REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 448/2013

In the matter between:

TELECOM NAMIBIA LIMITED **APPLICANT**

and

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA **FIRST RESPONDENT**

THE MINISTER OF INFORMATION AND COMMUNICATIONS TECHNOLOGY **SECOND RESPONDENT**

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **THIRD RESPONDENT**

THE ATTORNEY-GENERAL OF NAMIBIA **FOURTH RESPONDENT**

Neutral citation: *Telecom Namibia Limited v Communications Regulatory Authority of Namibia* (A 448/2013) [2016] NAHCMD 292 (29 September 2016)

Coram: PARKER AJ

Heard: **19 July 2016**

Delivered: **29 September 2016**

Flynote: Constitutional law – Taxation – Regulatory levy – Distinction between a tax and a regulatory charge – Regulatory levy required to defray first respondent's expenses – Court held that while subsec (1) of s 23 authorizes imposition of regulatory levy, subsec (2)*(a)* of s 23 authorizes imposition of tax in violation of art

63(2)*(b)* of the Namibian Constitution as no relationship is created between the charges contemplated under that provision and the regulatory scheme, being collecting of levy for defraying first respondent's expenses – Court held therefore that the applicant has demonstrated that the levy has the attributes of a tax and the first respondent has not demonstrated that the levy is connected to the regulatory scheme – Such relationship will exist when the revenues are tied to the costs of the regulatory scheme and costs are actual or properly estimated cost of regulating first respondent (among others) – In instant case court found that no relationship exist or could exist between the levy contemplated in s 23(2)*(a)* of Act 8 of 2009 and the regulatory scheme – Consequently, court held that the charges provided in s 23(2)*(a)* have the attributes of tax and therefore not Constitution compliant – Accordingly, constitutional challenge to s 23(2)*(a)* upheld and the provision declared unconstitutional.

Summary: Constitutional law – Taxation – Regulatory levy – Distinction between a tax and a regulatory charge – Regulatory levy required to defray first respondent's expenses – Court held that while subsec (1) of s 23 authorizes imposition of regulatory levy, subsec (2)*(a)* of s 23 authorizes imposition of tax in violation of art 63(2)*(b)* of the Namibian Constitution as no relationship is created between the charges contemplated under that provision and the regulatory scheme, being collecting of levy for defraying first respondent's expenses – Court held therefore that the applicant has demonstrated that the levy has the attributes of a tax and the first respondent has not demonstrated that the levy is connected to the regulatory scheme – Such relationship will exist when the revenues are tied to the costs of the regulatory scheme and costs are actual or properly estimated cost of regulating first respondent (among others) – In instant case court found that no relationship exist or could exist between the levy contemplated in s 23(2)*(a)* of Act 8 of 2009 and the regulatory scheme – Section 23(2)*(a)* authorizes the making of regulations which provide for the imposition of charges based on the percentage of income of first respondent (among others) without reference to costs of regulating the first respondent (among others) – Court concluded that the charges contemplated in s 23(2)*(a)* bear no relationship with the regulatory scheme, being the collection of levies to defray cost of regulating applicant (among others) and costs are actual or properly estimated cost of regulating first respondent (among others) –

Consequently, court concluded that the applicant has demonstrated that the levy has the attributes of tax and the first respondent has not demonstrated that a relationship exists between the levy and the regulatory scheme – Court held further that where there is no connection between the regulatory scheme and the charges levied, the court will scrutinize the facts to ensure that the Constitution is not circumvented by legislative or administrative action – Court held further that the charges provided in s 23(2)*(a)* have the attributes of tax and therefore not Constitution compliant – Accordingly, constitutional challenge to s 23(2)*(a)* upheld and the provision declared unconstitutional.

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.

(b) The first respondent shall pay costs of this application, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] The main issue (in para 1 of the notice of motion) in this application is whether s 23(2)*(a)* of the Communications Act 8 of 2009 ('the Act'), together with reg 6 of the Regulations Regarding Administrative and Licence Fees for Service Licences, Regulation 311 of 2012 (GN 5037 of 13 September 2012) ('the Regulations') are constitutional. There is an alternative to the main prayer ('first alternative prayer'), and it is whether reg 6 of the Regulations is constitutional. Then there is an alternative prayer ('second alternative prayer') to both the main prayer and the first alternative prayer, and it is whether the Regulations are to operate retrospectively.

[2] It follows that I should consider the first alternative prayer only if I refuse to grant the relief sought in para 1 of the notice of motion, which contains the main prayer. And I should consider the second alternative prayer only if I refuse to grant the relief sought in para 2 of the notice of motion, which contains the first alternative prayer.

[3] Accordingly, it is to the main prayer that I now direct the enquiry. In para 1 of the notice of motion the applicant mounts a constitutional challenge to s 23(2)*(a)* of the Act. In that regard, the enquiry should be directed at only the words used in formulating the statutory provision which the applicant seeks to impugn and their true construction to see whether the statutory provision – in the instant case, s 23(2)*(a)* of the Act – violates art 63(2)*(b)* of the Namibian Constitution in relation to the applicant. That is to say; the court should concern itself with only an act which can be attributed to the Legislature. The court should not concern itself, as far as the constitutional challenge to s 23(2)*(a)* of the Act is concerned, with what first respondent has done or has not done in implementing s 23(2)*(a)*. The reason is simply this. If s 23(2)*(a)* is found to be inconsistent with art 63(2)*(b)* of the Namibian Constitution, anything done, including a subordinate legislation made under that paragraph is also, as a matter of law, unconstitutional. See *Disciplinary Committee for Legal Practitioners v Makando and Another*; *Makando v Disciplinary Committee for Legal Practitioners and Three Others* Case No. A 216/2008; Case No. A 370/2008, paras 9-11 (Saflii/NAHC/2011/311.html).

[4] Article 63 of the Namibian Constitution provides:

> '(2) The National Assembly shall further have the power and function, subject to this Constitution:
>
> (a) ...
>
> (b) to provide for revenue and taxation; ...'

And s 23 of the Act provides:

'(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;

...'

[5] As I understand it, both Mr Heathcote SC (assisted by Ms Van der Westhuizen), counsel for the applicant, and Mr Coleman (assisted by Mr Maasdorp), counsel for the first respondent, are agreed that what s 23(1) authorizes is the imposition of '*a regulatory levy*' upon providers of communications services *in order to defray its expenses.* (Italicized for emphasis) I accept their contention: it is borne out of the true construction of subsec (1) of s 23 of the Act.

[6] What emerges clearly from s 23(1) is that what is authorized is not 'regulatory levy' simpliciter; but – and this is significant – a regulatory levy which is *required and necessary* 'to defray its (ie first respondent's) expenses'. (Italicized for emphasis) I have therefore no difficulty – none at all – in holding that, *pace* the first respondent, there should be a demonstrable 'relationship between the charge (levy) and the scheme itself'. This is related to the second step in distinguishing a regulatory levy (or charge) from a tax proposed by the Supreme Court of Canada, per Rothstein J (the rest of the judges (eight in number) concurring), in *620 Connaught Ltd v Canada (Attorney-General)*, [2008] 1 SCR 131, 2008 SCC 7, paras 24-28. In that regard, I accept Mr Heathcote's submission on the point.

[7] The next level of the enquiry is to consider the distinguishing features of a regulatory levy (or charge) from a tax, which the Act itself in s 23(1) of the Act, does not authorize the first respondent to impose. In doing so I shall rely heavily on the principles of law proposed by Rothstein J in *620 Connaught Ltd* ('the Rothstein

principles') because of their sheer insightfulness and limpidity. The Rothstein principles are greatly persuasive; I should say.

[8] In the long run, the question is whether, in pith and substance, a levy 'constitutes a tax or a regulatory charge which is used to defray the costs of a regulatory scheme'. (*620 Connaught Ltd*, para 21) Thus, in the instant matter, the question is whether s 23(2)*(a)* provides for the imposition of a tax or a regulatory charge.

[9] In *620 Connaught Ltd*, Rothstein J explained, as follows, about 'The Characteristics of a Tax' and 'Distinguishing a Regulatory Charge from a Tax':

> '3. *The Characteristics of a Tax*
>
> [22] In *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, 1930 CanLII 91 (SCC), [1931] S.C.R. 357, Duff J (as he then was) identified the characteristics of a tax (pp. 362-63). In *Eurig*, Major J summarized the *Lawson* characteristics of a tax at para 15:
>
> > Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.
>
> [23] These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental.
>
> '4. *Distinguishing a Regulatory Charge From a Tax*
>
> [24] The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J in *Westbank* added a fifth consideration to those articulated by Duff J in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para 43). This fifth

consideration provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

[25] In *Westbank,* Gonthier J established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:

> [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 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. [para 44]

The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.

[26] Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J, at para 24:

> This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.

[27] Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself. This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

(*Westbank*, at para 44)

> [28] In summary, if 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. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? And (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson.* To answer the second question, one must proceed with the two-step analysis in *Westbank.*

[10] Having applied the Rothstein principles to the facts of the instant case, I come to the following inexorable conclusions. The charge provided in s 23(2)*(a)* is connected to a regulatory scheme, as provided in s 23(1) of the Act. This conclusion is reached under the first step proposed by Rothstein J in *620 Connaught Ltd*, para 25 of the judgment. Having found that a relevant regulatory scheme exists in terms of the Act, I should proceed to the second step which 'is to find a relationship between the charge and the scheme itself'. And Rothstein J tells us in para 27 of *620 Connaught Ltd* judgment that -

'This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme ...'

[11] In the instant case, the levy that s 23(2)*(a)* imposes is 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'. 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 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. See *620 Connaught Ltd*, para 25.

[12] Without beating about the bush, I should say, on a true construction of subsec (2)*(a)* of s 23, first respondent is being authorized to impose a levy, but a levy having

no relationship between the levy and the scheme itself. As *620 Connaught Ltd* tells us in para 27, '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'.

[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'. (See *620 Connaught Ltd*, para 25.) That being the case, applying the second step in the Rothstein principles, 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.

[14] As Mr Heathcote submitted, the Rothstein principles are on almost all fours with the views expressed by Basu, the well-known sage of constitutional law, that, as to regulatory fees (or levies), their 'reasonableness or vires cannot be justified as fees (ie regulatory fees or levies) where there is no reasonable relation to the cost, and its object is to raise revenue'. See Basu, *Commentary on the Constitution of India*, 8th ed (2007), p 2348, referred to the court by Mr Heathcote.

[15] On the authorities and on the facts of this case and the foregoing reasoning and conclusions, I find that the first respondent has failed to establish that the levy chargeable in terms of s 23(2)*(a)* is connected to the regulatory scheme under the Act. And I find that the applicant has shown that the so-called levy, as enabled by the provisions of s 23(2)*(a)*, has the attributes of a tax.

[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 subsection (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.

[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. For the proposition of law posited in para 3 of this judgment, 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.

[18] The first respondent has raised a preliminary point that there has been an unreasonable delay to institute this application. The first respondent avers that there has been unreasonable delay to bring the application. And why does the first respondent so aver? Only this. According to Mr Coleman, 'The Regulation are covered by s 32 of the Act; and subsec (2) of s 32 requires a challenge to regulation to be taken within six months of the applicant becoming aware of it', ie the Regulations. Furthermore, Mr Coleman says: 'Cran commenced the process to promulgate the regulations in question in November 2011. The notice of intention to make the regulations was published on 25 November 2011. The applicant participated and submitted representations. As a result of this process the regulations were promulgated on 13 September 2012. It is submitted applicant was aware of it then.

[19] As I understand Mr Coleman, the unreasonable delay to bring the application has occurred because applicant was aware of the fact that the Regulations in question were promulgated on 13 September 2012 and the first respondent 'invoiced the applicant for the levy on 1st February 2013'. And the 'application was ultimately served on CRAN on 9 December 2013, about one year after the regulation was promulgated and 8 months after applicant was invoiced in terms of the regulations. Applicant does not even attempt in its reply (I take it, applicant's replying affidavit) to explain the delay'. Counsel concludes: 'It is trite that unreasonable delay can be a basis to dismiss an application to administrative action. In this instance 6 months is the cut off by virtue of section 32(2) of the Act.'

[20] Section 32 of the Act provides:

'(1) Any person may take any regulation for which procedures have been prescribed in terms of section 30 on review on the same grounds and in the same manner as a decision of an administrative body.

(2) Any person who has a substantial interest in any proceedings before the Authority may not take any decision, order, regulation or any other action that is made or taken by the Authority as a result of such proceedings, on review after a period of six months from the date on which that person has become aware of the decision, order, regulation or action concerned.'

[21] Mr Heathcote's crisp response to the preliminary point on the question of unreasonable delay is that s 32 of the Act does not apply in the instant case. Counsel's reason is that the applicant has not come to the court to challenge s 30 regulations. I agree. The limitation provision in s 32(2) does not govern every attack imaginable against everything done or omitted to be done under the Act. The limitation provision is specific and particular in its application. It concerns a 'regulation for which procedure have been prescribed in terms of section 30'.

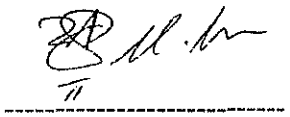
[22] I see that the limitation clause regulates the institution of judicial review application against 'a regulation for which a procedure has been prescribed in terms of s 30'. But the applicant has not approached the seat of judgment of the court to attack by judicial review a 'regulation for which procedures have been prescribed in terms of s 30'. And what is more; from the proposition of law in para 3 of this judgment about constitutional challenge to statutory provisions, I conclude that the limitation provision in subsec (2), read with subsec (1), of s 32 cannot apply to the constitutional challenge which is the main prayer or at all, or to any other attack in the notice of motion. It follows inevitably that the point *in limine* on the issue of unreasonable delay must be rejected; and, it is rejected. It is not well taken, with the greatest deference to the first respondent.

[23] Based on these reasons, the application succeeds, and I grant the main relief sought in para 1 of the notice of motion. That being the case, as I intimated earlier, I should not consider the first alternative prayer and the second alternative prayer in the other paragraphs of the notice of motion.

[24] In the result I make 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.

(b) The first respondent shall pay costs of this application, including costs of one instructing counsel and two instructed counsel.



C Parker

Acting Judge

APPEARANCES

APPLICANT:	R Heathcote SC (assisted by C E Van der Westhuizen) Instructed by Shikongo Law Chambers, Windhoek
FIRST RESPONDENT:	G Coleman (assisted by R L Maasdorp) Instructed by AngulaCo. Inc., Windhoek

CASE NO.: A 448/2013

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, WINDHOEK

THURSDAY, THE 29TH DAY OF SEPTEMBER 2016

BEFORE THE HONOURABLE MR JUSTICE PARKER, ACTING

In the matter between:

TELECOM NAMIBIA LIMITED	**APPLICANT**
and	
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA	**FIRST RESPONDENT**
THE MINISTER OF INFORMATION AND COMMUNICATIONS TECHNOLOGY	**SECOND RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**THIRD RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**FOURTH RESPONDENT**

Having heard **Mr Heathcote SC** (assisted by **Ms Van der Westhuizen**), counsel for the applicant, and **Mr Coleman** (assisted by **Mr Maasdorp**), counsel for the first respondent, on **19th** day of **July 2016** and having read documents filed of record:

THE COURT RESERVED JUDGMENT

Thereafter on this day

IT IS ORDERED THAT:

1. 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.

2. The first respondent shall pay costs of this application, including costs of one instructing counsel and two instructed counsel.

BY ORDER OF THE COURT

REGISTRAR
/ek

TO: Shikongo Law Chambers

AngulaCo. Inc.