

CRAN WINS SUPREME COURT CHALLENGE ON REGULATORY LEVIES

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BACKGROUND

During December 2020, Mobile Telecommunications Limited (MTC) filed a constitutional challenge against the amended Section 23 of the Communications Act, in the High Court. MTC's application was based on the grounds that Section 23 as amended, which allows CRAN to collect regulatory levies was unconstitutional as the amended section had no limit to the upper threshold of the regulatory levy, it lacked executive oversight and failed to prescribe parameters leading to CRAN's unchecked, uncircumscribed discretion without limitation.

On 22 August 2022, the High Court held that Section 23 of the Communications Act 8 of 2009 as amended and any Regulations prescribed to that provision are declared unconstitutional and null and void.

APPEAL BY CRAN

CRAN appealed the High Court judgment of 22 August 2022, to the Supreme Court and the appeal hearing was heard on the 14th of April 2023.

CRAN Chief Executive Officer Emilia Nghikembua explains that *"Consequently no regulatory levies have been collected since 22 August 2022. This had undermined CRAN's viability as regulatory levies make up 80% of CRAN's revenue"*.

On 13 March 2024, the Supreme Court of Namibia delivered a judgment in CRAN's favour.

SUMMARY OF JUDGEMENT

The Supreme Court concluded that, in its view, the High Court in its consideration of the constitutionality *vires* of the amended Section 23 did not attach sufficient weight to the fact that the Legislature added considerable detail to Section, 23 which did not form part of the previous Section 23.

The Supreme Court further held that, with the amended Section 23, the legislature has succeeded in circumscribing and limiting CRAN's discretionary power to set regulatory levies. The legislative schemes under Section 23 as amended strikes a balance between two competing interests, being the recognition of CRAN as the main dependent of the levy income for its activities and on the other hand sourcing funds for CRAN should not be at the expense of the operators.

The Court also found that the regulatory scheme adopted under the amended Section 23 allows for the flexibility in the joints of CRAN accompanied by sufficient safeguards against either over-recovery or under recovery and sets out justiciable criteria on which operations may challenge any unreasonable exercise of discretionary power.

Finally, the Supreme Court concluded that it is satisfied that, on its own terms, Section 23 read with the relevant provisions of the Communications Act, passes the constitutionality muster, independent of the provisions of the Public Enterprises Governance Act.

IMPLICATION OF THE JUDGMENT AND THE WAY FORWARD

The implication of the judgment is that the challenged Section 23 as amended is constitutional and will remain valid and enforceable.

Nghikembua explains the impact of the judgement as follows: "No Regulatory Levies have been collected since 22 August 2022. Considering the Supreme Court findings, the Authority will resume collecting levies backdating back to that period and moving forward. The Authority will also finally launch the Universal Service Fund, which was equally hampered by the legal challenge"

Nghikembua concludes that "This is a landmark decision because CRAN can now focus on the rudimentary aspects of its mandate i.e. to ensure that all Namibians have access to affordable and good quality services. This mandate was hugely undermined by the lack of sufficient resources to defray the cost of regulation, due to the uncertainty around the regulatory levies, being our biggest source of revenue".

"ENDS"

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