

[44] The COW, as earlier intimated, opposed the application. To that end, the City's acting CEO Mr George Mayumbelo, deposed to an affidavit. There are certain themes that run through this affidavit. I will highlight the most important ones.

[45] First, the CEO pointed out that having regard to the applicant's notice of motion and the relief therein contained, there is no legal challenge to the COW's decision to apply for the licence in question. It was contended that that being the case, the applicant appears to seek to mount an indirect challenge on the COW's decision to apply for the licence, alleging some unlawfulness of the decision, which was made on 31 October 2017.

[46] It was contended that having regard to the time when the decision was made i.e. to apply for the licence in question, that decision stands and has valid legal consequences, which can not be wished away, save obtaining an appropriate order before a competent court, setting the said application aside. The COW thus moved the court to simply ignore the relief seeking to attack the decision to apply for the licence. The COW, in any event contended that even if the said decision was liable to be set aside on the basis of the grounds alleged by the applicant, the latter had taken an inordinately long time to challenge that decision and this, alone, is a good and proper basis to dismiss the application.

[47] Regarding the question whether CRAN had power to validly issue the licence to the COW, considering that the latter is a municipality, and subject to the Local Authorities Act, the applicant contends that CRAN should have made that determination in the first instance. The failure to do so should render the decision made in the COW's favour reviewable and liable to be set aside, submitted the applicant. In response, the COW contends that CRAN does have power in law to make a determination of the COW's eligibility to be granted the licence in question. This, it was argued, was not on the basis of the Local Authorities Act, but rather on the Communications Act, considering that the COW is a juristic person as defined in the Communications Act. The reliance

on the Local Authorities Act to impugn the decision to grant the licence, it was submitted, is clearly wrong.

[48] On the issue of whether the proceedings in question, were properly authorised, the COW contended that there was nothing untoward in the moving of the application for the licence. The COW argued that it must be regarded as a person for purposes of the Communications Act and thus entitled to apply for the licence. It was contended that the Council in this case made a resolution to apply for the licence and this was done under the watchful eye of the COW's CEO. To this end, the application filed, was dispatched under the hand of the CEO.

[49] To that extent, the fact that the person who completed the form is not the one specifically authorised by the Council Resolution, is neither here nor there, the COW submitted. That person, who filed the application on the COW's behalf, is an employee of the COW and acted under the control and direction of the CEO. This challenge, it was submitted, should in the circumstances, fail.

[50] Another issue addressed pertinently by the COW related to the powers imbued to it by the Local Authorities Act. It was submitted that the provisions of s 30(1)(u) of that Act, as read with s 30(1)(a) and (b) of the Local Authorities Act, allows the COW to commercialise any services it renders. This, it was contended, does not exclude the provision of the service associated with the granting of the licence in question.

[51] The COW further pointed out that one of its key responsibilities and functions, is to promote tourism and the availability of affordable communication services, such as internet access and to provide information regarding key strategic sites. It was also submitted that the COW is following the trend among major cities in the world which are described as 'smart cities' with all manner of conveniences such as affordable internet access, which can help not only with information, but may also assist with other services such as policing and crime prevention. The decision to apply for the licence, it was finally contended, was in line with the provisions of s 30(1)(ae) of the Local Authorities Act.

[52] Regarding the complaint that there was certain information that the applicant was not privy to, the COW states that the applicant is not entitled to every piece of information that accompanies the application to CRAN. Some of the information, it was contended, is not for public consumption and is confidential and must be kept as such. Any person aggrieved by a failure to access that information, has a right at law, to obtain a remedy. This the applicant did not do, further contended the COW.

[53] The COW denied any insinuation that it had some engagements with CRAN outside the prescribed Regulations and the provisions of the Act. The granting of the licence to the applicant, it was contended, was properly and carefully taken by CRAN and having regard to its discretion and all the applicable criteria.

[54] The CEO further denied that there was any information that was lacking from the application form filed by the COW. It was contended that although it might appear that there were blanks that were not filled, there were however annexures which were submitted to CRAN and which in its wisdom, considered the information sufficient to enable it to issue the licence in question. The allegation that the COW was allowed to 'patch' its application, were strongly denied by the CEO.

[55] The CEO proceeded to deny that CRAN failed to properly apply its mind to the application. It was contended that CRAN, in that particular regard, exercised its statutory powers properly and granted the licence to the COW. The contention that CRAN committed a reviewable error when it granted the licence in question was strongly denied by the COW. It was contended that on a contextual interpretation of the Communications Act, CRAN has the power to issue a licence to any person, who has made an application and this applies with equal force to the COW.

[56] The COW also argued that CRAN fully considered its decision and allowed an opportunity for a re-consideration of the application at the

applicant's behest. In this connection, CRAN considered all the evidence before it, including the grounds for reconsideration raised by the applicant. Having done so, CRAN still held and properly so, that its previous decision should stand. There is thus nothing for the court to review, the COW argued.

[57] Regarding the issue of the *declarator* sought, the COW submitted that the applicant is not entitled thereto. It pointed out that having regard to the applicant's papers, there is nothing advanced by the applicant as to the reasons why the court should issue the declaratory relief sought by the applicant in its notice of motion.

[58] In dealing with the supplementary affidavit filed by the applicant, the COW denied that the Board of Directors of CRAN was not properly constituted when it dealt with the matter. It was the COW's contention that the applicant is challenging the appointment of the Board of Directors of CRAN.

[59] Having considered the respective cases of the protagonists, it is now opportune to proceed to make a determination on the various issues that arise as may be rendered necessary. I proceed to do so presently.

### Determination

[60] As a prelude, I need to mention that whereas CRAN had initially opposed the application and filed an answering affidavit to that end, it decided, of its own motion and for reasons that were not and probably need not be disclosed, to abide by the court's decision. This means that the application is no longer opposed by CRAN and what it may have stated in its answering affidavit may no longer represent its stance belatedly taken to abide by the decision of the court.

[61] I now proceed to consider and to rule on the arguments presented on behalf of the parties. Mr Töttemeyer, for the applicant indicated that his argument would be presented on five main fronts, namely, that the licence granted to the COW, was *ultra vires* the powers open to the COW to exercise

by law; that the decision of CRAN is a nullity because the appointment of the Board was invalid; that the decision by CRAN is invalid because it granted a licence other than the one applied for; that audi was not observed by CRAN in the making of both decisions in this case and that the decisions made violated Art 18 of the Constitution.

[62] It may not be necessary, for the determination of this matter to deal with all the issues raised above. I will, however deal with each in turn as may be rendered necessary. I wish to begin with the argument regarding the authority of the COW to bring the application.

#### The authority of the COW to move the application

[63] It was submitted on the applicant's behalf, as recounted earlier, that the Council of the COW, in its resolution, nominated an officer, who was designated to file the application on the COW's behalf. It appears common cause that another officer, who had not been specifically authorised, is the one who completed the application and about this, the applicant cries foul. I should add, however, that this is not an argument that was pursued during the hearing.

[64] I am of the considered view that although there may have been a resolution for the Strategic Executive: Electricity to apply for the licence, the fact that Mr R Kandjiriomuini, the SE: Information Comm Technology did so, does not necessarily mean that the latter went on a frolic of his own. It is clear that Mr Kandjiriomuini was an employee of the COW and all things considered, his designation appears more attuned to the licence applied for.

[65] It can also not be denied that the application was signed of by Mr Kahimise, the COW's chief executive at the time. What needs to be established in these cases, is whether at the end of the day, all things being said and done, can it be said that the application was, without doubt one moved by the COW? I am of the considered view that this question must be answered in the positive, namely, that the said officer, was not acting on a frolic of his own. It is established that he was an employee of the COW at the time and would have

made the application within the scope of his employment with the COW. The said application was dispatched under the hand of a letter from the CEO of the COW.

[66] In view of the foregoing, I am of the considered view that this argument cannot be sustained. On an objective basis, it is clear that the application in question was made by the COW, pursuant to a resolution of the Council. To split hairs in relation to the person who actually made the application as opposed to the resolution, is in my considered view, tantamount to legal sophistry. All indications are that the application filed was done and fully owned by the COW. That should put this argument to eternal rest.

#### Attack on the composition of the CRAN Board

[67] The applicant further sought to challenge the decision made in the COW's favour by attacking the composition of the Board at the time when the licence in question, was granted. It was the applicant's case that there were six members who participated in the making of the decision, when in terms of s 8(1) the Communications Act, there should be 5 members. This was challenged by the applicant as being contrary to the Act and therefor resulting in the decision made by the Board, being invalid in law.

[68] The COW, for its part places reliance on two principal issues. First, it contends that in terms of s 15(6)(b) of the Act, any decision made by the Board shall not be invalid by reason of the fact that a person not entitled to sit, participated in the deliberations concerned. Secondly, the COW argued that the court should not expend any energy dealing with this issue for the reason that the party, who is appropriately placed to deal with the issue, is the Minister. No relief was sought against him in this regard.

[69] I am of the view that the applicant ought to have been vigilant and should have sought specific relief against the Minister in this regard. This is so because it is the Minister that is in law authorised to appoint the Board. It would be queer and indeed improper for the court, at this stage, without the Minister having

been put on notice and being granted an opportunity to deal squarely with the issue, for the court to determine the issue. The Minister is a necessary party in this regard and ought to have been afforded a proper opportunity to deal with this issue. I will accordingly decline to make a finding on the validity of the Board's decision as to do so would be unfair and improper in the circumstances.

Disparity between what was applied for by the COW and what was eventually granted by CRAN

[70] In this leg of the attack, the applicant contends that the COW applied for a network facility licence but was, in some kind of windfall, granted a Class Comprehensive Licence (ECNS and ECS). This was alleged to be irregular by the applicant in that it, as an objector to the COW's application, was not afforded any notice or an opportunity to make representations, considering that CRAN contemplated granting a licence other than the one applied for.

[71] Mr Phatela, for the COW argued that CRAN explained the considerations, which resulted in it granting the licence in question. In this regard, it was argued that CRAN has the ability to discern what type of licence would suit a particular applicant, given their peculiarities and special needs. In this regard, s 38(1)(a) of the Act was relied on as basis for the exercise of that specific power.

[72] Before I deal with this particular argument, the propriety of relying on the answering affidavit of CRAN rears its ugly head as intimated earlier. I say this because CRAN did not follow through on the case it mounted in the answering affidavit. It appears to have abandoned same as it belatedly decided to file a notice to abide. As to the weight that the COW can place reliance on that affidavit, to meet the case against it, remains problematic, especially because the decision to abide is not explained by CRAN. I will say no more of this.

[73] For what it is worth, I will presently refer to the provisions relied on by the COW, namely, s 38. In this connection, I will investigate whether the powers imbued on CRAN by the Act is s 38, entitle it, as it did in this case, to advertise

one licence application and then proceed, to grant a licence of a different type or class.

[74] The said provision, headed 'Telecommunication licences', reads as follows:

'38. (1) The Authority may issue –

- (a) service and technology neutral licences to a limited number of applicants who intend to render a comprehensive telecommunications service (including a mobile or fixed line telephony service);
- (b) other individual licences to applicants where the licence applied for does not fall within the classes for which a class licence is required;
- (c) class licence for the classes of telecommunications services and electronic communications networks set out in subsection (2).

(2) The Authority may issue class licences to persons who comply with the provisions of this Act and such other conditions as may be prescribed, authorising –

- (a) the provision of telecommunications services which entail the routing or other processing of information, but in respect of which the provider of those services uses the facilities of another licensee to transport the information concerned;
- (b) the construction, operation or use of an electronic telecommunications network by any person for his or her own purposes where the network concerned is not a private network contemplated in section 43(2);
- (c) the provision of such other telecommunication services and the construction, operation, use of such other types of electronic telecommunications network as the Authority may prescribe after having followed a rule-making procedure.'

[75] Having read the above provision, nowhere does it, in my considered view, allow CRAN to accept an application from a prospective licensee for a certain type of licence, advertise that application, including in the Government Gazette, to enable interested parties to object thereto if they wish, only to later, and without any notice especially to the objectors, grant a licence that was not applied for.



[76] The process of advertising the applications for licences is consistent with the aura of transparency that should govern the granting of licences in a democratic State. Where a party, such as the applicant gets information pursuant to an advertisement in the Government Gazette that a certain entity has applied for a particular licence, it is entitled to file its objection thereto and which must be properly considered, and where necessary, a hearing be provided for proper ventilation of the objection.

[77] In the instant case, whereas the applicant filed its objection, CRAN, on considering the application, and without reference to the applicant, for reasons it may have stated, did not afford the applicant, which it well knew had objected to the granting of the licence applied for, an opportunity to respond to the intimations that CRAN was labouring under, namely, of granting the COW, a different licence from the one it had applied for.

[78] The right to be heard in this case, is not limited to the application that the COW made. Where CRAN or the COW, for that matter, considered that it was, for any reason, necessary, to consider or to apply for a different type of licence from the one that was advertised, it was necessary to follow the advertisement route once again. This would be to place the parties who had objected to the previous application, an opportunity to consider the proposed change and to decide if they will still object to the new proposal. The re-publication of the intended granting of a licence, different from the one applied for and advertised, was in my view simply inevitable.

[79] CRAN was not at large to simply resort to an internal process that involved it and the COW, to the exclusion of other members of the public with an interest in the industry. It may have happened that there were other parties in the industry, who although they had seen the applicant's application, did not find it necessary to object thereto. It is also conceivable that those very parties, when subsequently made alive to the fact that CRAN, despite the advertised application, considered granting a different type of licence to the COW, would have reason to object. Those parties were denied that opportunity, the applicant included.

[80] There is no denying the naked fact that the applicant was an interested party in this application and its rights and interests were likely to be affected, not only by the application made by the COW, which it had an opportunity to address. Nothing in common sense or reason suggests that where there was a change of heart, either on the part of the COW or CRAN regarding the advertised application, there would be any sustainable reason to exclude the applicant and other members of the public the opportunity to consider the granting of the new application.

[81] The denial of the applicant the right to be heard before the granting of the application, which had not been applied for by the applicant and which was not advertised, is in my view serious and should not be countenanced by this court. The need to apply the audi alteram partem has been ingrained in our judicial and administrative DNA. We cannot simply depart from it, regardless of how convenient or tempting it might seem to be.

[82] The words that fell from the lips of Tebbutt JA in *Swaziland Federation of Trade Unions v The President of the Industrial Court and Another*<sup>3</sup> resonate exceedingly in this case. The learned Judge of Appeal said:

‘The audi alteram partem i.e. the other party must be heard before an order may be granted against him, is one of the oldest and universally recognised principles enshrined in our law. That no man is to be judged unheard was a precedent known the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18 century English judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied from 1723 to the present time.’

[83] As intimated above, there is no question that the decision to award the COW a licence that it had not applied for, would have affected the applicant’s rights. This should have been obvious to CRAN because the applicant had

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<sup>3</sup> *Swaziland Federation of Trade Unions v The President of the Industrial Court and Another* [1998] SZSC 8 (01 January 1998).

objected to the application that was advertised. To excise the applicant from the process when a licence not previously advertised was being considered, is most unforgivable as is inconsistent with the provisions of Art 18 of the Constitution.

[84] This was a serious and irremediable *faux pas* (if *faux pas* it was) on the part of CRAN and the COW cannot justify it on any reasonable basis. It follows, in my considered view, that the application should succeed on this very point alone. I do not, in the circumstances, find it necessary, for the court, to pronounce itself on the other issues raised by the respondent. The denial of the right to be heard goes to the root of the entire process and serves to nullify everything that followed.

[85] It is important to mention that the behests of s 40 of the Communications Act, must always be in the forefront of CRAN in all its dealings. Section 40(1), requires CRAN, in dealing with its licence procedures, to maintain an open, non-discriminatory and transparent procedures. Section 40(2) of the Act, requires these transparent procedures, to include public notice and an opportunity to comment on applications. These requirements were thrown out of the window and the applicant was denied the benefits thereof in relation to the licence eventually granted by CRAN to the COW.

[86] I should also mention, albeit briefly, that the complaint by the applicant regarding the incompleteness of the application form has a lot to commend itself for. Going through the application form filed by the COW,<sup>4</sup> it is plain that there were many blanks, especially regarding the financial information, that were evidently not completed.<sup>5</sup>

[87] It is no answer, in my considered view for the COW, or for CRAN, for that matter, to say that certain annexures were filed in relation to those missing

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<sup>4</sup> Page 449 – 452 of the record of proceedings.

<sup>5</sup> Part D, E, F, G, H, I and J of Annexure A Form CRAN 15, were not completed and were left blank by the COW and there is no explanation written therein as to whether there are any attachments filed elsewhere related to the missing portions of the application form.

portions, when there is no link made in the application form between the empty portions of the form and the annexures referred to. Applications for licences must be complete in every respect and must not need belated extraneous explanations to justify what was mandatorily required in the first place.

[88] It is accordingly not necessary, to deal with the issue of the declaratory relief sought by the applicant, which I must say, does not appear to have been properly mounted in the founding affidavit. That may have to be a story for another day, the present one expressly excepted.

### Conclusion

[89] In the premises, and for the reasons advanced above, I come to the conclusion that the applicant's application to review and set aside CRAN's decision to award a telecommunications licence to the COW, must succeed. The right to be heard is so fundamental that any decision, regardless of how well intentioned it may be, will not be allowed to stand, when the right to be heard, has been violated – the reasons or the circumstances for its violation become no justification in that regard.


### Costs

[90] The path to be traversed when it comes to costs has been well traversed. Costs will normally be granted in favour of the successful party. In this case, the applicant has been successful and must recover its costs. I am of the view that although CRAN belatedly filed a notice to abide, it should be liable for the costs incurred by the applicant up to the point of the filing of the said notice.

### Order

[91] In consideration of the discussion, findings and conclusions above, in the court's considered view, the following order should ensue:

1. The first respondent's decision to award a Class Comprehensive Telecommunications Licence ('ECNS and ECS'), to the second respondent, announced in General Notice 155 (published in Government Gazette 7916 on 29 April 2020, and any and all decisions underpinning same, are hereby reviewed and set aside.
2. The first respondent's decision communicated by letter dated 28 July 2020, on petition, to uphold its decision of 29 April 2020 and its approval of the award of the Class Comprehensive Licence to the second respondent, is hereby reviewed and set aside.
3. The first and second respondents are liable to pay the costs of the application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and two instructing legal practitioners, where so employed.
4. The first respondent's liability for costs stated in paragraph 3 above shall be reckoned up to and including the filing of its notice to abide.
5. The matter is removed from the roll and is regarded as finalised.



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T S MASUKU  
Judge

## APPEARANCES

APPLICANT: R Tötemeyer SC, (with him D Obbes)  
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