services in order to defray its regulatory costs, which levy may take one or more of the following forms -

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

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

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

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

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

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

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

b) In support of this argument it was then pointed out that Sections 23(2)(a)-(c) identify factors that may affect the decision on whether to impose the levy in a form of a

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[132] Para. 30 of replying affidavit.

percentage or in a specific amount. It allows CRAN a level of flexibility in setting the levy in order to accommodate various service providers, i.e. meaning that each provider can have its own unique levy or can be treated differently or different providers or license holders can be divided ininto categories with the same levy for everybody within that category. Once again, these are guidelines worked into the impugned section to assist CRAN in determining whether to impose a levy in a form of a percentage or a fixed amount, which is permissible. It reads:

'(2) When imposing the levy, the Authority may by regulation -

(a) impose different percentages or different fixed amounts depending on -

(i) the amount of turnover of the provider;
(ii) the category of communications services rendered by the provider;
(iii) the class of licence issued to the provider; or
(iv) any other matter that is in the opinion of the Authority relevant for such an imposition;

(b) impose a fixed minimum amount payable by providers of communications services irrespective of the form of the regulatory levy as set out in subsection (1);

(c) impose different forms of the regulatory levy, as set out in subsection (1), depending on –

(i) the amount of the turnover of the provider;
(ii) the category of communications services rendered by the provider;
(iii) the class or type of licence issued to the provider; or
(iv) any other matter that is in the opinion of the Authority relevant for such an imposition."

c) In addition Sections 23(2)(d)-(g) set out guidelines, limitations and a framework within which CRAN must determine the levy to be imposed on the turnover and the manner in which that should be done. Subsection (d)-(g) guide and compel CRAN to set out the ambit of turnover, the assessment thereof; periods of assessment; the documents needed for such an assessment as well as the manner for calculating the levy. This

section compels CRAN to establish a clear and transparent procedure for the determination of the levy which is to be imposed on a clearly defined turnover. Most importantly, retrospectivity is expressly prohibited herein. It reads:

'(d) prescribe –

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

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

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

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

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

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

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

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

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

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

f) In regard to the argument that CRAN may inflate its regulatory costs and the levy imposed would not necessarily cover the regulatory expenses only it was pointed

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[133] Para. 28 of the applicant's heads of arguments.
[134] Paras. 30 and 31 of the applicant's heads of argument.

out that this argument was similar to the rationality requirement that was raised by the fifth respondent in the SC case[135] and to which the SC held that since the levy in terms of section 23 is connected to a regulatory scheme[136], once it is established that the pith and substance (or the dominant purpose, in the language of Shuttleworth) of a legislative measure is to raise revenue to carry out the policy objectives of legislation aimed at affecting behaviour through regulation, it is not necessary to show that income is directly 'tied to', 'connected to' or 'adhesive to' the service provided by the regulator. Accordingly, it will be just as acceptable if the levy is related to a regulatory scheme in the sense that the monies realised are used to pursue the policy objectives and requirements of the Act.[137]

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

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

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[135] CRAN at 679A-B, para. [46].
[136] CRAN at 685C-D, para. [82].
[137] Ibid at 686A-B, para. 85.

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

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

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

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

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

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

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

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

(ii) income derived from any other sources;

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

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

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

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

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

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

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

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

k) With reference to that the Supreme Court had highlighted that section 23 lacked guidelines and limitations for the exercise: the exercise of a discretion to set the percentage of the regulatory levy[139] CRAN's counsel felt that it beats logic how the

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[138] Paras. 33-35 of the applicant's heads of arguments.
[139] At 687D-E.

Applicant can still sustain the argument that section 23 in its current form is a delegation of unchecked legislative powers to CRAN, even noting that the new section has more sections than the old section 23. Factors such as the need to mitigate any negative impact that the regulatory levy may have on the business sustainability of providers of communications services are limitations and guidelines on the powers of CRAN not to impose "any amount or percentage" which will bring a negative effect on business sustainability.

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

m) In regard to the applicant allegation that the impugned amendment purportedly confers on CRAN the power to impose a regulatory levy in its own discretion, without any parliamentary or other oversight (whether by the Minister or other executive authority)[140] it was pointed out that CRAN is a State- owned Enterprise. In terms of sections 13 -15 of the Public Enterprises Governance Act 1 of 2019, a public enterprise must develop an integrated strategic business plan for a period of five years (section 13(1)) which must encompass and include all the businesses and activities as well as, *inter alia*, a five-year business implementation plan to include, a marketing plan, an operations plan, an investment plan, financial projections, work force plan and skills development plan, financing plan and risk management plan. Section 14 (1) requires of CRAN to annually, at least 90 days before the commencement of its next financial year, to submit an annual business and financial plan to the relevant Minister. Section 14(5)(b) states that the annual business and financial plan must contain the operating budget and the capital budget of the public enterprise for the next financial year, with a description of the nature

[140] Para. 8 of the founding affidavit.

and scope of the activities to be undertaken, including commercial strategies, pricing of products or services and personnel requirements. Unless the integrated Strategic Business Plan and the Annual Business and Financial plan has been approved by the relevant Minister for Public enterprises, in consultation with the Minister of Information, CRAN may not incur any expenditure except in accordance with an estimate of expenditure approved in terms of section 15 of the Public Enterprises Governance Act 1 of 2019.

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

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

> '(6) The Authority must before the expiry of five years from the last imposition of the levy or a last review under this section, review the regulatory levy to ensure that the levy is compliant with the requirements set out in this section and that there are no continued under- or over-recoveries.
>
> (7) If the Authority has received regulatory levy income in excess of its regulatory costs, the Authority may retain such over-recovery but must set it off against the projected regulatory costs used for the next regulatory levy determination and imposition.

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[141] CRAN at 687B-C.

(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.'

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

[142] Paragraph 36 of the founding affidavit.

p) It was contended that the applicant misunderstood the meaning and effect of the SC judgement when it alleged that the current amendment merely broadens the powers of CRAN or that the guidelines as contained in section 23(2) are open ended and do not constitute fertile ground to sustain a claim of unconstitutionality of section 23. O'Regan JA in *Dawood and Another v Minister of Home Affairs and Others* [143] in addressing the issue of the absence of guidelines as to the circumstances relevant to a refusal to grant or extend a temporary permit, stated that without such guidance, it would be difficult to determine in what circumstances an exercise of a discretion to refuse a permit would be justifiable.[144] The court at 969, paragraph 53 stated that:

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

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

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[143] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 2000* (3) SA 936 (CC) at para 53.
[144] At 967, para. 50.
[145] 2017 (2) NR 544 (SC).

of the power and generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives.[146]

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

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

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

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

levy. Hence the requirements and obligations set out in the Public Enterprises Governance Act 1 of 2019.

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

The Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *'5. A note on flexibility*
>
> *While the delegation of lawmaking powers to the executive risks undermining the constitutional role of Parliament as lawmaker in chief, Parliament should retain the ability to delegate its lawmaking powers to others where adequate safeguards are in place. The reality of lawmaking in the 21st century is that the details of complex statutory schemes, which often require the input of experts working in the field, cannot be made by Parliament alone. Regulations are necessary, and desirable, to complement primary legislation. Delegation provides the flexibility needed to do the job of changing detailed rules quickly in response to new circumstances. ... ."* (Own emphasis)

Costs and conclusion

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

[78] It was also pointed out again that CRAN is a public enterprise which renders services in the public interest, that it is wholly reliant on fees to generate revenue to defray its regulatory expenses in order to enable it to provide quality regulation by means of securing adequate resources. Mere litigation, irrespective of the outcome, puts a hold on the imposition of the levy for a number of years, and as a result thereof

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

CRAN is unable to efficiently and prudently carry out its mandate in terms of the Communications Act. This is an intolerable position and unjustified, especially in the face of unmerited litigation such as this one brought by MTC. Continuous litigation is therefore not in the public interest and CRAN is ultimately the entity that is suffering greatly.

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

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

[81] In conclusion it was then submitted that as the amendment passes constitutional master and as applicant has not set out justifiable grounds to invalidate

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[148] Para. 5 and 6 of founding affidavit.

section 23 it would follow that the application must be dismissed with costs, such costs to include the costs of one instructing- and two instructed Counsel.

Oral argument on behalf of MTC

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

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

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

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

regulations to save its constitutionality that would be the end of CRAN's case as it was clear that the upper limit was not set and the guidelines given where vague.

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

Oral argument on behalf of CRAN

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

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

[89] He noted that the main attack was against the absence of guidelines as formerly only a percentage of 1% had been set but that now also an upper cap had been set in terms of the new regulations together with a formula at 1.65%. The amendment had now introduced elaborate guidelines. This together with the capping set in the regulations rescued the amended section. As far as the necessary oversight as

required by the SC was concerned this aspect was now taken care of. There has to be a business plan and a report to the executive and sections 23(4) to (8) introduced the relevant references and guidelines. It appeared that 'sufficiency' was set as a guiding principle and CRAN was told that there would have to be a fair allocation and was required not to 'kill' businesses. There was nothing wrong with the requirement that the levy would have to be aligned to the best standard.

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

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

MTC's oral reply

[92] Mr Gauntlett immediately latched on to the last submission in respect of which he pointed out that counsel for CRAN realised he had a point to answer – that answer was to the effect that 'the act with regulations fixes it' and that we were told, selectively, with reference to the last passage from para [54] in Dawood that : *' ... Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority',* in circumstances where regard should also be had to the rest of the relied upon paragraph and from which it appeared that the court had held open a small door that the regulator may take certain aspects further, which would be permissible in principle, subject to the necessary guidance. He submitted that the said paragraph was not supportive of a general reliance on regulations.

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

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

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

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

<u>The Supreme Court judgment</u>