(3) of the Communications Act; and that it is only constraints contained in the Communications Act which are relevant to the determination of the constitutionality of s 23(3).

[64] Finally, that the court *a quo* erred in finding that CRAN is not subject to sufficient executive and legislative oversight, notwithstanding Arts. 40(a) to (k) of the Namibian Constitution, ss 27 and 28 of the Communications Act, and the Public Enterprises Governance Act 1 of 2019.

Submissions on appeal

CRAN

[65] Mr Budlender SC for CRAN submitted that the amended s 23 creates sufficient guidelines, parameters and limits in respect of the exercise of CRAN's power to impose a levy by regulation. Counsel submitted that the Communications Act does not prescribe an upper limit by imposing a specified monetary amount because CRAN's regulatory costs may vary from time to time. The objective limit imposed by the section, however, is the income required by CRAN to defray its regulatory costs, which is a limit determined by external and objectively determinable facts.

[66] Counsel further submitted that s 23 has been substantially amended and that the new provision's scheme considered in its totality establishes sufficient safeguards

against the unconstitutional exercise of the power to impose levies. The scheme of the new provision is said to rest on the following pillars.

[67] The first is that the regulatory costs are defined and may only be imposed by regulation. In other words, CRAN may not impose a levy other than for the purpose of achieving its regulatory function in relation to the communication services providers. Further, under the new scheme regulatory costs must meet clearly spelled out requirements and guidelines, parameters and limits. They are:

- (a) CRAN must undertake a rule-making procedure to defray its regulatory costs under s. 23(1).
- (b) the levy regime may not be discriminatory: s 23 (1) (e);
- (c) the purpose of the levy must be to generate sufficient income for CRAN to defray its regulatory costs;
- (d) there should as far as practical be a fair allocation of costs amongst the communication service providers (fine only); and
- (e) the levy should serve to promote the objectives of the Act.

[68] The second pillar consists of the following guidelines to be applied in determining the levy which are-

- (a) In determining a levy, CRAN must assess the impact that the levy will have on the sustainability of the business of the providers of communication

services. As Mr Budlender SC for CRAN submitted: 'If a regulatory levy has an unreasonable negative impact on sustainability of the providers of the communication services, the impact is to be mitigated, insofar as is practicable, by means of the rationalization of the regulatory costs and the corresponding amendment of the proposed regulatory levy'. This measure, counsel submitted, stood in rebuttal to Mr Gauntlett's proposition that CRAN may impose a levy of up to 100per cent of turnover and certainly answers this Court's concern in *CRAN v Telecom* that the previous s 23 permitted CRAN to impose a levy of up to 50per cent (2018) of turnover;

- (b) the determination of a levy should ensure predictability, fairness, equitability, transparency and accountability; and
- (c) the levy is to be aligned with regional and international best industry practices.

[69] Thirdly, the Authority's discretion to impose levies is circumscribed by the factors it must consider when determining the form, percentage or amount of the regulatory levy. They are:

- (a) The income CRAN requires over the period of the proposed levy and the proportion that should come from levies. The scheme requires CRAN to avoid as far as reasonably possible or predictable receiving income from the regulatory levy that is substantially in excess of what is required to cover its regulatory costs;
- (b) It must consider income derived from other sources and consider the necessity of managing any risks in the communication industry which might arise from the imposition of the regulatory levy;

- (c) The determination of a levy must have regard to any other fees, levies or charges which the providers of communication services are required to pay under the Act;
- (d) To achieve predictability and stability the process of determining a levy must avoid, unless there is good reason to do so, an increase in the regulatory levy or to introduce a new regulatory levy in any period of 12 consecutive months.
- (e) There must be regular review undertaken to prevent over-recovery or under-recovery and over-recovery must be set-off against the predicted regulatory costs for the next regulatory determination and imposition. Correspondingly, the Authority may adjust under-recovery by determining a higher levy for the next regulatory period.

MTC

[70] Mr Gauntlett KC SC submitted that in principle MTC had two material concerns as with regards the amended s 23. According to counsel for MTC, this Court in *CRAN v Telecom (2018)* held that s 23 (in its pre-amended form) constituted 'an unconstitutional abdication by Parliament of its legislative function'. Mr Gauntlett argued that the constitutional defect in the new s 23 is that Parliament had failed to itself impose an upper threshold beyond which CRAN may not set a levy.

[71] Mr Gauntlett anchors his core submission on paras 91 and 92 of *CRAN v Telecom (2018)*. He interprets those paragraphs to convey that the struck s 23(2)(a) constituted an unconstitutional abdication by the legislature of its legislative function because of the failure to itself impose an upper threshold beyond which the regulator

may not set a levy. Counsel makes short shrift of CRAN's position that the regulations made in terms of the amended s 23 do in fact set the upper threshold. According to Mr. Gauntlett, only Parliament can set the upper threshold. More so because, the argument goes, CRAN has a self-interest in the matter as, on CRAN's own version, it is 'wholly reliant on fees to generate its own revenue'. Counsel submitted that 'Good governance plainly militates against CRAN being concurrently regulator (with a power to impose penalties) and adjudicator of any upper threshold on its own revenue out-and-out, a judge in its own cause'.

[72] Mr Gauntlett drives the point more forcefully home by submitting that what CRAN characterises as the guidelines under the new s 23 'is a necessary but not a sufficient condition for constitutionality'. He adds: 'no option exists between imposing either guidelines or limits on the percentage'.

[73] According to counsel, imposing levies through a rule-making process really adds nothing to the debate as such rule-making process is the province of Parliament and not CRAN.

[74] It is not difficult to discern MTC's frustration that operators have to bear CRAN's operational expenses through the levy regime under the Communications Act. For example, MTC's counsel submits in the heads of argument (at para 9):

'CRAN requires . . . not simply that its revenue be derived substantially from the telecommunications sector (notwithstanding significant CRAN expenditure on

infrastructure and services entirely unrelated to telecommunication). It also requires that telecommunication consumers must pay for this.’

[75] Further, counsel submitted that the statutory discretion adversely affecting the sustainability of a service provider infringes upon Art. 21(1)(j) of the Constitution and therefore Parliament was required to circumscribe the discretion conferred upon CRAN.

[76] Mr Gauntlett relied on this Court’s judgment in *Medical Association of Namibia v Minister of Health and Social Services*¹⁵ for the proposition that the legislature is not constitutionally competent to confer ‘wide and unconstrained discretion without accompanying guidelines on the proper exercise of the power’.¹⁶

[77] Mr Gauntlett further relied upon *CRAN v Telecom (2018)* that CRAN should not be conferred unchecked discretion, without any ascertainable limitation. Counsel concluded that the real issue between the parties is not about the levy, but rather how to determine the said levy.

Discussion

[78] As I have demonstrated, the lynchpin of MTC’s case which found favour with the High Court is that, in the light of this Court’s judgment in *CRAN v Telecom (2018)*, the basis on which any regulatory levy regime will pass muster is if the Legislature sets the upper limit above which CRAN may not impose a regulatory levy. That approach is not

¹⁵ *Medical Association of Namibia & another v Minister of Health & Social Services & others* 2017 (2) NR 544 (SC) para 85.

¹⁶ *Dawood* para 47 cited in *Medical Association* para 85.

supported by the ratio of *CRAN v Telecom (2018)*. An upper limit is one possibility that this Court left open that could have made the old s 23 constitutionally compliant.

[79] Although writing in a different context, Lord Reid cautioned against treating sentences and phrases in a judgment as if they are provisions in an Act of Parliament.

According to the Law Lord:

‘ . . . experience has shown that those who have to apply the decision to other cases . . . find it difficult to avoid treating sentences and phrases in a . . . [judgment] as if they were provisions in an Act of parliament. They do not seem to realise that it is not the function of . . . judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive.’¹⁷

[80] In *CRAN v Telecom (2018)*, in light of the focus of the challenge on s 23(2)(a) and the way the matter was pleaded and argued, the primary concern was the absence of guidelines for the exercise of the discretionary power contained in that section. In particular, the absence of an ascertainable limit on CRAN's discretionary power. We proceeded to give examples of what the guidelines could constitute – such as an upper threshold and either legislative or ministerial oversight. If an amendment achieved ascertainable limits on, and constitutionally compliant guidelines for CRAN's discretionary power, it would pass muster.

[81] It was certainly not intended, for example, that just because legislative or ministerial oversight was provided for in the remedial provision that it would, for that

¹⁷ *Broome v Cassell* 1972 AC 1027,1085.

reason alone, pass muster. Therein lies the danger of treating selected words in a judgment as if it were a statute.

[82] The implications of the legislative choice of a self-funded regulator on the nature of its discretionary power to impose regulatory levies was not well-articulated and debated in *CRAN v Telecom (2018)*. CRAN's affidavit brings that issue to the fore, amongst others, in the following way:

'93. CRAN is a self-regulatory enterprise with extensive and complex regulatory mandate in terms of the Communications Act. 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 ['levies' would have been preferable choice of word] to generate revenue in order to defray its regulatory costs. . . It is 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.'

[83] The legislature's duty after *CRAN v Telecom (2018)* was to devise a legislative scheme that would impose limits on the discretionary power to impose levies. The gravamen of CRAN's case is that the litmus test for the legislative scheme to meet the test laid down in *CRAN v Telecom (2018)*, is not so much whether it sets an upper limit for the levy but whether the legislature has set standards that limit the discretionary power and removes the possibility of unconstitutional exercise of the discretion.

[84] It was submitted on behalf of CRAN that it is not the court's function to determine whether the legislature's choice is the best manner of achieving the result as long as it falls within a range of reasonable options available for doing so. The fact that MTC may not prefer the chosen model is no less the test. CRAN maintains that the amended s 23 has created a levy-imposition scheme that achieves predictability, transparency, accountability and fairness and should therefore be validated by this Court.

[85] The refrain in MTC's objection to the new s 23 is that the discretion granted to the regulator should have been more narrowly defined and that the use of language such as 'as far as practicable'¹⁸ or 'unless there is good reason'¹⁹ are constitutionally objectionable. It bears mention that except for the specific insistence on an upper limit on the levy, a generalised disquiet that the amended s 23(2)(a) curtailing CRAN's powers could have been more restrictively formulated does not suffice to justify a declaration of invalidity.²⁰

[86] The real inquiry is whether the statutory scheme introduced by the Legislature under the new s 23 read with the other provisions of the Communications Act, contain sufficient safeguards against arbitrariness and unbridled exercise of discretionary power in the imposition of levies amounting to a constitutionally impermissible delegation of plenary legislative powers to CRAN.

¹⁸ Section 23(3)(b).

¹⁹ Section 23(5)(b).

²⁰ A diffuse and inadequately specific challenge to constitutionality is unlikely to succeed: *Minister of Cooperative Governance and Traditional Affairs v De Beer & another* (Case no 538/2020) [2021] ZASCA 95 (1 July 2021) para [116]

[87] What is at issue in this appeal therefore is whether the levy-imposition regime chosen by the legislature in the amended s 23 falls within a range of reasonable alternatives open to the legislature to meet the objective of achieving a self-funded regulator of the telecommunications regulator. Where more than one consideration is relevant, often more than one course of conduct will be acceptable. A court should refrain from imposing its preferred course of conduct and confine the inquiry of constitutional compliance to whether the course chosen by the legislature falls within a range of reasonable alternatives to address a legitimate governmental objective.²¹

[88] The appeal should succeed if we are satisfied that the model chosen by the Legislature for funding CRAN makes the setting of levy thresholds and limits in primary legislation less attractive than granting wider discretionary power to a regulator – who must be presumed to have a far wider range of technical expertise and information than the Legislature for designing and implementing a regulatory levy regime.

Is CRAN a specialized body?

[89] In dealing with a submission made on CRAN's behalf during oral argument, this Court commented at para 90 in *CRAN v Telecom (2018)* as follows:

'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

²¹ *Trustco Ltd t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others 2011 (2) NR 726 (SC)* at 736, para 31.

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.' (Underlined for emphasis)

[90] That has provided fodder to MTC's counsel in the present appeal in support of a submission that CRAN is not a specialised administrative body in the sense contemplated in such cases as *Dawood*. The clear implication of that suggestion is that CRAN is not deserving of wide discretionary powers.

[91] In the paragraph relied upon by MTC's counsel we stated that it was not demonstrated what specialised skill was relied upon in CRAN's counsel's submission, in particular in the design of Item 6 of the then impugned regulations which the court struck alongside the old s 23(2)(a). It is incorrect to suggest that by that comment this Court laid down an immutable rule that CRAN is not a specialised regulator.

[92] It is idle to suggest that telecommunications is not a complex industry requiring specialised skill on the part of not only operators but also those tasked with regulating it. As CRAN's answering affidavit states at para 93:

'CRAN is a self-regulatory enterprise with extensive and complex regulatory mandate in terms of the Communications Act.'

How is CRAN funded?

[93] Upon its establishment CRAN received an 'initial amount appropriated by Parliament.'²²No further appropriations are envisaged for CRAN under its enabling legislation – not even after the amendment²³ to the principal statute in the wake of *CRAN v Telecom (2018)*. CRAN's primary source of funding is therefore the regulatory levies it is empowered to impose on telecommunications providers²⁴ and as confirmed in CRAN's affidavit. The secondary sources of funding are those listed under s 22(1)(b), (c) (e), (f), (g), (h), (i): being an assortment of licence fees, radio spectrum regulation fees, income from services 'provided in the course of its activities', proceeds from auctions of radio frequencies, and interest derived from investment of moneys standing to CRAN's credit. These form part of the remaining 20per cent of CRAN's source of funding.

[94] In my view, the funding model chosen by Namibia's legislature for the telecommunications regulator is an important factor and backdrop against which to test the rationality of the levy-regime which is now placed under constitutional scrutiny. It has not been suggested in the present proceedings that it is unconstitutional to create a statutory body that is not dependent on the national Fiscus for the performance of its mandate. It must follow that the rationality of the levy regime chosen by the legislature must be tested against the choice of funding model for the regulator. It is settled that the

²²Section 22(1)(a) of Communications Act 8 of 2009,

²³ Communications amendment Act 6 of 2020.

²⁴ Section 22(1)(d) of Act 8 of 2009 as amended by Act 6 of 2020.

courts will not dictate economic policy and that the legislature is at large as to the form and degree of economic regulation.²⁵

[95] In circumstances where the legislature has opted for a legislative model that requires the regulator to finance its operations from regulatory levies, is it irrational for the legislature to adopt a model that does not set an upper ceiling above which the regulator may not set a levy or to bestow far greater autonomy and flexibility to the regulator in determining the levy regime? If the approach contended for by MTC – that the legislature must in primary legislation straightjacket the regulator to upper limits on chargeable regulatory levies – holds sway, is there not the real danger that CRAN may not generate sufficient income to meet its regulatory costs while not being able to receive funds from the national Fiscus to meet any shortfall?

[96] The danger of setting an upper threshold in primary legislation is two-fold: Out of fear of under-recovery, the legislature might set the levy at a level that potentially compromises the viability of operators in the telecommunications industry regulated by CRAN. On the other hand, the Legislature might, not being possessed with the requisite technical expertise, set the upper threshold so low that it might compromise the viability of the regulator – and thus undermine the effective discharge of the regulator's statutory mandate.

²⁵ *Medical Association* para 71 citing *Namibia Insurance Association v Government of the Republic of Namibia & others* 2001 NR (HC) 1 at 11G-15D; *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd & others* 2011 (2) NR 670 (SC) at 687.

[97] It seems to me that MTC's grievance is misdirected. As CRAN demonstrates, 80 per cent of its income is projected to derive from levies. That is the choice the Legislature made. We must therefore assume that the regulated industry has the capacity to absorb that burden. If MTC takes the view that the industry is not capable of absorbing that burden of regulatory costs its answer is to challenge the underlying premise on which CRAN's funding model is conceived.

[98] In my view, the statutory scheme adopted under the new s 23 allows for flexibility in the joints of CRAN accompanied by sufficient safeguards against either over-recovery or under-recovery and sets out justiciable criteria on which operators may challenge any unreasonable exercise of discretionary power by CRAN. I proceed to demonstrate how that is the case.

Safeguards against unchecked discretionary power

[99] CRAN's primary mandate is to regulate the highly technical and competitive telecommunications industry – a function that would ordinarily be exercised by the Executive but which has been delegated to a statutory body. It has been recognised that:

' . . . 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. . . .²⁶

[100] Greater discretionary power is desirable in respect of an administrative body whose terms of reference call for the application of specialist skill and expertise. As this Court recognised in *CRAN v Telecom (2018)* (at para 6):

‘ . . . Namibia’s telecommunications, broadcasting, postal and radio spectrum landscape represents a complete and complex regulatory framework. If proof was needed of the completeness and rigor of the regulatory framework, the Act makes it a criminal offence for anyone to conduct any unauthorised business regulated by the Act and over which CRAN has supervisory jurisdiction.’ (Emphasis added)

[101] In my view, the High Court in its consideration of the constitutional *vires* of the amended s 23 did not attach sufficient weight to the fact that the Legislature added considerable detail to s 23 which did not form part of the old s 23. It is trite that where the legislature amends a provision, a significant change in language is presumed to entail a change in meaning. The changes made to s 23 should then have been tested against (a) the statutory preference for a self-funded regulator almost entirely reliant on regulatory levies and performing a regulatory function in one of the most competitive and technical fields of economic activity, and (b) that the setting of regulatory levies under the Communications Act involves the exercise of discretion for which the regulator has a far wider range of information and expertise than the Legislature.

²⁶ *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC) para 51.

[102] That does not mean that such an administrative body should be granted unchecked power. The power delegated must have ascertainable limits and safeguards against arbitrariness. That was the concern this Court expressed in relation to the old s 23 which was struck in *CRAN v Telecom (2018)*.

[103] With the amended s 23, the legislature has succeeded in circumscribing and limiting CRAN's discretionary power to set regulatory levies. The most important limitation placed on CRAN in determining the regulatory levy is that it must solely be for the purposes of meeting its regulatory costs. It will be recalled that in *CRAN v Telecom (2018)* we made clear that regulatory costs need not directly correlate to the costs associated with regulation.²⁷ We held that the quantum of the levy need not bear a rational nexus to the purpose of the levy as long as the levy was tied to the policy objectives of CRAN. This Court held that it was acceptable for the quantum to exceed the costs defrayed as long as it was in service of the larger policy objectives of CRAN.²⁸

[104] Yet, crucially, under the new s 23, the legislature has gone out of its way to do the opposite and in that way tied CRAN's hands. As I will more fully set out below, the legislature, time and again, makes clear in the amended s 23 that regulatory costs must be related to the levy imposed on regulated operators.

[105] The definition of regulatory costs in the amended s 1 of the Communications Act is to be read with subsec (5) of s 23 - which in relevant part states that when

²⁷ Paras 73 and 76.

²⁸ Para 67.

determining the form, percentage or amount of the regulatory levy CRAN must – in view of its regulatory costs, duly consider the income it requires and the ‘proportion of such income which should be funded from the regulatory levy’. That obligation imposed on CRAN inures to the benefit of operators who are subject to CRAN’s levy regime. CRAN is therefore under an obligation – and in a manner that is intended to be justiciable – to be transparent about the regulatory function to be performed during a particular levy-cycle, the associated projected or estimated costs and the *pro-rata* burden of levy liability to be borne by the respective operators.

[106] In other words, CRAN must separate its regulatory functions and the costs associated therewith from its other functions and ensure that the power to impose levies is limited to ‘raise sufficient income to defray its regulatory costs’²⁹; and ensuring ‘a fair allocation of cost among providers of communication services’.³⁰

[107] Significantly, in terms of s 23(4)(a)-(c), the power to raise regulatory levies must:

- (a) have due regard to ‘the impact...on the sustainability’ of operators; and
- (b) if the levy has an ‘unreasonable negative impact on such sustainability’ to mitigate the impact as far as practicable ‘by means of the rationalization of the regulatory cost and the corresponding amendment of the proposed levy’;
- (c) ensure predictability, fairness, equitability, transparency and accountability in the determination of and imposition of levies;
- (d) be aligned with regional and international best practices.

²⁹ S 23(3)(a).

³⁰ S 23(3)(b).

[108] The legislative scheme under the new s 23 strikes a rational balance between two competing interests³¹: On the one hand, it recognises that CRAN is, in the main, dependent on levy income for its activities. On the other hand, sourcing funds for CRAN should not be at the expense of the viability of operators. In seeking to strike a proper balance between the two competing interests, the amended s 23 punctiliously infuses justiciable safeguards and standards against which the balance can be objectively assessed and, if necessary, challenged if CRAN's levy regime falls short.

Predictability

[109] The amended s 23 provides for a Five-year levy-cycle and compels CRAN - before the expiry of a levy-cycle³² - to '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'. Subsection (7) of s 23 recognises the possibility of over-recovery and provides for a set-off in favour of affected operators. Subsection (8) on the other hand recognises the possibility of under-recovery 'less than its regulatory costs' and allows CRAN to make appropriate adjustments in the next levy-cycle.

Levies do not apply retrospectively

[110] The *proviso* to para (d) of s 23(2), and the provisions of s 23(2)(e) prevent the imposition by CRAN of regulatory levies - in whatever category or form - on leviable activities except after the date of publication in the Gazette of the regulations imposing

³¹ *President of the Republic of Namibia & others v Namibian Employers' Federation & others* 2022 (3) NR 825 (SC), para 141.

³² Section 23(6).

levies and not before that. In other words, a five-year levy-cycle commences with CRAN publishing in the Gazette³³ regulations determining regulatory levies payable by operators in one or more of the forms envisaged in s 23(1)(a)-(e). Such regulations should also set out³⁴ the periods and methods of assessment of the regulatory levies and the due date for payment.

[111] That such documents will be readily and publicly accessible admits of no doubt if regard is had to s 27 of the Communications Act which obligates CRAN to make all information concerning its organisation, how its functions are performed, rules of procedure, statements of general policy, etc publicly available. That, indubitably, affords the affected operators the opportunity to form a view whether CRAN has complied with the requirements and standards set out in s 23 – buttressed (in favour of affected operators) by the statutory duty imposed on CRAN by s 23(5)(a)(i) and the corresponding right of affected operators – for CRAN to determine levies –

‘ . . . 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.’

Statutory right to audi

³³ Section 23(1).

³⁴ Section 23(2)(e).

[112] An important counterweight to arbitrariness is if those affected by administrative decision-making have the opportunity to make representations coupled with the duty on the decision maker to apply its mind by meaningfully reflecting on the representations made and reconsidering its decision when all the facts have been placed before it. That is yet another feature of the new s 23 which militates against unchecked exercise of CRAN's discretionary power.

[113] In terms of s 30(3) of the Communications Act, CRAN must in –

'respect of each provision of the Act that requires the following of a rule-making procedure, prescribe procedures for requesting and considering the comments of industry, users and the public.'

[114] According to subsec (4) of s 30, the procedures prescribed under subsecs (3) may include the holding of public oral hearings, the holding of closed hearings or requests for written comments.

[115] Importantly, subsec (5) of s 30 states:

'(5) The procedures prescribed in terms of subsection (3) must provide that –

- (a) all persons that have a substantial interest in the regulation concerned are given a reasonable opportunity to make representations to the Authority; and
- (b) if representations and communications concerning a regulation are received by the [CRAN], every person who has a substantial interest in

the decision concerned must be given an opportunity to comment on those representations and communications.

[116] The above provisions have important in-built safeguards for operators which militate against arbitrariness on CRAN's part. In the first place, when CRAN has resolved to impose a regulatory levy as it is empowered to do under s 23, it must publish it in the Gazette by way of a regulation. Simultaneously, it must prescribe the procedures for requesting and considering the industry's comments which could, in its discretion, be either by way of public or closed hearings, or through requests for written comments. Section 30(5) however entrenches the right of affected operators to be afforded a 'reasonable opportunity' to make representations to CRAN on the published levies.

Regulator's duty to reconsider

[117] According to s 31, CRAN may, on its own motion or on a petition filed by an aggrieved party to any proceedings, reconsider any order or decision that it has made, within 90 days from the date of making that decision or issuing that order. Clearly, a regulatory levy will not take effect until representations made by affected operators had been considered and a reasoned decision made thereon by CRAN. This is a serious limitation on CRAN's discretionary power because there is no provision in the Communications Act to the effect that the affected operator is obliged to make payments while the reconsideration process remains pending. In other words, the liability to pay the levy proposed under the Regulations only takes effect once the reconsideration process has been completed.

The court has a supervisory role

[118] If all else fails, the court retains the ultimate power to assess if CRAN has acted in compliance with the obligations imposed on it under its levy imposition regime. As s 32 states:

‘(1) Any person may take any regulation for which procedures have been prescribed in terms of section 30 on review on the same grounds and in the same manner as a decision of an administrative body.

(2) Any person who has a substantial interest in any proceedings before [CRAN] may not take any decision, order, regulation or any other action that is made or taken by [CRAN] as a result of such proceedings, on review after a period of six months from the date on which that person has become aware of the decision, order, regulation or action concerned.’

[119] MTC postulates that the new s 23 is no different to the old one and that it reproduces the same constitutional defect as its forerunner. I disagree. As I have demonstrated , the old s 23 which was struck in *CRAN v Telecom (2018)* was not subject to *inter alia* the following important provisions which are part of the amended provision: a very clear definition of regulatory costs; a direct correlation between levies and the costs of regulation; caution against over-recovery; paying due regard to potential adverse impact of levies on the sustainability of operators and a corresponding obligation on the regulator to mitigate any adverse impact, and having regard to international best practice.

[120] A statutory provision vesting discretionary power in a prison superintendent to confine inmates in iron was held by the Indian Supreme Court in *Sunil Batra v Delhi*

*Administration and Ors*³⁵ not to be 'unguided and uncanalised' because it was 'hemmed in with severe restrictions'. The restrictions included a requirement that the exercise of the power has to be 'necessary' (which means 'necessity is certainly opposed to mere expediency') ; the reasons for exercising the power had to be ' fully recorded' ; the power had to be exercised ' only for reasons and considerations . . . germane to the objective of the of the statute'; there is a duty to give reasons for the decision; there is a duty on the functionary to review the decision at regular and frequent intervals to ascertain whether it should continue. As the court concluded (at para 261): 'Such circumscribed peripheral discretion with the duty to give reasons which are reviewed by the higher authority cannot be described as arbitrary so as to be violative of Art 14.'

[121] Under the Communications Act, the legitimate governmental interest at stake is the creation of a regulatory body which is funded – not from the national treasury – but mainly through regulatory levies imposed on telecommunications services providers. The power to impose levies is limited to realising sufficient income for the purpose of performing the regulatory function *vis a vis* the regulated operators. That power is further restricted in the sense that the levies to be imposed on operators must have due regard to the sustainability of the affected operators.

[122] A remedial procedure is prescribed for what should happen either when there is over-recovery or where sustainability of operators is adversely impacted. A levy does not take effect until those affected have had the opportunity to make representations

³⁵*Sunil Batra v Delhi Administration & ors* 1980 AIR 1579, 1980 SCR (2) 557, 1980 CRI. L. J. 1099, 1980 (3) SCC 488 1980 SCC (CRI) 777, 1980 SCC (CRI) 777, AIR 1980 SUPREME COURT 1579, (1980) 2 SCR 557 (SC).

and had their representations considered. The duty to consider representations naturally carries with it the duty to give reasons for any decisions. Those dissatisfied with the proposed levy even after representations have been made are afforded the statutory right to challenge the decision-making in a court of law.

[123] The court *a quo* held that the requirement that the regulatory levy to be imposed must take into account international trends was not of much assistance in limiting CRAN's discretionary power – because there was no universal model for regulatory cost-recovery. That cannot be correct.

[124] The fact that there is no universal model for regulatory-levy-cost recovery is not a sufficient reason for holding that setting an international benchmark is a vague standard for guiding CRAN's discretion. In the context of this litigation, we have been shown some examples of how other jurisdictions approach the matter. I doubt if those are the only ones. Of the examples referred to by CRAN, the percentage levy ranges from 1-3 per cent of turnover, and within that range are some which are part-levy and part-national Fiscus-funded.

[125] We have it on CRAN's affidavit that applying the formula prescribed in s 23, the maximum percentage levy on turnover is 1.6per cent as reflected in the maiden regulations published in terms of the amended s 23. Now, that level of levy recovery is demonstrated by CRAN in its papers to fall within a broad range of international best practice covering what are admittedly very different models. That, in my view, demonstrates that there is value in placing a premium on international best practice.

[126] It is improbable that with the resources at their disposal telecommunications operators in Namibia will not be able to demonstrate – in the course of representations to CRAN in terms of s 30 of the Communications Act – that compared to similarly funded regulators internationally with comparable industry size or level of economic development, a perceived objectionable levy proposed by CRAN exceeds international best practice.

[127] In aid of MTC's objection to the amended s 23 and its contention that the legislature must determine the percentage levy, MTC relied on s 76(4) of the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA); and s 56(3A) of the Communications Act in respect of the universal service levy. The latter provides that 'The universal service levy imposed on a provider of telecommunications services may not exceed an amount which is more than five per cent of the annual turnover of that service provider'.

[128] Section 76(1) of the ACLRA empowers the Minister of Land Reform, with the concurrence of the Minister of Finance, to by regulation impose a land tax payable by owners of agricultural land. In terms of subsec (3), the regulations imposing a land tax must be approved by resolution by the National Assembly. MTC's contention is that a similar approach should have been adopted and CRAN required to lay its regulations before the legislature for approval.

[129] That s 76(3) of the ACLRA is couched in the terms it is, is hardly surprising. It is a taxation measure which the levy under s 23 is not: *CRAN v Telecom (2018)* at para 85 - 88. Thus, the taxation measure contained in s 76 of the ACLRA is not in *pari materia* with the regulatory levy under s 23 of the Communications Act. The two provisions, dealing as they do with different subject-matter, are therefore incomparable. Besides, it is a matter of public knowledge that the income derived from s 76(4) of the ACLRA is not the sole source for the funding of the land reform programme of the Government. Through the national budget, the legislature allocates funds for the acquisition of land for resettlement purposes. Under the Communications Act no provision is made for CRAN to receive funding through the national budget for the performance of its statutory mandate.

[130] As regards the universal service levy, it serves a purpose quite different to that of the regulatory levy and is equally incomparable with the latter. It is clear from s 22(2) of the Communications Act that the universal service fee does not form part of CRAN's funds: the regulatory levy is CRAN's *raison d'être*. CRAN accounts separately for the universal service levy which is intended for the sole purpose of providing telecommunications services to communities in need: *CRAN v Telecom (2018)* para 5.

[131] In my view, the amended scheme under s 23 establishes objectively justiciable criteria, standards and restrictions which, viewed in their totality, limit CRAN's exercise of discretion so as to remove the possibility of its unconstitutional exercise. In its current form – with a clear methodology for assessing the levy and the circumstances wherein it

may be exceeded – the legislature remedied the defect that caused constitutional concern. No plenary legislative power has been delegated to CRAN because Parliament has also established sufficient checks and balances over the process of determining levies via Regulations.

[132] In response to MTC’s assertion that the new s 23 does not make the imposition of levies by CRAN subject at the very least to ministerial oversight, CRAN had maintained that it is subject to political control in terms of the State-Owned Enterprises Governance Act. The question then arises, is it jurisprudentially tenable to premise constitutional compliance of an impugned statute on the basis that another piece of legislation contains some of the safeguards against, or restriction on, unchecked exercise of discretionary power to impose a levy? MTC argues against such a finding. It maintains that the *vires* of legislation must be tested solely on its own terms and not on statutory provisions extraneous to it.

[133] The Constitutional Court of South Africa in *Independent Institute*³⁶ affirmed its decision in *Ruta*³⁷ which held that “[w]ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together.”³⁸ The Court held that this is consistent with a broadly contextual and purposive approach to statutory interpretation which has regard to both internal and

³⁶ *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society & others* (CCT68/19) [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) (11 December 2019)

³⁷ *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) cited in *Independent Institute*, para 41.

³⁸ *Ruta* above, paras 41-6.

external context.³⁹ Considering the internal context entails interpreting legislative provisions in light of the text of the legislation as a whole while having regard to the external context includes paying attention to other legislation.⁴⁰ Similarly, in *Shaik*, the Constitutional Court of South Africa held that a contextual approach mandates consideration of other legislation.⁴¹ Therefore, it is arguable that CRAN's discretionary power under the Communications Act is subject to political control in terms of the Public Enterprises Governance Act.

[134] I am satisfied however that on its own terms, s 23 read with the relevant provisions of the Communications Act, passes constitutional muster, independent of the provisions of the Public Enterprises Governance Act.

[135] The judgment and order of the High Court should therefore be set aside.

Order

[136] I accordingly order that:

1. The appeal succeeds, with costs, including the costs of one instructing and two instructed legal practitioners.

³⁹ See Kroeze 'Power Play: A Playful Theory of Interpretation' (2007) SALJ 19 at 25 cited in *Independent Institute*, para 42.

⁴⁰ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12, para 53. In *Goedegelegen*, this Court, per Moseneke DCJ, recognised that "[w]e must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values", cited in *Independent Institute* at para 41.

⁴¹ *Shaik v Minister of Justice & Constitutional Development* [2003] ZACC 24, para 18.

2. The judgment and order of the High Court are set aside and replaced with the following:

'The application is dismissed, with costs, consequent upon the employment of one instructing and two instructed legal practitioners.'

DAMASEB DCJ

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANT:

G Budlender SC (with him S Namandje)
Instructed by: Sisa Namandje & Co. Inc.

1ST RESPONDENT:

J J Gauntlett KC SC (with him F.B
Pelser) Instructed by: Palyeenime Inc.