



REPORTABLE

CASE NO: SA 62/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

COMMUNICATIONS REGULATORY

AUTHORITY OF NAMIBIA

Appellant

and

TELECOM NAMIBIA LTD

First Respondent

MINISTER OF INFORMATION

AND COMMUNICATION TECHNOLOGY

Second Respondent

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Third Respondent

MTC NAMIBIA (PTY) LTD

**Fourth Respondent
Intervening party**

Coram: DAMASEB DCJ, SMUTS JA and CHOMBA AJA

Heard: 6 April 2018

Delivered: 11 June 2018

Summary: Section 23(2)(a) of the Communications Act 8 of 2009 (the Act) authorises the Communications Regulatory Agency (CRAN) to by regulation impose a levy to 'defray' its 'expenses' as contemplated under s 23(1) of the Act, for the purpose of regulating the telecommunications, postal and radio spectrum industries. CRAN by regulation published on 13 September 2012 imposed a levy

of 1.5% on gross income of telecommunications providers, including the first respondent (Telecom). Telecom refused to honour the levy and challenged s 23(2)(a) and the regulation made under it in the High Court, alleging that the regulation impermissibly had retroactive effect, and s 23(2)(a) either constituted an unconstitutional tax without representation, or constituted an unconstitutional delegation by parliament of plenary legislative power.

The High Court upheld the constitutional challenge holding that s 23(2)(a) of the Act was a tax as it went beyond what s 23(1) authorised; there was no connection between the regulatory scheme and the charges levied based as it was on a percentage and without actual or properly estimated costs of regulation. The order of invalidity took effect from the moment the Act came into force as no order was made delaying the order of invalidity. Costs were ordered against CRAN.

On appeal by CRAN to the Supreme Court:

Held: The High Court misdirected itself on the applicable test for determining if a charge is a tax or a regulatory levy; that even if a charge has all the attributes of a tax but is connected to a regulatory scheme, it will not be a tax.

Held: The Act represents a complex and complete regulatory framework for the affected industries with substantial benefits and privileges to those granted licenses to operate under it; and, therefore, there is a relationship between the scheme and those being regulated.

Held: The pith and substance of the Act (or its dominant purpose) is to regulate behaviour and the raising of revenue is only incidental. The levies imposed are intended for the carrying out of the policies of the legislation and need not be directly linked to the costs of regulation.

On appeal, court considered if s 23(2)(a) was unconstitutional on the alternative ground that it granted uncircumscribed plenary legislative power to CRAN.

Held: Although a levy of 1.5% on annual turnover was not per se unconstitutional, as it was within the international norm as shown in evidence and in cases considered, the absence of clear (or any) guideline or limit for its exercise failed to remove the risk of an unconstitutional exercise of discretionary power by CRAN, and rendered the section and regulation made thereunder unconstitutional. But order of invalidity made to operate only from date of judgement.

Held: That for the period preceding the taking effect of order of invalidity, CRAN can only exact payment from Telecom such amounts as are due after the regulation came into force.

As regards costs, *held* that the litigation enriched Namibia's constitutional jurisprudence and none of the parties was frivolous; and therefore it was an appropriate case for each party to bear its own costs; both in the High Court and on appeal.

Appeal allowed and order of the High Court corrected appropriately.

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and CHOMBA AJA concurring):

Introduction

[1] Namibia's Communications Act 8 of 2009 (the Act) was enacted to 'provide for the regulation of telecommunication services and networks, broadcasting, postal services and the use and allocation of radio spectrum'.¹ I will henceforth refer to these services collectively as the 'regulated industries'.

¹ Long title to the Act.

[2] The Act's objects have wide amplitude:² to establish the general framework governing the opening of the telecommunication sector to competition; to provide for the regulation and control of communications activities by an independent regulatory authority; to promote the availability of a wide range of high quality, reliable and efficient telecommunications services to all users in the country; to promote technological innovation and the deployment of advanced facilities and services in order to respond to the diverse needs of commerce and industry and support the social economic growth of Namibia; to encourage local participation in the communications sector in Namibia; to increase access to telecommunications and advanced information services to all regions of Namibia at just, reasonable and affordable prices; to ensure that the costs to customers for telecommunications services are just, reasonable and affordable; to stimulate the commercial development and use of the radio frequency spectrum in the best interests of Namibia; to encourage private investment in the telecommunications sector; to enhance regional and global integration in the field of communications; to ensure fair competition and consumer protection in the communications sector, and to advance and protect the interests of the public in the providing of communications services and the allocation of radio frequencies to the public.

[3] The appellant is the 'independent Communications Regulatory Authority'³ (CRAN), created by s 4 of the Act 'to regulate the communications industry in Namibia'⁴.

² Section 2 of the Act.

³ Long title to the Act.

⁴ Section 5 of the Act.

CRAN's regulatory competence

[4] CRAN's mandate under the Act includes: to guard against anti-competitive practices in the telecommunications and broadcasting industries (Chapter IV) and in that respect to investigate, enforce and authorise any breach of competition rules (s 33); to approve the transfer of telecommunication or broadcasting licences from one operator to another (s 35); to issue, renew, modify or terminate telecommunication licences (Chapter V); to adjudicate upon disputes between licence holders (s 69); to adjudicate any dispute that may arise between a telecommunication service provider and institutions wielding the power to intercept personal communications (s 74); to conduct hearings to determine which operators hold a dominant position in a market (s 78); as part of its consumer protection role to make available to the public the standard terms and conditions for the provision by operators of telecommunication services (s 79); to set standards for telecommunication equipment (s 80); to prescribe a national numbering plan for use in the provision of telecommunication services (s 81); to issue broadcasting licences (s 85); to supervise compliance by operators with conditions imposed on broadcasting licences (s 90 (i)); to issue postal service licences (s 93); to issue radio spectrum licences (Chapter VIII); and to issue enforcement orders against any person who contravenes or failed to comply with any provision of the Act (s 116).

[5] The immense public benefit of telecommunications in the modern State is exemplified by the fact that licensees engaged in the regulated industries may be required by CRAN to provide a minimum number of prescribed telecommunication facilities or services to communities, known as a 'universal service' (s 57).

[6] The all-encompassing objects of the Act, CRAN's extensive mandate, and the requirement that those who wish to engage in the regulated industries must be licensed, make it apparent that Namibia's telecommunications, broadcasting, postal and radio spectrum landscape represents a complete and complex regulatory framework. If proof was needed of the completeness and rigour of the regulatory framework, the Act makes it a criminal offence for anyone to conduct any unauthorised business regulated by the Act and over which CRAN has supervisory jurisdiction.⁵

[7] CRAN even has power to issue criminal summons for contraventions (s 115(1)) and to hold hearings and to impose criminal sanctions in the event of guilty pleas (ss 115(2) and (3)). This tight regulation by the Act of the regulated industries indubitably shields licence holders from unbridled competition in what is otherwise a notoriously competitive industry that telecommunications is. The significance of this will become apparent when I come to discuss whether or not the impugned section is a form of tax or a regulatory levy.

Funding of CRAN

[8] According to s 22 of the Act, CRAN derives its funds from an 'initial amount appropriated by Parliament'; fees from the grant, renewal and transfer of licences; any revenue received for services it provides; fines and monetary sanctions imposed by CRAN, and any levies prescribed under the Act. It is clear therefore

⁵ See in this regard Chapter X of the Act which deals with regulatory offences.

that, barring the 'initial' appropriation, the Act makes no provision for CRAN to receive a steady income from the National Treasury.

[9] Levies are governed by s 23 of the Act in the following terms:

'Regulatory levy

23. (1) The Authority may by regulation after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services in order to defray its expenses.

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

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

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

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

- (c) Prescribe penalties for the late payment of the regulatory levy, or for providing false information or for the failure to provide information to the Authority relating to the assessment of the levy.’ (Underlined for emphasis).

[10] Purporting to act on the authority of s 23(2)(a), CRAN promulgated Regulation 6 ‘Licence Fees’⁶ (sic), hereafter ‘Item 6’ or ‘impugned regulation’. The effect of Item 6 is that a telecommunications service provider (such as the first and second respondents) is levied a ‘minimum’ percentage on its ‘turnover’ – being 1.5%. The *Concise Oxford English Dictionary* defines ‘turnover’ as ‘the amount of money taken by a business in a particular period.’

[11] At the heart of the present appeal is CRAN’s power to by regulation source funds from levies under s 23(2)(a) of the Act. The High Court had found that the section unconstitutionally constitutes the imposition of a tax by CRAN as opposed to the levying of a regulatory levy for the purpose of ‘defraying expenses’. According to the learned judge *a quo*:

‘[16] What makes this case one of its kind is this. The Legislature itself provided for the imposition of a regulatory levy in subsec (1) of s 23; but it veered off this correct path and wandered into the wrong path of providing for the imposition of a tax under subsec (2)(a) of s 23. The conclusion is therefore inescapable that the imposition of tax could not have been what the Legislature intended, if regard is had to the width of the wording of subsec (1) of s 23, but the Legislature’s intention was not given words to in subsec (2) (a), as it should have been the case, if regard is had to subsec (1) of s 23 and if the two provisions are read intertextually.’

⁶ ‘Regulations Regarding Administrative and Licence Fees for Service Licences’ No 311 of 2012 GG 5037 of 13 September 2012.

As regards the impugned regulation, the learned judge concluded:

[17] Where there is no connection between the regulatory scheme and the charges levied or to be levied the court will scrutinize the facts to ensure that the Constitution is not circumvented by legislative or administrative action. Having scrutinized the facts, and relying on the authorities, I come to conclusion that subsec (2)(a) of s 23 of the Act is not Constitution compliant. . . . it serves no purpose to give any regulation made under s 23(2)(a) any deep treatment, except to say that it cannot stand in law if the enabling provision, being s 23(2)(a), is not Constitution compliant.'

[12] The learned judge *a quo* relied principally on Canadian jurisprudence on the *tax versus regulatory levy* dichotomy to support his decision. He found that although the Act reveals a *regulatory scheme*, and s 23(1) of the Act authorises the imposition of a levy 'to defray' CRAN's expenses, that section, instead of facilitating a regulatory levy, is a form of taxation. He said at para 11 of the judgment:

'I do not see any relationship established between the charge, which is based on a percentage of the income of providers of services 'regulated by the first respondent, and the regulatory scheme itself; neither, as a matter of logic, can there be any such relationship when the rate chargeable is based on a percentage – no matter the absence of 'actual or properly estimated costs of the regulation' which need defraying.'

[13] The High Court made the following order: '(a) It is hereby declared that s 23(2) (a) of the Communications Act 8 of 2009 and any regulation made thereunder are unconstitutional and invalid'. CRAN was ordered to pay the costs of the application.

[14] The question is, was the judge *a quo* correct? Did he correctly apply the relevant test for determining whether a particular charge is regulatory or a form of tax?

The issues in the appeal

[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.

[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 laws⁷. 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.’

⁷ For a comparative exposition of the principle, see the judgement of the SA Constitutional Court in *Fedsure Life Insurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 44 and fn 44.

Sub-article 2(b) empowers the National Assembly, subject to the Constitution, 'to provide for revenue and taxation'. The Constitution contains detailed provisions⁸ on how the legislature is to go about enacting legislation, including that providing for revenue and taxation.

[17] As for the second because of two principles that 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, & others v President of the Republic of SA & others* 1995 (4) SA 877 (CC) para 51:

'In a modern State detailed provisions are often required for the purpose of implementing and regulating laws 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 statute under which the delegation is made, and assigning plenary legislative power to another body.'

⁸ Most notably, Articles 62 (sessions), 64 (withholding of presidential assent), and 65 (signature and enrolment).

[18] The third is the *Dawood* principle⁹, which has been approved by this court in for example *Medical Association of Namibia v Minister of Health and Social Services & others*.¹⁰ As the court put it in *Medical Association* at 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 & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) para 59:

‘One of the incidents of the rule of law is that 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

⁹ Based on *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) and see also *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC).

¹⁰ 2017 (2) NR 544 (SC).

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 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.'

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

The shifting onus

[21] A party seeking an order of unconstitutionality of legislation must put up the necessary facts and contentions supporting the claim of unconstitutionality, in other words the right relied upon and the manner in which it was allegedly breached. The party relying on the legislation must then establish that the provision is Constitution compliant (Compare *Ferreira v Levin NO 1996 (1) SA 984 (CC)* para 44).

[22] All law must comply with the Constitution, and to the extent it does not, is liable to be declared invalid. Article 1(6) of the Constitution is the so-called 'Supremacy Clause'. It states: 'This Constitution shall be the Supreme Law of Namibia'. The principle of no taxation without legislation is rooted in constitutionalism, the rule of law and the separation of powers which are foundational cornerstones of the Constitution. An infringement of those basic principles underpinning the Constitution are just as justiciable as an infringement

of the fundamental rights and freedoms contained in Chapter 3 of the Constitution (Bill of Rights).

Litigation history

[23] When proceedings commenced in the High Court, only the first respondent (Telecom) was an applicant who sought relief aimed at challenging the constitutionality of s 23(2)(a) of the Act. After the appeal was set down in this court, the second respondent (MTC), who is the dominant operator in Namibia's mobile telephony, sought leave, and was allowed, to intervene in order to place legal argument before court in support of the High Court's order and without seeking to place evidence before court. In so doing, it promised merely to rely on the grounds and bases set out by Telecom in its founding affidavit.

[24] Therefore, MTC stands or falls by the factual averments and legal contentions put forward by Telecom in its founding affidavit in support of the relief it sought. The outcome of the appeal will thus depend on:

- (a) Whether Telecom laid sufficient bases for the conclusion that s 23(2)(a) is offensive of either of the constitutional imperatives stated in paragraphs 16, 17 and 18 above - and in the event of it having set up an arguable case in either respect;
- (b) Whether CRAN was able to demonstrate that the impugned provision is not a tax (or collection of revenue) but a regulatory levy; or is a form of

permissible delegation of a legislative function by parliament to an administrative body.

The pleaded case

[25] Often, in the heat of oral argument, parties tend to overstate their positions and veer off their pleaded cases. This case was no exception. It is important that the court stays focussed and decides only those issues properly raised in the pleadings. Therefore, it is now necessary to consider the pleadings. Telecom's amended notice of motion reads:

- '1. That section 23(2)(a) of the Communications Act, 8 of 2009 together with Item 6 of the Regulations Regarding Administrative and Licence Fees for Services Licences No. 311 of 2012, published by Government Gazette No. 5037 on 13 September 2012, be declared unconstitutional and/or null and void.
2. In the alternative to prayer 1 above, that Item 6 of the Regulations Regarding Administrative and Licence Fees for Service Licences No. 311 of 2012 (the Regulation), published by Government Gazette No 5037 on 13 September 2012, be declared unconstitutional and/or null and void.
3. In the alternative to prayers 1 and 2 above, declaring:
 - a. That the Regulations Regarding Administrative and Licence Fees for Service Licences No 311 of 2012, published by Government Gazette No 5037 on 13 September 2012 do not operate retrospectively;

and that

- 3.2 regulatory levies imposed by the aforesaid Regulations can only be imposed against the applicant in respect of turnover generated from 13 September 2012 and beyond.

4. That the respondents who oppose this application shall pay the costs jointly and severally the one paying the other to be absolved.
5. Such further or alternative relief as the above Honourable Court may deem meet.'

[26] As will become apparent when I set out the version pleaded in Telecom's founding affidavit, the amended notice of motion places the unconstitutionality of s 23(2)(a) of the Act at the forefront, and the *ultra vires* of Item 6 in the alternative; while the founding affidavit does the opposite.

Telecom's pleaded grounds in the founding affidavit

The Regulations

[27] Item 6 was impugned for alleged vagueness in relation to the terms 'annual turnover' and 'expenses', if measured against the Act and the Constitution. It is alleged that contrary to the Act and the Constitution, the impugned regulation imposes 'levies' exceeding the bounds statutorily set; which is to defray CRAN's expenses. In other words, that under the guise of a levy Item 6 imposes a tax and that the purported levies exceed CRAN's objectives and powers under the Act.

[28] According to Telecom, Item 6 imposes a limitation¹¹ on its Art 21(a) and (j) rights and does not comply with Art 22(b) of the Constitution. In the alternative, it appears if all else fails, it is alleged that the imposition of levies for the year ended 30 September 2012 is null and void as the regulations cannot operate

¹¹ In the event, this ground was not pursued with any seriousness as a basis for invalidation of the impugned provisions, and will not be further considered in this judgment.

retrospectively. The further attack is that the regulations are vague and therefore void as the formula for determining the levy fails to define an amount. It is said that the liability of the different licence holders is impermissibly determined by reference to annual turnover whilst there is no clarity as to what constitutes turnover in the sense of what it includes and what it excludes.

The Act

[29] Telecom's case as pleaded is that if it be found that s 23(2)(a) of the Act has the effect of permitting the imposition of tax by CRAN, the section would violate Art 44 read with Arts 56 and 63(1) of the Constitution and, therefore, since that section is unconstitutional, the regulations made thereunder would suffer the same fate. The premise is that the power of taxation cannot be surrendered or transferred in whole or in part to CRAN and to the extent the section does so, it is subversive of the supremacy clause, the separation of powers, and the rule of law.

The evidence

Common cause facts

[30] The Act came into operation on 18 May 2011 while the impugned regulation was promulgated on 13 September 2012. CRAN invoiced Telecom on 1 February 2013 for an amount of N\$17 173 860 determined in terms of Item 6 and based on Telecom's 'annual turnover' for the year ended 30 September 2012. Telecom objected to the invoice as a 'blatant retrospective operation' of the impugned regulation. CRAN issued a further invoice on 6 September 2013 for N\$18 717 000 relative to Telecom's 'turnover' for the year ended September 2013. Telecom refused to pay and denied liability resulting in the present litigation.

Telecom's affidavit

[31] Telecom's affidavit in support of the relief sought was deposed to by its manager of legal affairs, Mrs Patience Kanguuehi-Kananelo. According to the deponent, the Act does not authorise the impugned regulation. According to her, in terms of s 23(1) of the Act, the only purpose of the regulatory levy is for CRAN to 'defray its expenses'; yet the impugned regulation does not confine itself to that objective. Mrs Kananelo states that to meet the test for 'defraying' CRAN'S expenses, the levy must have a rational connection with the expenses or costs of service of CRAN and should be shared by all license holders 'jointly'. She states that CRAN's Annual Report (ended March 2012) shows that its operating expenses in respect of services rendered for the period amounts to N\$13 375 671, while CRAN for the same period generated an income of N\$73 394 668 mostly from regulatory levies.

[32] According to Mrs Kananelo, CRAN made a profit of N\$61 235 159, thus demonstrating that the levy regime is used to raise revenue and not merely to defray expenses. That renders the regulation *ultra vires* the Act. She states further that based on CRAN's financial statement's analysis undertaken by Telecom's expert witness, chartered accountant Mr Celliers, the levies account for five times CRAN's annual operating expenses. For that reason, she maintains, it is irrational and that CRAN 'operates as a tax authority unto itself', contrary to the Constitution which empowers only the legislature to impose taxes.

CRAN's affidavit

[33] The opposing affidavit of CRAN is deposed to by its chief executive officer, Mr Stanley Shanapinda.

In limine

[34] The deponent alleges *in limine* that (a) Telecom's application was not brought within 6 months of it becoming aware of the levy imposed by the impugned regulation as required by s 32(2) of Act, (b) that the relief is overbroad, 'vague and embarrassing' because it seeks to declare the entire regulation "null and void", whilst the only relevant part is item 6, and (c) that no basis is made out in the founding affidavit for the constitutional relief that Telecom seeks.

The mandate

[35] Mr Shanipanda emphasises the importance and broad extent of CRAN's mandate. He states that in order to properly carry out that mandate, CRAN is required by the Act to employ staff with specialist skills in law, accounting, economics, engineering and technology, to mention only a few. It is also allowed by law to invest funds standing to its credit and to acquire property to house its staff and to run operations from.

The evolving scene

[36] The deponent sets out the activities undertaken by CRAN since the Act came into force. These include the setting up of the organisation from scratch, developing strategic plans and engagement with those it regulates. He makes the point that what CRAN spent on operational expenses in its formative years,

particularly the year ended 31 March 2011, is not reflective of what the true costs are in the succeeding year and beyond as the organisation grows and matures. By way of illustration, CRANS's total staff costs for the year ended 31 March 2013 was N\$12 255 230, while the total human resources costs were expected to rise to N\$19,3 million by the year ending 31 March 2014 and projected to be in the order of N\$42 million by 31 March 2015. CRAN currently leases a property for office space at the cost of N\$865 725 and intends to acquire extra space at an additional estimated cost of N\$350 000.

[37] Mr Shanapinda proceeds to engage with (and undermines) Telecom's assertion that in the year its operations started it made a huge profit from the levies it imposes on the regulated operations. According to him, in 2012 CRAN received start-up funding of N\$31 million from the government and a once-off capital infusion of N\$55 million representing arrear levies/fees paid by licensees. As he put it, those figures constitute an 'extraordinary injection of cash which will not recur'.

[38] The witness states that barring the cash windfall, the actual revenue CRAN generated for the year ended 31 March 2012 only shows a net operating surplus of N\$11 040 173 of which N\$4 million is interest earned on retained capital. He states that the international standard in the regulatory environment is to retain a buffer of up to 20% of total revenue annually and that it is unreasonable to expect a regulator to function on an exact break-even basis.

Determination of the levy

[39] The chief executive officer explains how, at its inception, CRAN consulted with those it regulates, including Telecom, before it settled for the current levy regime which is the subject of the constitutional challenge. The process was preceded by the engagement of consultants who advised CRAN on the process of determining the levy. The process also involved looking at what other jurisdictions do internationally. The witness demonstrates that internationally regulators raise levies (or fees as he calls them) as a percentage of licensees' revenue. For example, in Greece (0.025%), Hong Kong (15%), Kenya (0.5%) and India (6-10%). Significantly, Mr Shanipanda states what the consultants' advice concluded as regards a formula for the determination of the regulatory levy envisaged by s 23 of the Act:

'CRAN was advised that operating profit is not a viable variable to use because it is easily manipulated by management decisions relating to investment and depreciation.

...

Fees imposed in Uganda, Tanzania, Kenya and South Africa was used as a benchmark for CRAN.'

[40] As part of the consultation process, CRAN published a notice of its intention to make regulations in the government gazette and held a public hearing where it disclosed its findings and proposals. Licensees, including Telecom, were represented. According to Mr Shanapinda, Telecom in fact proposed at the hearing that 1% of telecommunications related turnover of a dominant operator

and 1.5% for all other operators would be an acceptable levy. It was after this process that the levy formula contained in Item 6 was determined and gazetted.

Submissions on appeal

Appellant

[41] Mr Maleka's argument on whether or not s 23(2) (a) of the Act is a tax or a revenue measure can be summed up thus: One has to consider what is the *dominant purpose* of the statute under consideration. Is it regulatory or tax-raising or revenue-raising? If the dominant purpose is regulatory but the statute has an element of imposing a tax or raising revenue, the latter is incidental only and therefore not inconsistent with the Constitution. Counsel relied on the South African Constitutional Court case of *South African Reserve Bank & another v Shuttleworth & another* 2015 (5) SA 146 (CC).

[42] In *Shuttleworth*, the South African Reserve Bank imposed a 10% levy amounting to R250m on Mr Shuttleworth when he took his funds out of South Africa during 2009. This levy was imposed in terms of s 9 of the Currency and Exchanges Act 9 of 1933, read with various Exchange Control Regulations, specifically, reg 10(1)(c); and Exchange Control Circulars - aimed at discouraging capital flight from South Africa. The issue was whether the fee imposed by the Reserve Bank was a levy or a tax or a measure intended to regulate behaviour. The majority of the court found it was the latter.

[43] As Moseneke DCJ put it at 48 and 64 of the judgment, writing for the majority:

[48] So, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, “every tax is in some measure regulatory”. That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax. In support of this basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is.

...

[64] This point of departure is overbroad. It is not consistent with the money Bills scheme of the Constitution nor with domestic and comparative judicial authority on imposition of taxes. Not every duty, levy, charge or surcharge that raises national revenue is a national tax. Not every law that permits the raising of national revenue is a money Bill. That is plain from the Constitution. It sets money Bills apart from other laws and imposes a distinct procedure for their passage. This is because there are indeed many other laws that themselves impose, or authorise the Executive to impose, a myriad of charges outside the strictures of money Bill requirements. In each case, as our and other courts have often held, the primal question is: what is the dominant purpose of the revenue-raising law concerned? To raise revenue in order to fund the operations of the State, or to regulate behaviour or defray costs or advance another legitimate purpose? I have earlier sought to show that here the charge or levy was expected to slow down the extent and the frequency of capital externalisation. Revenue-raising was a mere by-product of the exit charge’s true purpose: regulation of the export of capital. The exit charge was therefore not one which attracts the definition of “money Bill.

In each case, as our and other courts have often held, the primal question is: what is the dominant purpose of the revenue-raising law concerned? To raise revenue in order to fund the operations of the State, or to regulate behaviour or defray costs or advance another legitimate purpose?’

[44] On this approach, according to Mr Maleka, the Act's dominant purpose is regulatory and not a taxation or revenue measure. It is incidental but inevitable that revenue has to be raised in the process to enable CRAN to execute its statutory function of regulating and supervising the telecommunications industry.

[45] In answer to the alleged breach of the *Dawood* principle, Mr Maleka argued that CRAN is a specialised body and for that reason the *Dawood* exception would apply so as not to invalidate the impugned section. Mr Maleka submitted that the exception is that discretionary powers may be broadly formulated in situations where the decision maker is possessed of expertise relevant to the decisions to be made.

Telecom's principal submissions

[46] Telecom's written argument focusses exclusively on s 23(2)(a) of the Act as a form of taxation without representation. The core of Mr Heathcote's argument on behalf of Telecom's, is the proposition that s 23(2)(a) adopted a levy regime inconsistent with the express terms of s 23(1) which authorises such levy only in so far as it seeks to 'defray' CRAN's 'expenses'. The argument goes that in its present formulation, s 23(2)(a) 'does not remotely relate to the costs of expenses. It is simply a tax, where the levy charged is based on the gross income of the service provider'. To be in sync with s 23(1), it is suggested on behalf of Telecom, that the levy regime under s 23(2)(a) ought to require CRAN 'to calculate or estimate its expenses, and then, based on such calculations, to make regulations to defray those calculated expenses'. In other words, there should be (as the High Court also found) a 'relationship between the charge (levy) and the scheme itself'

and that (according to counsel for Telecom), it 'is this rationality requirement which distinguishes a regulatory levy (or charge) from a tax.'

[47] It is submitted on Telecom's behalf that:

'A crucial feature of tax is that it is designed to raise revenue for general public purposes. A fee or levy, on the other hand, is intended to raise funds to pay for a specific service being provided. Another factor which generally distinguishes a fee or a levy from a tax, is that, to be a fee or levy, a link must exist between the quantum charged and the costs of the service provided in order for the levy to be considered constitutionally valid.' (Emphasis added.)

[48] The attack levelled against s 23(2)(a) is also extended to the impugned regulation. In summary, it is argued that Item 6 fails to meet the 'rationality test, and without doubt, also the reasonableness test because it seeks to raise revenue in a way that is not aimed at defraying an expense for a service rendered but is instead based on the gross income of a licensee'. (My emphasis.)

[49] The nub of Telecom's argument against the impugned regulation is best captured in the following telling passage in the written submissions:

'[F]or such a levy to have any rational or reasonable connection to the service provided by CRAN, that levy must be determined with reference to the following:

. . . what are the costs of the service rendered?

. . . how many contributors are there? and

. . . with due reference to the provisions of Article 8 and 10 of the Constitution, it must be determined what each service provider must contribute.

The papers demonstrate that such a calculation has never been made. Clearly, CRAN plays taxman.'

MTC's principal submissions

[50] I will only reference those of MTC's submissions which are founded on the evidence and contentions advanced by Telecom in its founding affidavit. I say so because in its heads of argument MTC puts up some factual averments such as that 50% of CRAN's levy revenue comes from MTC. That is not permissible because MTC participated in the appeal on the express basis that it would not introduce evidence.

[51] According to Mr Gauntlett SC QC, counsel for MTC, s 23(2)(a) of the Act offends the *Dawood principle* because it confers 'uncircumscribed discretion' on CRAN in levying 'revenue and taxation' without representation. The argument goes that the 'content of the law is not ascertainable by reading it' and gives CRAN the discretion, amongst others, to itself on a discretionary basis decide what 'percentage to impose: it could be anything from zero to 100%'. Counsel adds crucially that the provision contains 'no requirement that the percentage be within a prescribed range'. Nor is any method for computing the percentage provided, or any requirement imposed that the percentage be approved by Parliament, debated in Parliament, or even tabled in Parliament'.

[52] MTC also lays great store by the fact the section permits the imposition of a levy on a percentage based on income in combination with any other form identified in paras (b)-(d) of subsec (2) of s 23 of the Act. As Mr Gauntlett put it:

‘Thus a levy based on a percentage of income may be imposed in addition to a levy based on a percentage of profit and to a fixed annual levy and a fixed amount per call. And to these CRAN may add “any other” form of levy imaginable.’

By so doing, the argument goes, the legislature failed ‘to limit the risk of an unconstitutional exercise of discretionary powers’.

[53] The net result of the statutory scheme of s 23(2)(a), MTC’s argument concludes, is that CRAN has been impermissibly granted *plenary legislative powers* under the section.

When is a regulatory charge not a tax? Comparative jurisprudence

South Africa

[54] In *Shuttleworth* the impugned subordinate legislation imposed ‘an exit charge’ of 10% on capital being exported from South Africa. It was challenged on the basis that it constituted a tax. Although, unlike in the case before us, the money raised was in fact payable into the National Treasury, the Constitutional Court held that the garnering of revenue by the Treasury was only incidental to the dominant purpose which was to discourage capital flight from the country and to protect the domestic economy. The court took the view that although ‘there was no evidence of the actual or properly estimated costs of the regulatory scheme

related to the revenue raised, there was a close relationship between the regulatory charge and the persons being regulated’.

Canada

[55] The leading cases in Canada on the tax versus regulatory charge dichotomy are: *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 (*Westbank*) and *620 Connaught Ltd v Canada (Attorney-General)*, [2008] 1 SCR 131 (620 Connaught); *Canadian Assn of Broadcasters v Canada (FCA)* [2009] 1 FCR.

[56] In Canada, just like in South Africa, when a dispute arises as to whether a particular levy, fee or charge is an impermissible form of taxation without representation, the approach is to ask the question: Is the levy in *pith and substance* a tax or a regulatory charge? The pith and substance of a levy is its’ dominant or most important characteristics; to be distinguished from its’ incidental features’. Where a levy has characteristics of both tax and regulatory charge, the court’s task is to ascertain which is dominant and which is incidental. In that inquiry, it is the primary purpose of the law that is determinative.

[57] In *Westbank*, Gonthier J (at para 30) points out that when the question arises whether a charge is a tax or a regulatory levy, the court looks at the statutory scheme to ascertain whether its primary purpose is in pith and substance:

‘(1) to tax, i.e. to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for service directly rendered, i.e., to be a user fee’

[58] To constitute a tax, a levy must, according to Gonthier J in *Westbank* at para 43 be:

‘(1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose¹²; and (5) unconnected to any form of regulatory scheme. . . .’ (My emphasis.)

[59] The significance of the fifth attribute is that if a levy is connected to a regulatory scheme, it will not be a tax even if the other four attributes of a tax are present.

[60] In the case before us, it is beyond doubt that s 23(2)(a) of the Act has the first four attributes of a tax. The only real issue is if it is connected to a regulatory scheme as envisaged by Gonthier J’s fifth attribute.

[61] To determine if a governmental levy is connected to a regulatory scheme, according to Gonthier J in *Westbank* (para 44), that exercise engages a two-step approach. As for the first step:

‘To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some

¹² The position is the same in Namibia: *Du Preez v Minister of Finance* 2012 (2) NR 643 (SC) para 8.

behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. The list is not exhaustive.’ (My underlining for emphasis.)

[62] Gonthier J observed in the same paragraph that if the first step (i e the existence of a regulatory scheme) is met, the second step is the following:

‘In order for a charge to be “connected” or “adhesive” to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of a regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.¹³ (Emphasis added.)

[63] It becomes apparent, therefore, that there will exist a relationship between a levy and a regulatory scheme, either if the income generated by the levy is ‘tied to’ the costs of the regulatory framework, or if the levy has a ‘regulatory purpose such as the regulation of certain behaviour’.

[64] In applying Gonthier J’s two-step approach, Rothstein J in *620 Connaught* 11 states as follows at para 28:

‘[I]f there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy’ will be its regulatory characteristics.’

¹³ The same approach was taken in *Shuttleworth*.

The High Court's misdirection: tax vs levy dichotomy

[65] In the High Court's understanding of the Canadian case-law, for there to be a relationship between a levy and a regulatory scheme:

'This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme. And the costs should be actual and properly estimated costs of the regulation'¹⁴.

[66] The learned judge continued at para 13:

'In the instant case, as s 23(2)(a) stands, the first respondent is being authorized to impose a levy without carrying out actual or properly estimated costs of the regulation. That being the case...I find that there can be no relation established between the levy and the regulatory scheme itself in the way s 23(2)(a) is formulated.'

[67] As I already demonstrated, under Canadian jurisprudence which the learned judge *a quo* sought to apply, it is not necessary for there to exist a direct relation between the quantum of the levy and the actual or estimated costs of the regulation. It will suffice if the revenue derived from the levy is applied for the pursuit of the policy and requirements of the Act.

[68] The High Court's approach mirrors that of the first instance court in the Canadian case of *Broadcasting Assn v Canada* [2009] 1 FCR. There the first instance court took the view that the test whether or not a levy is connected to a regulatory scheme, is whether there is a 'reasonable nexus between the quantum charged and the cost of the service provided by the regulatory scheme it is

¹⁴ Para 12, High Court judgment.

intended to support'. That court went on to state that: 'If there is an insufficient close relationship between the amount of the licence fee and the cost of administering the corresponding regulatory scheme, then the charge constitutes a form of taxation'.

[69] That is essentially the case of Telecom and MTC as accepted by the High Court.

[70] On appeal the Federal Court of Appeal disavowed the approach of the first instance court. As Reyer JA put it:

'In my view, the Federal Court has concluded that a levy, other than a user charge, will be a regulatory charge only if there is a reasonable nexus between the quantum of the levy and the cost of the regulatory scheme in which it arises. With respect, I am unable to agree with that interpretation.'

[71] The Federal Court of Appeal emphasised the importance of the distinction between revenues being 'tied to' the costs of a regulatory scheme and where a levy has a regulatory purpose. Reyer JA, speaking for the court, put it as follows at para 49:

'[In Westbank] Gonthier J held that when the revenues raised by a levy are 'tied to' the costs of a regulatory scheme, the requisite nexus between the levy and the regulatory scheme will exist. However, he also went on to say that the requisite nexus will also exist when the levy has a regulatory purpose. It follows, in my view, that where a regulatory purpose for a levy has been established, the requisite nexus between that levy and the regulatory scheme in which it arises will nonetheless exist even if the quantum of the revenues raised by that levy

exceeds the costs of the regulatory scheme in which that levy arises.' (My underlining for emphasis).

[72] And as Létourneau JA put it in a concurring judgment (at para 102):

'However, when a regulatory scheme and a regulatory purpose exist and a charge is levied for the benefit or a privilege as in this case, there is, in my respectful view, no need for a reasonable nexus between, or a linkage to, the quantum of the levy and the costs of the regulatory scheme...'

[73] The Federal Court of Appeal's statement of the rule (which I prefer and adopt) is important in the light of the manner Telecom and MTC frame their argument against the scheme of s 23(2)(a) of the Act. It is abundantly clear from the exposition of the relevant test that, a levy will be found to be a regulatory charge, and not tax, either:

- (a) if the revenues are 'tied to' the costs of the regulatory scheme or
- (b) if it has a regulatory purpose.

In other words, when a levy is challenged as being a tax, the party seeking to justify it will prevail if it establishes either (a) or (b).

[74] In oral argument Mr Heathcote suggested that it would never be constitutionally permissible to express a levy to defray expenses as a percentage, either on gross income or on profit. It bears mention that the scheme validated by the Federal Court of Appeal in *Broadcasting Assn v Canada* was couched in terms

that are quite non-specific and also expressed in percentage terms. Section 11 of the relevant Canadian Act empowers the regulatory agency to make regulations for broadcasting fees providing for different classes of licensees, and interest to be paid on overdue fees. It also empowers the agency to make regulations to provide for fees 'to be calculated by reference to 'any criteria' the agency 'deems appropriate', including by reference to 'the revenues of the licensees'. Section 11 of the Regulations made under the legislation then imposed regulatory fees representing 1.365% of each licensee's 'gross revenue' from broadcasting activities in the year.

[75] It is apparent, therefore, that expressing a levy as a percentage and on gross income is not irrational as suggested by Telecom. In my view, it is a reasonable and rational justification put forward by CRAN in its answering affidavit that expressing a regulatory levy as a percentage of turnover is preferred because it limits the opportunity for licensees to manipulate chargeable revenue through management decisions.

[76] The High Court therefore misdirected itself in invalidating s 23(2)(a) and the impugned regulation without considering if it was connected to a regulatory scheme in light of its finding that it was not connected to the cost of regulation.

Analysis: tax vs regulatory levy

[77] In the light of the High Court's misdirection, I will proceed to consider if the scheme of s 23(2)(a) of the Act amounts to taxation without representation. In para [58] above I made reference to the four *indicia* (indicators) evidencing a regulatory

scheme. The question arises whether CRAN has established their presence in order to escape the conclusion that the impugned levy is a tax. That is the first of the two-step process for testing the existence of a regulatory scheme.

First indicator: complete, complex and detailed code of regulation

[78] I demonstrated at the beginning of this judgment the complex web of regulation and supervision weaved by the Act, and its transformative and developmental aspirations. The regulated industries are subjected under the Act to comprehensive regulation in industries that are only open under a licensing regime. CRAN bears the brunt for the realisation of all that. The first indicator is therefore more than sufficiently met.

Second indicator: regulatory purpose intended to influence behaviour

[79] The policy underpinning the Act, the objectives to be pursued thereunder, the manner in which the policy and the objectives is to be implemented, speak to the legislature's intent to influence behaviour in the regulated industries with commensurate benefits to the licensees. The second indicator is therefore also satisfied.

[80] Because of its centrality to the respondents' argument on appeal, I will return to the third indicator after I have dealt with the fourth indicator.

Fourth indicator: a relationship between the licensee and the regulation in the sense that the licensee benefits from the regulation or causes the need for the regulation.

[81] Telecom and MTC, as licensees under the Act, derive substantial benefit from the regulatory scheme. Licensees operating in the regulated industries are shielded from competition in what is a fiercely competitive landscape of telecommunications. Licensees are protected from anti-competitive practices (Chapter IV) and restraints of trade (s 51). They have other benefits: interconnection¹⁵ (s 49), and sharing of infrastructure (s 50). In other words, the privilege of holding a licence is a benefit accruing to the respondents from the regulatory framework of the Act. The fourth indicator is therefore also satisfied. I now proceed to the third indicator.

Third indicator: presence of actual or properly estimated costs of regulation

[82] Is the levy 'connected to', 'tied to', or 'adhesive to' the service rendered, or is it 'related to a regulatory scheme'? This indicator goes to the heart of the second of the two-step process. In my view, the levy envisaged by s 23(2)(a) of the Act is connected to a regulatory scheme. As we saw, that was a sufficient criterion for validating a levy in *Shuttleworth* and in *Canadian Broadcasting Assn. v Canada*.

[83] The approach contended for by Telecom and MTC is that to defray expenses in the language of s 23(1) of the Act, a levy must be tied to the service rendered by CRAN to them; CRAN should apportion to each licensee a proportionate share of the cost of the regulation linked to it; CRAN cannot exact

¹⁵ Which is defined in the definitions section as 'the linking of two telecommunications so that users of either network may communicate with users of, or utilise services provided by means of, the other network...'

through levies income greater than the cost of regulating the industry; and each licensee must pay their due share of the cost of regulation.

[84] The way in which the respondents' case has been formulated was considered and resoundingly rejected by the Canadian Federal Court of Appeal in *Canadian Assn of Broadcasters v Canada*. I can do no better than quote the apt remarks of Reyer JA in:

[58] The third indicium-the presence of actual or properly estimated costs of the regulation-requires a more precise focus on the scope of the putative regulatory scheme. Otherwise, how could one quantify the actual or estimated costs of that which is regulated? Thus, the question becomes whether the costs that are to be considered under this *indicium* are the actual or estimated costs incurred in the regulation and supervision of the entire Canadian broadcasting system or only the costs that relate to the administrative activities of the Commission in fulfilling its duties under the Act and of Industry Canada in managing the broadcasting spectrum.

. . .

[61] Accordingly, I am of the view that the costs which are to be considered in relation to this *indicium* must not be limited to only those costs that are incurred by the Commission and Industry Canada in fulfilling their administrative mandates in respect of the regulation of the Canada broadcasting system. Rather, the costs that should be considered are all of the costs that are incurred in fulfilling the policy objectives and other requirements of the Act and the Regulations. (My underlining for emphasis.)

[85] 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 a 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. 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.

[86] Quite apart from the general regulation of the regulated industries, the Act envisages the carrying on by CRAN of developmental and transformative functions which are not funded from National Treasury. That the levy regime will in part be used to finance those activities is axiomatic. I am therefore satisfied that the dominant purpose of the Act is to regulate behaviour in the regulated industries, and in the process to extend to licensees substantial privileges through licensing, enforcement and prevention of anti-competitive practices. The fact that revenue (in the broad sense of the word) is generated by the regulator is only incidental. Section 23(2)(a) of the Act is therefore not a form of tax as the third indicator is also satisfied.

[87] There is a regulatory scheme embedded in the Act which saves it from being a constitutionally impermissible tax measure. The High Court ought to have come to that conclusion on the primary issue raised, whether or not s 23(2)(a) of the Act is a taxation measure.

[88] I am satisfied that the alleged unconstitutionality of s 23 (2)(a) of the Act does not lie in the fact that it authorises a levy on 'annual turnover' or that it does not require CRAN to base the levy on the cost of its service relative to a particular industry or licensee being regulated. There is no merit in the assertion that

authorising a levy to defray CRAN's expenses as a percentage of annual turnover of a licensee is constitutionally impermissible. It now remains to consider if the respondents have made out a case for the invalidation of the impugned section on another basis.

Delegation of uncircumscribed discretionary power

[89] As I understand the respondents' remaining case, the section in its present form grants subordinate legislative authority to an administrative body, CRAN, to, on a discretionary basis, determine levies in the absence of guidelines informing the exercise of that power. (The so-called *Dawood* principle.)

[90] In defence, Mr Maleka argued that CRAN is a specialised body and that it was recognised in *Dawood* that in such circumstances it is permissible for wide discretionary power to be granted to an administrative body. Mr Maleka only made a general observation about CRAN being a specialised body without suggesting how that specialist skill is applied in the determination of the levy. It is not clear to me what specialist endeavour is called for in determining the levy. Certainly it is not demonstrable from the manner in which Item 6 was executed.

[91] On the converse, Mr Gauntlett evocatively described the rather draconian, limitless and unchecked power enjoyed by CRAN when it comes to determining a levy under s 23(2)(a). (As to which see paragraphs 51- 52 above). In my view, what is striking about the provision is the absence of any guideline as to the limit of the percentage on annual turnover that CRAN may impose. For example, there is no upper threshold beyond which CRAN may not set a levy, nor the permissible

circumstances under which, if at all, that threshold can be exceeded. Can it really be that, 'Anything goes'?

[92] Can it be right for CRAN to have unchecked discretion, without any ascertainable limitation (or even as much as oversight by either the Executive or the Legislature), to determine what the percentage levy on 'turnover' should be? What if in one year they decide it is 1.5 % and in another that it be 50%? How are the licensees to know what percentage exceeds the legislative competence of CRAN? Mr Maleka was not able during argument to provide a satisfactory answer to this conundrum! Without a reasonable degree of certainty, regulations made under s 23(2)(a) of the Act are fertile ground for incessant litigation. The rule of law requires that the law is ascertainable in advance so as to be predictable and allow affected persons to arrange their conduct and affairs accordingly. Section 23(2)(a) fails that test.

[93] In its present form therefore, s 23(2)(a) of the Act constitutes the outsourcing of plenary legislative power to CRAN given the absence of guidelines and limits for its exercise. The legislature has failed to guard against the risk of an unconstitutional exercise of a discretionary power by CRAN and the result is that s 23(2)(a) of the Act is unconstitutional and liable to be struck down, as must the impugned regulation.

Consequences arising from order of invalidity

[94] Objective constitutionalism implies that a breach of the Constitution invalidates the implicated provisions from the moment they were enacted (*in o w ex tunc*), and unless a contrary order is made, s 23(2)(a) of the Act and Item 6 should

cease to have the force of law immediately. That is because of the default position that when a provision is declared unconstitutional, the declaration of invalidity operates retroactively. The inevitable consequence of which is that those who suffered its existence on the statute book should not be made to bear its consequences. Therefore, given the finding that s 23(2)(a) and Item 6 are invalid, Telecom would not be required to make good to CRAN the monies imposed by the impugned regulation as it must fall with the section on whose authority it was made.

[95] Art 25 (1)(a) of the Namibian Constitution, however, empowers the court to suspend the order of invalidity and to afford the legislature the opportunity to correct the defect identified by the court. During the period of suspension the implicated provision continues to have the full force of law.

[96] Mr Heathcote urged us on behalf of Telecom not to apply Art 25 (1)(a) because the jurisdictional basis for its invocation is lacking in the present case as that article is confined to the case in which there is violation of a fundamental human right or freedom guaranteed under the Bill of Rights.

[97] I accept that Art 25(1)(a) is applicable to situations where the court finds a breach of a fundamental right or freedom, or to pre-independence legislation.¹⁶ But what does the court do when the legislature, as in this case, commits a breach of the Constitution unrelated to the Bill of Rights? Because of the supremacy clause the court has jurisdiction to adjudicate upon breaches unrelated to the Bill of

¹⁶ *Mostert v Minister of Justice* 2003 NR 11 (SC) at p. 42

Rights, yet for those cases the Constitution is silent on what remedy the court must give.

[98] To complement the supremacy clause, Art 80(2) of the Constitution grants the High Court all the powers of a superior court, including the power to hear cases which 'involve the interpretation, implementation and upholding of [the] Constitution'. Once the court makes an order of unconstitutionality in respect of a breach other than one related to the Bill of Rights it must, of necessity, deal with the consequences of declaring it invalid. The principle of objective constitutionalism informs that the default position is that an order of invalidity operates *ex tunc*.

[99] I am unable to accept the proposition that for breaches unrelated to the Bill of Rights the Namibian High Court enjoys no power to delay a declaration of invalidity of legislation. Persuasive comparative jurisprudence will serve to demonstrate the point. These are jurisdictions which, because of their constitutional arrangements, recognise the constitution as the supreme law and the courts enforce the principle of objective constitutionalism. Yet, while their constitutions do not contain a specific provision empowering the courts to delay an order of invalidity, their courts assumed such a power.

[100] The Botswana Court of Appeal¹⁷ has recognised a superior court's competence to tailor a remedy that best serves the interest of justice when

¹⁷ *The President of the Republic of Botswana & others v National Amalgamated Local Central Government and Parastatal Workers & others* CACGB-02-17 delivered on 29 May 2017, para 58.

declaring a statute inconsistent with the constitution. The court also recognised that the court has the power to make an order of constitutional invalidity prospective.

[101] A similar jurisdiction has been recognised in Canada in relation to both Charter¹⁸ and non-Charter breaches. As Hogg¹⁹ observes:

‘While s 52(1) requires a court to hold that an unconstitutional statute is invalid, the courts have assumed the power to postpone the operation of the declaration of invalidity. When a court exercises this power, the effect is to grant a period of temporary validity to an unconstitutional statute, because the statute will remain in force until the expiry of the period of postponement.’ (Emphasis added.)

[102] In those pages the author references several decisions wherein Canada’s highest court applied the rule in the face of the principle of objective constitutionalism: *In Re Manitoba Language Rights* [1985] 1 SCR 721; *Sinclair v Que.* [1992] 1 SCR 579; *R v Brydges* [1990] 1 SCR 190; *R v Bain* [1992] 1 SCR 91; *Schachter v Canada* [1992] 2 SCR 679.

[103] The USA Supreme Court has assumed a similar jurisdiction in criminal cases: *Linkletter v Walker* (1965) 381 US 618; *Johnson v NJ* (1996) 384 US 719 and *Desist v US* (1969) 394 US 244.

[104] I am satisfied that the High Court had jurisdiction to delay the order of invalidity if it found (as it should have) s 23(2)(a) and item 6 unconstitutional on the

¹⁸ Equivalent to Namibia’s Bill of Rights, Chapter 3.

¹⁹ Constitutional Law of Canada, Vol. 2 (Carswell, 1997) 37-4 to 37-8.

basis that I have described. The question arises whether the order of invalidity should be delayed.

[105] The levy of 1.5% on annual turnover is not *per se* an unconstitutional exercise of discretionary power as it is well within the international norm as demonstrated in CRAN's answering papers and *Canadian Broadcasting Assn v Canada*. In fact, as demonstrated by CRAN in the opposing affidavit, Telecom considered that to be the case. That is a compelling reason for not making the order of invalidity operate *ex tunc*. However, the rule of law dictates that care should be exercised so that the effect of the order of invalidity is not rendered meaningless and that those who have suffered its existence are not made to endure it any longer than the circumstances justify.

[106] I would therefore validate s 23(2)(a) of the Act and Item 6 only up to the point that its invalidity has been confirmed by this court: In other words, the order of invalidity will operate *ex nunc*.

The resultant legal vacuum

[107] No doubt the order of invalidity taking immediate effect after this judgment creates a legal vacuum in the levy regime. At the prompting of the Executive, the Parliament has in the past acted with deliberate haste to deal with the court's declaration of invalidity of legislation and administrative decision-making. I have no reason to believe that the same cannot be done in respect of s 23(2)(a) of the Act.

Was the challenge to the regulation time-barred?

[108] CRAN's allegation that the challenge to the regulation should have been brought within six months of it being gazetted, as required by s 32 of the Act, cannot be the basis for barring a challenge to the constitutionality of s 23(2)(a). As I have demonstrated, in view of the amended notice of motion, the focus of the attack is now s 23(2) (a) of the Act. Since s 23(2)(a) is invalid from the date of this court's order, Item 6 suffers the same fate and cannot validly be kept alive.

Retroactive operation of item 6

[109] Telecom pleaded in its founding affidavit that in the event that the court finds the impugned regulation to be valid, it be declared that it should only apply prospectively. Although that ground was not canvassed by Mr Heathcote in the written heads of argument, the relief was not abandoned and must be considered especially because the order of invalidity will operate *ex nunc* and Telecom will be expected to honour its liability under the impugned regulation up to the point it is no longer of any force and effect.

[110] There is a presumption against the retrospective operation of a legislative measure, primary or subordinate. Generally, a statute will be construed as operating prospectively unless the legislature has clearly expressed a contrary intention.²⁰ On this basis, the impugned regulation does not pass muster. Since it is common cause that the levy was imposed against Telecom retroactively, the regulation is *ultra vires* to that extent and must be made to apply only from when it was duly gazetted.

²⁰ *Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry & others* 1995 (1) SA 563 (A) at 572E-F).

Costs

[111] Either party has had success and failure in equal measure. Although s 23(2)(a) of the Act and Item 6 have been declared unconstitutional, the order of invalidity will not have retroactive effect and will have legal consequences only from now and into the future. That does not detract from the fact that Telecom will only be required to pay a part of the levy which operated retroactively, and it will also not be liable for any levy after the order of invalidity. On the other hand, Telecom, which has to date refused to pay the levy, will from the date the levy was gazetted until the date of invalidity be liable to CRAN for the payment of the levy imposed by Item 6. Not least significantly, CRAN has succeeded in obtaining from this court an unequivocal statement of principle that a levy under s 23(2)(a) of the Act is not a tax.

[112] Both Telecom's constitutional challenge and CRAN's opposition thereto were not frivolous and certainly contributed significantly to the enrichment of Namibia's constitutional jurisprudence.²¹ Therefore, the present is an appropriate case where each party must bear its own costs, both in the High Court and in the appeal.

Order

[113] I propose the following order:

²¹ Compare *Biowatch v Registrar Genetic Resources* 2009 (6) SA 232 (CC) paras 23 and 24.

1. The appeal succeeds and the order of the High Court is set aside and substituted for the following:
 - (a) Section 23(2)(a) of the Communications Act 8 of 2009 is declared unconstitutional and is hereby struck down;
 - (b) Subject to para (c) below, the order of invalidity in paragraph (a) will take effect from the date of this judgement and shall have no retrospective effect in respect of anything done pursuant thereto prior to the said date.
 - (c) Telecom shall not be liable to pay any levy imposed covering a period before the coming into force of Item 6 of *the Regulations Regarding Administrative and Licence Fees for Service Licences*, published as GN 311 in GG 5037 on 13 September 2012.
 - (d) There is no order in respect of costs.”
2. There shall be no order as to costs in the appeal and each party shall bear its own costs.

DAMASEB DCJ

SMUTS JA

CHOMBA AJA

APPEARANCES:

APPELLANT: I V Maleka SC (with G Coleman, R L Maasdorp)

Instructed by Angula Co Inc

FIRST RESPONDENT: R Heathcote (with him C E van der Westhuizen)

Instructed by Shikongo Law Chambers

INTERVENING PARTY: J J Gauntlett SC QC (with him F B Pelsler)

Instructed by Tjombe-Elago Inc