REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

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

In the matter between:

MOBILE TELECOMMUNICATIONS LIMITED	**APPLICANT**

and

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

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

Coram: **GEIER J**

Reserved: **4 November 2021**

Delivered: **31 August 2022**

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

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

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

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

Held, further, that in its amended form, s 23 of the Act still constituted an impermissible outsourcing of plenary legislative power to CRAN, given the absence of sufficiently circumscribed guidelines and limits for its exercise. The legislature had again failed to guard against the risk of an unconstitutional exercise of the discretionary powers by

CRAN and the result was that also the amended section 23 failed to pass constitutional muster, which rendered it liable to be struck down, as must the subsequently promulgated regulations.

ORDER

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

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

JUDGMENT

GEIER, J

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

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

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

---

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

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

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

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

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

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

---

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

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

a statute under which the delegation is made, and assigning plenary legislative power to another body . . . .'

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

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

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

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

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

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

---

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

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

impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.' [Own emphasis.]

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

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

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

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

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

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

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

The introductory argument on behalf of MTC

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

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

---

[6] *Id* para 91.

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

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

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

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

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

---

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

[9] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 6.

[10] *Id* at para 9.

[11] Section 23(1).

[12] Section 23(1).

[13] Section 23(1).

[14] Section 23(1)(e).

[15] Section 23(1)(a).

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

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

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

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

---

[16] Section 23(1)(a).
[17] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at paras 17-19.
[18] *Dawood , Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[19] 1995 (4) SA 877 (CC) at para 51.
[20] 2017 (2) NR 544 (SC).
[21] *Id* at para 85.
[22] 2010 (2) NR 487 (SC).
[23] *Id* at para 59.
[24] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 19, citing *Dawood supra* at para 53.
[25] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd supra* at para 51.

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

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

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

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

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

---

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

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

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

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

18. Secondly, section 23's predecessor contained words in parentheses qualifying "income" in section 23(2)(a). It read: "whether such income is derived from the whole business or a prescribed part of such business". It is compounding that this provision's successor (the

---

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

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

presently impugned section 23(1)(a)) does not contain the same qualification. This is because the effect is that the percentage perforce applies to a wider category: the *entire* turnover of the firm is struck (whether or not the licensee engages also in other business), not only the turnover relating to the licensed "portion" of the "business". Thus also in this respect the unconstrained discretion conferred by section 23 now have even more potential for prejudice.'

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

---

[40] Section 23(1) provides that CRAN "*may* ... impose a regulatory levy" (emphasis added).
[41] Section 23(1)*(a)(iv)* provides that CRAN may impose a levy "in any other form that is not unreasonably discriminatory".
[42] Section 23(1) provides that the levy imposed by CRAN "may take one or more of the following forms".
[43] Section 23(1)*(a)* allows CRAN, as mentioned, to impose "[a] percentage", entirely unlimited to any maxima.
[44] Section 23(1), read with section 23(5)(a)(i) which does *not* cap CRAN regulatory costs or required income by any amount approved by any other authority – least of all Parliament.
[45] Section 23(5) is the only potential provision purporting to refer to factors which CRAN must consider. We address each more fully in the text below. For present purposes it suffices to summarise the three "factors" as follows. The first concerns the income CRAN requires. It is self-referring. CRAN determines the income it requires, and it only has to "take into consideration" plans submitted under the Public Enterprises Governance Act, but is not bound by such plans for purposes of determining for itself the "income it requires". And even then CRAN can further determine for itself "the proportion of such income which should be funded from the regulatory levy". The second "factor" is not a factor guiding or constraining CRAN's discretion at all. It simply states that the levy should not be increased more frequently than annually, unless "good reason" exists. The third factor defeats the entire point of legislating discretion-confining guidelines. It explicitly unfetters CRAN to "consider any other matter" which CRAN "deems relevant". Thus CRAN is rendered the author of the criteria which – on the approach adopted in its answering affidavit – are supposed to constrain its discretion.

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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 …'

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

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

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

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

---

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

31. Moreover, CRAN's argument in any event also elides a further aspect. It relates to the now expanded definition of the new operative concept: "regulatory costs". The amendment introduces a newly minted statutory meaning which exceeds any notion of ordinary operating "expenses" (the concept contained in the version the Supreme Court considered), and explicitly includes actual *and* estimated "capital costs".[56] Therefore even if it could competently be contended that these or any other provisions imply that the percentage must be calculated working back from the sum of all capital and operating costs which CRAN might estimate it could require, then this is itself a discretionary exercised *not* constrained by section 23. And it now encompasses a far greater sum and scope for maladministration.

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

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

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

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

---

[56] Section 1(a) of the Amendment Act at Record p 54.
[57] Record pp 85-86 para 26.
[58] As MTC already argued in its heads of argument before the Supreme Court, the Ugandan example – to use only one of the comparators on which CRAN relies (Record p 91 para 35) – demonstrates that CRAN's purported reliance on at least some of the African countries to which it refers defeats its case. Under the Uganda Communications Act 1 of 2013 levies are governed by section 68. It imposes levies only on one basis: as a percentage calculated on the gross annual revenue of operators. The section itself sets the parameters of the levy. The parameters are very confined: the minimum is 2% and the

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

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

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

---

maximum is 2.5%. Moreover, under the Ugandan Act it is the Minister who sets the percentage, not the Commission or even its Board (section 67(2) of the Ugandan Act). All of this is quite clear from the actual text of the operative statutory provision, which MTC quoted in its Supreme Court heads, but which CRAN does not disclose in invoking *inter alia* Uganda as comparator in its answering affidavit before this Court. The full text of section 68 reads

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

fail to provide predictability and certainty.[62] More frequent increases and innovations *a fortiori* frustrates predictability and certainty, especially if the basis for breaching the mere 12-month malleable moratorium on amendments is left in CRAN's uncircumscribed discretion.

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

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

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

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

---

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

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