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

Ad section 23(5)

[133] In respect of the factors CRAN is to consider when determining the form, percentage and amount of the regulatory levy MTC critiques that sub-clause (5)(a)(i)[180] introduces an additional discretionary indeterminacy which, far from providing any guidance, or any appropriate limitation or through imposing a threshold, it allows CRAN to determine not only the income it requires but also the *proportion* of such income which should be funded from the regulatory levy. It was argued that thus CRAN determines a gross amount (i.e. the amendment's expansively defined "regulatory costs"), that it thereupon determines a proportion (thus yet another *percentage*) of the gross amount to be funded by levies and then the percentage of levies - (if a percentage-based levy is elected under section 23(1)(a), as CRAN indeed elected to do). In imposing the section 23(1)(a) percentage CRAN is moreover at large to impose different percentages on different licensees. Accordingly sub-clause (5)(a)(i) increases the constitutional defects. At best for CRAN, sub-clause (5)(a)(i) cannot constitute a constraint on its discretion.

[134] The subsection clearly requires the consideration of a number of aspects. The constraint that has been built into the subsection is that CRAN's consideration of the listed aspects must be *'due'*. What probably was intended was that each aspect listed in the subsection should be 'appropriately' considered. What is 'appropriate' in each

---

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

case is however not circumscribed. It so appears that also subsection (5)(a)(i) imposes an open-ended guideline.

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

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

[137] Sub-clause (5)(a)(iii)[181] refers to "the need to ensure business continuity" and sub-clause (5)(a)(iv)[182] refers to avoiding *'as far as is reasonably possible'* or 'predictable' the " receiving of income from the regulatory levy in *'substantial excess'* of what is required to cover the regulatory costs. MTC claims that this provision, too, demonstrably does not impose a guideline or threshold and that the formulation in sub-clause (5)(a)(iv) compounds the unconstitutionality as it does not require CRAN to impose a levy which avoids over-recovery when the regulatory levy income is considered cumulatively with other sources of income and that this is significant since the rest of section 23 explicitly refers to other sources where so intended.[183]

---

[181] The Authority is to duly consider: (iii) ...the necessity to ensure business continuity by, amongst others, providing for reasonable reserves as set out in its plans contemplated in sub-paragraph (i);
[182]The Authority is to duly consider : (iv) ... the necessity to avoid, as far as is reasonably possible or predictable, the receiving of income from the regulatory levy in substantial excess of what is required to cover the regulatory costs;
[183] See e.g. subclause (5)(a)(ii) and (vi).

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

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

[140] I agree.

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

---

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

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

even *permitted*)[186] to consider any fees, levies, charges or other impost which the providers of communications services are required to pay in terms of any other law.

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

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

[144] It does not take much to understand that subsection (5)(a)(vii) was intended to be the catch-all provision enabling CRAN to consider all relevant matters. This as a guideline would be acceptable, in principle, as far as it goes, for as long as the matter would be relevant to ensure that the income generated would be sufficient to defray regulatory costs. It is indeed so that the provision is open-ended and that it unfortunately does not constrain the discretions to be exercised discernibly in any way, save to provide that this should by *'duly'* done.

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

[145] CRAN's position in this regard is that the subsection solidifies the rationality element in that it establishes a relationship between the levy and the scheme itself. MTC on the other hand - noting that while the subsection (5)(b),[187] purportedly,

---

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

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

requires *"predictability and stability"* by requiring that increases in levies be avoided in any period of 24 months - points out that the guidelines that are provided for purposes of achieving this objective actually permit annual increases in the regulatory levy or the introduction of a new levy if '*good reason to do so exists*' in CRAN's uncircumscribed discretion. Contrary to the proclaimed objective this provision really increases the opportunity for increasing the levy and/or the introduction of new levies by CRAN in any 24 month cycle as frequently as it feels fit. It was accordingly concluded that this regulation of annual increases and innovations in levies really fails to achieve the purported desired *'predictability and certainty'*.[188]

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

[147] Nothing much needs to be added to MTC's submissions that 'subsection (5)(c)[189] crowns CRAN's uncircumscribed discretion by adding an additional tier of indeterminacy. Over-and-above all other open-endedness, this provision adds that CRAN *"may consider <u>any</u> other matter"* which it "deems" relevant. This formulation, the Supreme Court held (in a different matter), deploys "very wide language".[190] Clearly it cannot constrain, but instead expands, the discretion conferred on CRAN.'

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

---

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

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

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

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

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

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

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

[150] Secondly mention should still be made of CRAN's reliance on the Public Enterprises Governance Act 1 of 2019 in terms of which it must develop an integrated strategic business plan for a period of five years.[193] Section 14 (1) requires of CRAN to annually, at least 90 days before the commencement of its next financial year, submit an annual business and financial plan to the relevant Minister. Section 14(5)(b) states that the annual business and financial plan must contain the operating budget and the capital budget of the public enterprise for the next financial year, with a description of the nature and scope of the activities to be undertaken, including commercial strategies, pricing of products or services and personnel requirements.

---

[191] Subsection (8)(a).
[192] Subsection (8)(b).
[193] section 13(1).

Unless the integrated Strategic Business Plan and the Annual Business and Financial plan has been approved by the relevant Minister for Public Enterprises, in consultation with the Minister of Information, CRAN may not incur any expenditure except in accordance with an estimate of expenditure approved in terms of section 15 of the Public Enterprises Governance Act 1 of 2019. CRAN thus submits that an approval would not be made unless CRAN would act within the statutory framework imposed by the Communications Act. CRAN thus does not impose a regulatory levy in its own discretion, without any parliamentary or other oversight as there is substantial ministerial and/or executive oversight and control on the exercise of CRAN's discretionary powers.

[151] The counter argument to this was that 'CRAN's extra-textual resort to the Public Enterprises Government Act 1 of 2019 does not assist it.[194] It is CRAN's own Act, comprising (as the Supreme Court held) "a complete and complex regulatory framework",[195] which provides the regulatory regime which must confer a constitutionally competent discretion on CRAN. Whether section 23 in its current or previous form explicitly refers to CRAN's obligations under other legislation is legally irrelevant. CRAN is bound by all legislation applicable to it. But its discretion under section 23(1)(a) is not constrained by any extraneous legislation, and no executive control (even had this been separation-of-powers compliant)[196] over the prescribed percentage is imposed by the Act.[197] The Act does *not* require executive confirmation, ratification, approval or consideration of the percentage (or other form of levy) imposed by CRAN.'

[152] Two core aspects, apparent from MTC's counter-submission, persuade me that what is termed as CRAN's 'extra-textual resort' to the Public Enterprises Governance

---

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

Act, was indeed misplaced, the first being that it surely must be CRAN's own regulatory regime, in terms of the Communications Act, that must confer constitutionally compliant discretion on the authority, and secondly, that, in any event CRAN's discretion exercised in terms of the Communication Act is not fettered by any extraneous legislation.

Conclusions

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

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

[155] While the amended section 23 recognisably constitutes an attempt to avoid the outsourcing of unchecked plenary legislative power to CRAN, that attempt has, in my respectful view, unfortunately fallen short of what was required as it did not succeed in guarding sufficiently against the risk of an unconstitutional exercise of the discretionary powers conferred on CRAN.

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

'Regulation-making, like the exercise of other administrative action, depends on the legal validity of the empowering provision.[198] Once the authorisation is set aside, action taken

---

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

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

Costs

[157] Both parties have sought a costs order following the result. On behalf of MTC a strong argument for a punitive costs order has been additionally made. While in the first place the relied upon inclusion of 'without prejudice' documentation should certainly be frowned upon, particularly as this has occurred on the watch of a senior legal practitioner of this court, and whereas the pre-litigation advances and the failure to concede the contended for unconstitutionality were in the eyes of MTC unmeritorious, an aspect possibly also confirmed by the result, it cannot in my view be said that CRAN's opposition was frivolous to such an extent that a punitive costs order is warranted. A more pro-active approach on CRAN's behalf could most certainly also have helped in shortening the delay and linked monetary prejudice occasioned by this litigation The unprofessional *ad hominem* approach engaged in by CRAN really constitutes the strongest of the advanced factors militating for a special costs order. However CRAN and MTC have been waging a war. This is evidenced by the multiple litigation which the parties have been conducting over the last years. In a 'war' 'the

---

[199] *Seale v Van Rooyen NO* 2008 (4) SA 43 (SCA) at para 13. The Supreme Court approved *Seale* in *Minister of Mines and Energy v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC) at para 22.
[200] *Ibid.*
[201] Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) at 548, citing *inter alia Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) and *S v Smit* 2008 (1) SA 135 (T) at 179-181.
[202] *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at para 31, holding that "the grounds upon which the first certificate was challenged – namely that because the approval of the plans was unlawful, any issue of a temporary certificate of occupation in reliance upon the legal validity of the plans would itself be unlawful – are logically unassailable."
[203] *Oudekraal supra* at para 31.

gloves come off'. This is what seems to have occurred also in this case. In such circumstances one should be able 'to take on the chin' and one should not be too oversensitive in this regard. In any event there has been some rapprochement as CRAN has recently publicly stated in the Namibian press that it has settled all litigation between it and MTC. This aspect was followed up by the court's hearing notice of 15 June 2022 to which the parties' responded on 21 June 2022 by reporting that such settlement was only limited to the withdrawal of those cases dealing with CRAN"s claims against MTC for the payment of outstanding levies.

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

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

[160] The following orders are accordingly made:

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

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

H GEIER
JUDGE

APPEARANCES:

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