REPORTABLE

CASE NO: A 26/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MOBILE TELECOMMUNICATIONS LTD	**APPLICANT**
and	
NAMIBIA COMMUNICATIONS COMMISSION	**1st RESPONDENT**
TELECOM NAMIBIA LTD	**2nd RESPONDENT**
POWERCOME (PTY) LTD t/a LEO	**3rd RESPONDENT**

CORAM: **Smuts, J**

Heard on: 20 March 2012

Delivered on: 3 April 2012

JUDGMENT

Smuts, J

[1] At issue in this review is the legality of the decision made by the telecommunications regulator, then the Namibian Communications Commission ("NCC"), concerning prices and the pricing structure charged by mobile telephone operators.

[2] The applicant ("MTC") is one such operator. It has the lion's share of the market. It initially approached this Court for urgent interim relief pending the review of the regulator's decision. The application for interim relief was refused and the review has proceeded in the normal course, although the regulator's regard for normality in this context has repeatedly tested the limits.

[3] Before I refer to the decision which is challenged in these proceedings, it may be conducive to clarity to first refer to the factual background which gave rise to this application as well as briefly set out the statutory framework within which the challenged decision was taken.

[4] The regulator (NCC) was established under the Namibian Communications Commission's Act, 4 of 1992 (the Act) which subsequently underwent some amendment. The regulator's functions include the power to issue telecommunication licenses and exercise control over and supervise the telecommunications industry. Under the

Posts and Telecommunications Act, 19 of 1992, telecommunication services may only be conducted under the authority of a license granted by the regulator. Such a license is subject to the restrictions and conditions which may be imposed by the regulator generally or in a particular case. [1] The regulator is authorised to impose these conditions generally by way of notice in the Government Gazette. [2]

[5] The regulator's empowering legislation was amended in 2004 to enable it to determine the procedures, fees and conditions relating to telecommunication licenses. The regulator was specifically authorised to take into account when considering granting a telecommunications license matters relating to fair competition and any other matter which the Commission considers relevant. [3] The regulator is also expressly authorised to impose obligations and requirements on an applicant for a license regarding its rights and obligations relating to interconnection.

[6] Prior to the licensing of telecommunications operators brought about by the legislation referred to, services of that nature were the exclusive preserve of the State which thus had a legislated monopoly. One of the considerations which form the basis for this prior regime was a governmental imperative to ensure universal access to

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[1] S 2(3) of Act 19 of 1992

[2] S 2(4) of Act 19 of 1992

[3] S 22(B)(4) of the Act

telecommunication services. [4]

[7] This statutory framework has since changed. After the decision was taken, the Act was repealed and the NCC has been succeeded by the Communications Regulatory Authority of Namibia ("CRAN") which formally substituted the NCC in these proceedings.

[8] The applicant (MTC) had been the sole mobile phone operator in the Namibian market from 1995 to 2006. A second operator, the third respondent (LEO) was then licensed, although it initially traded under a different name. The Act was amended in 2004 to empower the regulator to take into account relevant matters relating to fair competition when considering the granting of the requisite license. The mobile phone market thus transformed from a monopoly carried on by the applicant to one which contemplated fair competition and other participants. The amendment also brought about the authority to the regulator to determine procedures, fees and conditions relating to licenses.

[9] In the answering affidavit, the erstwhile chairperson of the NCC, Ms Beukes-Amiss, referred to the need for regulatory intervention, including regulating tariffs in order to create fair competition in this context so that new entrants like the third respondent (and the second respondent with its mobile offering) would be afforded the space to

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[4] Burns *Communications Law* (2nd ed, 2009) at 397-399

actively participate in the market.

[10] The former chairperson also explained certain terms which are, used in the mobile phone industry such as a club effect. It occurs where offerings are structured so that customers of a network which has a large pool of subscribers can benefit from calling and being called from that large pool of subscribers. This could have an adverse impact upon competition and also create traffic distortion across networks and thus negatively impact the consumer. There was also reference to cross-subsidisation and tying or bundling with prices being set below cost as a strategy for customer acquisition. This occurs where the use of one product is conditional upon the purchase of a second product or where discounts are offered to customers who take a combination of products or services. These strategies would not necessarily inhibit competition but could do so depending upon circumstances. There was also reference to the concept of predatory pricing where an existing operator prevents entrants from gaining any reasonable foothold within the market by aggressively charging very low prices. That incumbent would then be able to subsequently raise prices to recoup lost profits which resulted from such an exercise, after repelling its opposition.

[11] It is within this context that the regulator supervises the industry and exercises its powers with regard to licensing and setting of conditions including prices. The statutory injunction to take into account fair competition is underpinned by the introduction of the

Competition Act, 2003. [5]

[12] The erstwhile chairperson of the regulator stressed that a fundamental reason for tariff regulation would be to promote competition which is in the public interest and consonant with the values and principles set out in the Competition Act.

[13] This is statutory context which has given rise to this application in which MTC seeks to set aside the decision taken by the NCC as published in Government Gazette 36 of 2011. The relevant portion of the Gazette is as follows:

> **"All Licencees and providers of public mobile cellular services shall implement a price cap for off-net call prices and call prices to fixed-lines to the level of their on-net prices. Off-net prices and prices for calls to fixed-lines may no longer exceed those of on-net calls for each product or service. <u>This applies for voice and text messages</u>.**
>
> **However, rates charged on voice calls between numbers belonging to the same institution or company, where subscriptions are part of the same contract (i.e. intragroup tariffs) are exempted from the above resolution. Intra-group**

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[5] Act 2 of 2003 put into operation on

calls shall be classified as internal calls.

The price cap will only have a small negative financial impact on MTC and LEO since the majority of billable minutes are on-net, but will be of greater benefit to their customers in providing affordable services. The amendment is based on the following reasons:

1. **Mobile termination rates were reduced to the cost of an efficient operator on 1st January 2011. Terminating a call on another mobile network or on a fixed-line network therefore costs approximately the same as on the own network.**

2. **The spirit of the licences granted is fair competition. Operators are not allowed to engage in any anti-competitive cross-subsidisation. Without an objective cost difference there exist no reasons for discriminating in retail prices against other networks.**

3. **Club effects which arises when consumers tend to have a preference for a network with a large pool of subscribers in order to benefit from the possibility to call and be called at a lesser calling rate by the largest possible number of subscribers have adverse impacts on competition and consumer welfare. The enforced price**

> **<u>cap will reduce any club effects and curb traffic distortions</u>.**
>
> **Bundled voice minutes and text messages are expected to be network neutral. <u>Bundled voice minutes and text messages are not part of this regulation</u>. The Namibian Communications Commission (NCC) will monitor market developments and regulatory interventions may be undertaken if bundling is being used to create club effects.**
>
> **The Namibian Communications Commission (NCC) strives to ensure fair competition in Namibia's telecommunication sector."**

[14] The gazetting of the decision was preceded by notices to the operators being MTC and the second and third respondents. Their notifications did not include the underlined portions of the above text which appeared in the Gazette. The significance of this aspect is referred to below.

[15] The factual background to the taking of the decision of relevance to this application extended over some 18 months. On 12 June 2009, the third respondent (LEO) directed a written complaint to the Commission, taking issue with high off-net rates charged by MTC. These are the rates which MTC charged its customers to connect to other networks. It is self-evident that a practice of this nature could

inhibit a new entrant from gaining a foothold within the market. In this context the previous chairperson of the Commission referred to the best international practice to address an issue of this nature would be to utilize wholesale price interventions known as termination rates to bring about fair competition. Only if this intervention did not achieve the desired degree of fair competition, should a regulator then resort to regulating retail prices.

[16] The process which was initiated by this complaint did not however lead to a reduction in off-net and on-net price differentials for most products offered by operators. In May 2010 the then chairperson of the NCC addressed MTC, raising the Commission's concern that MTC was not passing on a reduction in termination rates to consumers. This letter specifically foreshadowed the NCC considering a price cap and rate of return regulation should termination reductions not be passed on to consumers. High off-net rates were specifically stated by the NCC as being seen as **"anti-competitive pricing to misuse market dominance to cause traffic imbalances**".

[17] The MTC and other operators were invited to propose off-net and fixed price reduction within some 10 days after the letter was addressed. The second and third respondents each referred to their initiatives in passing on a reduction of termination rates to consumers. The second respondent expressly stated that current off-net rates were anti-competitive. MTC responded by referring to its own initiatives

which resulted in a decrease in off-net prices and sought to persuade the NCC not to regulate prices by asserting that its own prices were competitive within the context of the SADC region.

[18] The NCC then separately responded to the three operators in letters on 27 July 2010. In its response, the NCC acknowledged the reduction in off-net prices. It confirmed to the second and third respondents that they each believed that a regulatory intervention was required by the NCC. In its response to MTC, the NCC stressed MTC's license conditions which reserved the right to the NCC to enquire about tariffs or fees and the right to order an amendment to tariffs, fees or services with written reasons and justification. The letter proceeded to state:

> **"The NCC understands from MTC's response that it believes that no regulatory intervention is required. However, a Namibian operator lodged a complained with the NCC regarding MTC's high off-net and fixed-line rates. The NCC has several options to deal with such a complaint. Conducting an extensive market/tariff study, as MTC suggested, is one of them. For now, the NCC seeks the opinions of operators regarding the need for tariff regulation and the views for particular regulatory interventions such as price caps for off-net and mobile to fixed-line prices. A market/tariff study and subsequent regulatory interventions**

would not be required if operators signal their willingness to reduce off-net and fixed-line prices. The NCC would like to invite MTC to comment the following proposed interventions:

1. **Price cap for off-net calls and calls to fixed line networks of N$1.80.**

2. **Mandated reduction of off-net calls and calls to fixed-line networks in line with termination rate reductions for all operators.**

3. **Setting off-net prices equal to on-net prices and equal to calls to fixed-line networks. This intervention removes advantages a network may have to size and eliminates "club" effects.**

4. **Setting a price cap of on-net price plus termination rate for off-net call and calls to fixed-line networks. This is a softer cap compared to the intervention 3 and limits possible advantages from network size and club effects.**

The NCC would like to invite MTC, as well as other mobile operators, to comment on the suggested interventions and detail their plans for off-net prices and prices for call to fixed line networks by Tuesday August 10, 2010.

Please do not hesitate to contact me if two weeks is too short for MTC to respond to this request.”

[19] The regulator's approach was welcomed by the second and third respondents. The third respondent specifically supported non-discrimination between on-net and off-net rates on all tariff packages and promotional offers and to eliminate the club effect which would afford consumers the opportunity to choose between operators.

[20] In its response, MTC in a letter dated 9 August 2010 reiterated its position that the proposed interventions would be **“unwise”** and **“unnecessary”** and would hurt consumers. It did not respond to the invitation to address the four options set out in the letter of 27 July 2010 and instead raised what it termed **“three over-arching points”**:

“1. The NCC does not have the legal authority to take the actions it has proposed;

2. The NCC has not followed proper procedures; and

3. The rate regulation that the NCC threatens is unwise, unnecessary and will end up hurting consumers more than it helps.”

[21] The MTC response further stated:

> **"Around the world, consistent with proper regulatory practice and common law principles, to determine both the need for and method of regulating both retail and wholesale rates, regulators are required to undertake a fair and transparent process that allows for effected (*sic*) parties to present legal, economic, and technical arguments so that the regulator avoids decisions that are arbitrary or that undermine good public policy. Here, in sharp contract to proper procedures, the NCC is attempting to make its determination based simply on a series of brief letters demanding comment within incredibly short turnaround times – and referring to a complaint that MTC has seen, which was filed by an anonymous party. This in our view violates MTC's rights to a fair and reasonable administrative justice or action. Such a process imply cannot result in an informed decision. A thorough and proper proceeding must therefore take place before the imposition of dramatic new regulations, in which MTC is presented with the specific reasons for regulation rather than generalities, and in which MTC is afforded adequate time to respond with legal and economic testimony on these complex and important issues. Without such a**

> **proceeding the NCC will not comply with section 18.8 or well established principles of Namibian Administrative Law."**

[22] The reference to "section" 18.8 is a paragraph of that number included in MTC's license conditions which permits the NCC to order an amendment to its tariff, fees or services with written reasons and justification to which I have already alluded.

[23] Instead of seeking further time to respond to the regulator's invitation for comment on the four specific proposals, MTC instead reacted in this manner to that invitation. It did not subsequently seek further time to respond to the four specific proposals.

[24] The third respondent (LEO) subsequently addressed the NCC on 20 October 2010 requesting it to take speedy and effective action in respect of the regulation of cross-network tariffs and specifically stated:

> **"MTC has always charged higher tariffs to other networks than on their own network. This is a typical abuse of a dominant position ...".**

> and

> **"It is clear from these packages that MTC abuses its**

dominant position with impugnity.”

[25] This approach was followed up by LEO with further letters in November 2010 referring to MTC’s **“abuse of dominant market power and anti-competitive practices”**.

[26] The regulator then on 9 December 2010 addressed a further letter to the operators, including MTC, entitled **“Off-Net Rates, Dominant Market Position and Anti-Competitive Behaviour”** which reads as follows:

> **“During the past few months, some operators have lodged complaints pertaining to the issues of off-net rates, dominant market position and anti-competitive behaviour.**
>
> **The same complaints were also lodged with the Political Office Bearers of the Ministry of Information and Communication.**
>
> **In pursuant to address these concerns the Chairperson of Commission and the Honourable Minister of Information and Communication deliberated on these issues and concluded that amicable solution should be obtained for these concerns as a matter of urgency.**

Kindly take notice that the Commission is currently perusing the various alternatives and suggested suitable options regarding the modes operandi in solving the issues relating to the different concerns areas.

Further take notice that should the Commission be eventually convinced of the identified and/or proposed suitable options as solutions to various concerns, the Commission would make a ruling / directive to be published in the Government Gazette as a General Notice and all the Operators will be informed accordingly and required to adhere thereto.

It is against this background that the Commission would like to inform you that the mentioned issues are receiving its attention, hence, you will be informed of the Commission's final position pertinent to all the concern areas in due course.

I trust that the above is to your satisfaction."

[27] This letter resulted in a swift response from LEO on 13 December 2010 encouraging action on the part of the regulator. On 29 December 2010, MTC set out its position with regard to off-net rates. It complained that the NCC had not spelt out its written reasons and

justifications for regulations. It further asserted that **"proper regulatory practice and common law principles"** require that regulators undertake **"a fair and transparent process that allows for affected parties to present legal, economic and technical arguments in response"**. In the absence of this, MTC contended that the regulator's decision would be arbitrary or undermine good policy. It also asserted that its rates are reasonable and competitive and that it offered a variety of service offerings to consumers. It complained that the complaint had not been provided to it. MTC also asserted in this letter:

> **"In sharp contrast to the proper procedures mentioned above, the NCC is saying that a decision will be taken if the Commission be convinced of the suitability of the proposed options to the various concerns, which we deduce to mean policy solutions suggested by the complainants. In our views, that it would be a tremendous violation of MTC's rights if we were not given an opportunity to make our written comments, and if our points of views were not taken into consideration as well."** (*sic)*

[28] The erstwhile chairperson of the Commission points out with regard to this passage that the MTC was afforded an unlimited opportunity to present legal, economic and technical arguments in response to the NCC letter of 3 May 2010 informing MTC and other

operators that it had intended to regulate retail prices through price caps for off-net and fixed line calls. The MTC response of 29 December 2010 also included reference to data in a study conducted by Frost and Sullivan concerning pricing within the region. The MTC further stated that the complainants should be required to make public their legal, economic and technical arguments and an opportunity afforded to MTC to defend or comment in order for the process to be transparent. It further stated:

> **"Only having this participatory methodology, with the possibility for the parties to produce their written submissions, can the conditions be created for the industry to reach the desirable amicable solution. This way forward is paramount, rather than taking a decision as mentioned in subparagraph (e) above which might force MTC to defend its rights to have a fair and reasonable administrative justice or action and which could expose NCC to all procedural fragilities mentioned above."** *(sic)*

[29] On 19 January 2011, the NCC invited MTC and the other operators to an industry hearing to make representations regarding retail price regulation. The letter of invitation stated:

> **"The proposed regulatory intervention is to set a price cap limiting retail prices for off-net calls and calls from mobile to**

> **fixed line to the level of on-net price for all license services."**

[30] The NCC provided background in the letter with reference to complaints raised by the second and third respondents and also referred to the four options referred to in the NCC's earlier letter (of May 2010) to the operators. It was expressly stated by the NCC in the letter that:

> **"The industry hearing aims at giving operators a platform to express their opinions additionally to the written comments made to the NCC. Operators are expected to provide legal, technical and economic arguments for or against the proposed intervention."**

[31] The hearing was thus set for 3 February 2011, giving the operators two week's notice. On 21 January 2011 the Commission also addressed the operators including MTC and requested their tariffs on all products for approval in accordance with their licenses by no later than 31 January 2011. There was express reference to the license condition which gave the NCC the right to request details of tariffs or fees and to order an amendment to tariffs, fees or services with written reasons and justification. There was also reference to the license condition which required MTC not to charge any tariff or fee until lodged in writing with the regulator.

[32] On 31 January 2011, MTC addressed a letter the NCC concerning

the industry hearing, confirming that it would attend, but stressed that the regulator was **"not following appropriate procedures that are required before holding the hearing and envisaged regulatory intervention"**. It complained again that the complaint had not been forwarded to it and requested the NCC to postpone further regulatory action until it had conducted a proper market study. The letter further stated:

> **"Importantly, NCC's actions are also inconsistent with its obligations under section 28.1 of MTC's license which requires that the NCC act reasonably having regard to all surrounding circumstances before taking any decision, afford the operator reasonable opportunity to make representations in respect of all relevant issues and furnish written reasons for any decision so made. Clearly NCC neither responded to substantive issues raised in our letter of 9 August 2010, nor has it given MTC a written detailed explanation (and/or conducted any market study) before these decisions and regulatory intervention were taken. We have not received such an explanation, but only cursory letters with inadequate information and detail."**

[33] Despite this approach, the letter did not request any specific information or details from the NCC.

[34] The NCC through its chairperson responded to this letter by

making it clear that no decision had as yet been made and that once it would be made, reasons would be provided. It was also pointed out that legislation relied upon for some of MTC's contentions, the Communication Act, 8 of 2009, had not as yet been put into operation. The NCC also referred in its response to five written submissions made by MTC regarding price regulation in letters of 14 May 2010, 9 August 2010, 29 December 2010 and two of 31 January 2011 and stated that these responses had been considered by the NCC. It was also stressed that the hearing would provide MTC with the opportunity to be heard by presenting its position and discussing it with the regulator, (and responding to the other operators) and which had followed consultation over a nine months and was not premature – and thus there was no need to postpone it. The letter concluded by again inviting MTC to comment on the four possible regulatory interventions regarding off-net retail prices in the NCC letter of 27 July 2010. It was pointed out that MTC had not commented on any of these and was granted yet another opportunity to be heard in that regard at the hearing.

[35] The industry hearing proceeded in 3 February 2011. It was attended by MTC and the other operators, second and third respondents. An expert, advising the NCC, Dr Christoph Stork, was also in attendance and served as the facilitator at the hearing. He stated that the purpose of the hearing was for the Commission to receive industry concerns and input and to discuss the proposal of a price cap for off-net calls and calls to landlines from mobile phones. He

referred to the reason for the proposed options being to ensure fair competition and pointed out that the regulator would choose to intervene as little as possible and only to the extent necessary for this purpose. He further provided an analysis of the different operators' pricing structures. He referred to the fact that MTC had a market share of 85% and that one would ordinarily expect its traffic to be 85% on-net and 15% off-net, but that this proved not to be the case. In fact a survey had revealed that 96.4% of its traffic was on-net and only 0.08% was off-net, contrasting with the statistics obtained from the other operators. He thus explained that the consequence of a price cap would be that the network size would no longer be a factor which consumers would need to take into account in choosing an operator or service. Dr Stork also dealt with the financial impact of a price cap for the different operators and pointed out that a loss of revenue of less than 1% would arise for MTC and that there would also be a loss of revenue for LEO. A number of further aspects pertinent to the issue were outlined by Dr Stork in his presentation.

[36] The operators were then afforded the opportunity to present their arguments on this and other relevant issues. Each of them did so, including MTC. The latter's was in the form of reading out a statement similar to that contained in its correspondence with the Commission and again not specifically addressing the actual interventions proposed by the Commission, despite being repeatedly invited to do so.

[37] On 9 February 2011 the Commission met to make a decision on the issue. Details of its meeting in the form of contemporaneous minutes are inexplicably cryptic and extremely brief, particularly in view of the statement by the erstwhile chairperson in the answering affidavit that the meeting lasted some 8 hours. No minutes of this meeting were provided when the record of the decision making first was made available and even at a later stage when compelled by way of court order to provide a more complete record. Other documentation was provided. It was only after a yet further application was made and a further order was granted that these cryptic minutes emerged and well after MTC had filed its supplementary affidavit under Rule 53(4).

[38] Under the heading of matters arising from minutes of a previous meeting, item 6.1.1 with the heading **"Off-net and on-net rates of the operators [MTC, LEO and Telecom]",** the minutes stated the following on the issue:

> **"The operators should be informed in writing about the proposed ruling to be published as a general notice and advised to comment. The chairperson has prepared the letters to be forwarded to the operators as well as the general notice. The Commission resolved that, if no response or comment is received from the operators, the Secretariat should formalise the general notice and submit it to the Ministry of Justice for publication in the Government**

Gazette."

[39] That was the extent of the recordal of this item in the minutes of the meeting of 9 February 2011. No subsequent minutes were provided which adopted these minutes. This cryptic minute is to be read with NCC's chairperson's answering affidavit. The minutes, as confirmed by her affidavit, stated that two of the Commissioners were present with the one being absent with apology. It was also reflected in those minutes with reference to the apology that

> **"The Commission said that all resolutions should be forwarded to Ms S Ankambo** (the Commissioner who was absent with apology) **to endorse or ratify."**

[40] No written recordal of any endorsement or ratification by Ms Ankambo was provided as part of the record. Nor is any affidavit filed by her on this or on any other issue.

[41] At the industry meeting, a further invitation was extended to the operators to provide further presentations. In view of that invitation, MTC forwarded a further letter to the regulator proposing a compromise and expressing certain concerns in respect of the proposed cap on on-net and off-net rates favoured by the other operators. This letter was faxed to NCC on 9 February 2011 in the late afternoon (at 17h42). The erstwhile chairperson stated that this letter was handed to the

Commission and tabled during its meeting. This letter reiterated MTC's view that the proposed intervention limited competitive behaviour and did not best serve the interests of consumers. Ms Beukes-Amiss stated that it was fully considered by the Commission in reaching its decision. She points out many of the issues raised in it had been previously considered and addressed in the preceding process. She also stressed that the question was not essentially whether the MTC rates were affordable or not and reasonable within the context of the region, but rather that club effects combined with the high market share could impact upon competition by hampering the passage of new entrants to the market.

[42] As far as the compromise proposed by MTC was concerned, Ms Beukes-Amiss stated that the regulator would only accede to the second condition relating to intra group traffic exclusion as an exemption. Ms Beukes-Amiss further stated that, **"after a very full and detailed consideration of all the documentation and submissions before it, both written and oral, and the consideration of the environment within which the operators conduct business within the industry in Namibia, ..."**, the Commission made the <u>decision</u> set out in the letters sent to the three operators quoted above - with the exception of the underlined portions which were subsequently added to the decision, as subsequently appeared in the Gazette. The letter to operators is referred to in the minutes. It had been tabled and adopted by the Commission and also called upon operators to **"resubmit amended**

tariffs for all products and services to NCC for approval by the 7th of March 2011".

[43] The then chairperson of the NCC confirmed in her affidavit, as is foreshadowed in the cryptic minutes of the discussion, that she had tabled the latter to the operators for approval in the form of the text contained in the Gazette, with the exception of the underlined portions. It follows that the underlined portions of the text which were subsequently gazetted did not serve before that meeting and were thus not approved by that meeting. Nor did they serve before the commission prior to publication.

[44] It was contended by Mr Frank on behalf of MTC that the decision taken at the meeting contemplated a further decision making stage prior to completion and to publication in the Gazette, in the sense that there would be consideration of comment from the operators before finalising the decision which would then be published in the Gazette. He submitted that the decision making process had not been completed. As is clear from the facts, the operators did provide some further input which was then incorporated in the underlined portions of the text which was published in the Gazette. But these comments would not appear to have properly served before the NCC. They had rather been inserted by the chairperson or the Secretariat prior to publication. Mr Frank submitted that these portions had thus not been approved by the Commission and at the very least should be struck and removed from

the text published in the Gazette or that the Gazette should be read down to that extent.

[45] Mr Heathcote who appeared for the second and third respondents argued that the underlined portions made no difference to the decision and merely served to amplify the decision already taken and did so within permissible limits.

[46] Whilst it is correct that certain of the underlined portions were included as part of the reasons and did not alter the decision, two of the underlined sentences however purport to form part of the decision. Firstly, there is a sentence stating that the decision applies to voice and text messages. Secondly, there is the further sentence that bundled voice minutes and text messages do not form part of the decision.

[47] Mr Heathcote submitted that it was not necessary for these statements to have formed part of the original decision by virtue of the definition of "call" contained in the applicable license conditions which had been gazetted in 2007.

[48] Whilst it is correct that this definition of call may address the first of these insertions, it was in my view not permissible for these insertions to have formed part of the text in the Gazette if they had not served before the NCC. They may form the subject of interpretation with the assistance of the definition of call contained the gazetted

conditions. But it was not open to the chairperson or secretariat of the Commission to amplify or alter the decision without the NCC convening to do so. In the NCC's answering affidavit, the then chairperson clarified that the additional matter inserted in the Gazette (which did not serve before the Commission when it made its decision on 9 February 2011) was inserted to remove ambiguity. But it was clearly not for her or members of the Secretariat to do so. It was for the Commission itself to revisit its decision in order to improve or clarify it and then to pass a resolution to that effect.

[49] As a matter of process the NCC had not acted properly by publishing the text as its decision when the actual text had not served before the NCC. If it were to amend its decision to incorporate comment from the operators before being published in the Gazette, then it should have convened for the purpose of considering those comments and adopting them before they could be included in the decision which was to be gazetted.

[50] Mr Frank's submission that these portions should be excised from the decision is in my view sound.

[51] It would follow that the notices to operators represent the decision taken by the NCC and not the amplified version gazetted which was not approved by the Commission.

[52] It is also clear that as a matter of process, the minutes of the NCC should have properly reflected the decision taken by it. This is unfortunately not evident from its own minutes. This is again inexplicable from a regulator whose decision making must be the outcome of a proper process in accordance with its empowering legislation and sound principles of governance. The fact that these sentences may in any event be a matter of interpretation when considering the definition of call does not in my view address the severe shortcomings in the process adopted by the regulator in reaching its decisions.

[53] The Commission as a statutory body has a duty to properly keep minutes and record the decisions it takes. This is especially the case where those decisions are taken as regulator and which impact upon operators regulated by the Commission's decision making. There was thus a failure on the part of the Commission to meet this basic standard in conducting meetings and in governance. The reasons for compliance with this duty are self-evident. There needs to be a proper record reflecting the contents of resolutions of a body which has perpetual succession. They need to be ascertained with accuracy. [6] The Commission failed dismally in this fundamental duty. Its decision is however ultimately ascertainable from the minutes read with the notices

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[6] See Minister of Agricultural, Economics and Marketing and another v Peyper 1964(1) SA 206 (T) at 212

which were then given to the operators and read with the chairperson's affidavit.

[54] Mr Frank also urged me to find that there had been no resolution in view of the conditional nature of the wording of the Commission's resolution with reference to the absent member who was afforded the opportunity to endorse or ratify its decisions. He also submitted that it was provisional and not final, also in the sense that operators' comments would first be considered before a final decision would be published in the Gazette. Mr Corbett, who appeared for the first respondent, referred to the statutory regime governing the NCC and in particular to s 9(2) of the Act. It provides that the majority of the Commission forms a quorum for its meetings and that the decision of the majority of the members present at the meeting constitutes the Commission's decision. Mr Corbett submitted that the decision was valid because it met this statutory requirement and did not require the absent member's endorsement or notification. He also questioned whether it was open to Commission members to decide that a unanimous decision would be required in the face of this provision.

[55] It may not necessarily be *ultra vires* the Act if the Commission expresses a preference to make an important decision by way of unanimity, if possible. But in the absence of unanimity on an issue, the Commission would then need make its decision by way of majority vote in accordance with s 9 of the Act. It would however not seem to me to be

open to the NCC to require unanimity given the express dictates of the Act. A condition to that effect would thus be in conflict with its own empowering statute and not competent.

[56] On the facts before me, there is nothing to suggest that the absent member did not endorse or ratify the decision. It would have been preferable for this to have been addressed in an affidavit by her. In the answering affidavit this aspect is not even dealt with. Unfortunately no affidavit was filed by the absent member.

[57] It would have been open to the absent member to have subsequently ratified the decision given that was what the Commission contemplated. Even though this has not been expressly dealt with, it would seem to me that there had been an implied ratification on her part.

[58] Both Mr Corbett and Mr Heathcote stated that this point should have been raised in the applicant's founding or supplementary affidavit and that review grounds cannot be raised in a replying affidavit or even subsequently in heads of argument. Whilst this proposition is entirely correct, [7] I hasten to point out that the minutes of the decision were only provided after the second Court Order had compelled its production, given the incomplete record previously provided. MTC had

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[7] Mostert v Minister of Justice 2003 NR 11 (SC)

already by then filed its supplementary affidavit under Rule 53(4). If it sought to raise this aspect as an additional review ground, it should then have applied for leave to file a further supplementary affidavit so that the decision maker would have had the opportunity to address the issue. Leave would certainly have been given for such a further affidavit to be filed for that purpose, given the extremely dilatory and unacceptable manner in which the record had been provided.

[59] Mr Frank countered by arguing that the point arises from the minutes themselves and that it is open to MTC to raise it by virtue of what is stated in the minutes. This is also correct but then MTC is confined to what is stated in the minutes. In the absence of this aspect having been canvassed further factually, it would seem to me from the minutes and subsequent developments that there has at least an implied ratification of the decision on the part of the absent member. Given the provisions of s 9 of the Act, the actual consent of the absent member could in any event not be required for its validity. I accept that the decision taken was not provisional in the sense that it could not take effect.

[60] Although MTC has with justification criticised the slovenly manner of decision making and record keeping by the regulator, it would seem to me that a decision was taken as is reflected in the notice sent to the operators. Insofar as the Gazette goes further in the respects I have already referred to, those further portions are to be excised.

[61] Although the attack upon the NCC's decision was wide ranging in the founding and supplementary affidavits, Mr Frank narrowed the attack to two further issues, as I understood his argument. The two further review grounds raised against the Commission's decision relate to its reasonableness (and rationality) and secondly a claim that MTC was not afforded a proper hearing in the sense of being able to address the interest of the consumer as this issue had not been put to MTC during the process of consultation, so it was contended by Mr Frank.

[62] Mr Frank submitted that the NCC did not show a rational basis for what he termed as its interference with the tariffs in the industry and to interfere in the market, given the fact that it had also stated that it was not necessary to investigate the issue of abuse of a dominant position and by virtue of the NCC statement to the effect that cross-subsidisation, tying or bundling would not necessarily impede competition or that there was predatory pricing. In the absence of establishing these aspects and a market failure by way of a market survey or having demonstrated abuse of a dominant position or anti-competitive practices, he submitted there was thus no reason for the Commission to interfere with pricing and thus no rational basis for its decision.

[63] Mr Frank also submitted that the question of forcing prices down in the interest of the consumer was not raised until the decision had

been attacked. The consumer interest had not been put to the industry in the process of consultation. He submitted that the process was flawed as a consequence and that MTC had not been recorded its full right to be heard in the absence of the opportunity to respond to this adverse issue.

[64] With reference to the first component of this challenge, asserting that there was not a rational basis for the decision making, the starting point is an examination of the Commission's powers within its statutory and regulatory context. In terms of its empowering legislation read with the license conditions, the Commission enjoyed the right, with written reasons and justification, to order an amendment to the tariffs, fees or services charged by operators. In doing so, the conditions also require that the Commission is to act reasonably having regard to all surrounding circumstances and afford licensees every reasonable opportunity to make representations in respect of all relevant issues. These license conditions essentially embody the requisites of Article 18 of the Constitution which require statutory bodies to act fairly and reasonably and comply with the requirements imposed upon them by common law and their empowering legislation.

[65] In assessing whether the NCC acted fairly, the nature of the Commission's impugned decision is to be considered within its context, namely being that of price regulation of a specialist regulatory body authorized to do so. The legislature appointed the Commission to

regulate the telecommunications industry. Its empowering legislation was amended to accord it the power to set restrictions and conditions for the licenses of operators, specifically including pricing, tariffs and fees for services. In this context, the Commission may also take into the considerations of fair competition.

[66] The choice made by the legislature to enact a statutory scheme which could include price regulation as opposed to market forces determining prices was justifiably not challenged in these proceedings.[8] What is challenged is the exercise of that power.

[67] The regulation of fees or prices for specialist services was recently the context of a decision by the Supreme Court in Trustco Ltd v Deeds Registries Regulation Board and others[9]. The Court dismissed a challenge upon the regulation setting conveyancing fees. O'Reagan AJA, speaking for a unanimous court referred to the nature of the enquiry in that context in the following way:

> *"What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the*

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[8] Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at par [263]

[9] See 2011(2) NR 726 (SC)

administrative conduct, the identity of the decision-maker, the range of factors as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available."[10]

[68] An important factor in this context, as was stressed by O'Reagan AJA in that matter, was decision making by a specialist body within a specific industry or area of endeavour.

"The board is specialist body with expertise in the field of conveyancing. ...Quite clearly, there was a range of other options that the Board and the Minister could have chosen when they determined the tariffs. They could have set the rates differently, or they could have, as the appellants argue they should have, imposed a guideline or an hourly rate. That there is a range of other policy choices, however, does not mean that the route adopted is

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[10] Par [31]

unreasonable."[11]

[69] In addressing the challenge against the compulsory conveyancing tariffs set by a statutory board of specialists (which tariffs were challenged inter alia because they inhibited competition), the Supreme Court further stated:

> *"The respondents admit that the effect of compulsory tariffs is to prevent conveyancers competing on price. This effect is inevitable if certainty as to conveyancing charges is to be achieved. Although there may be circumstances where preventing competition on price would be unreasonable, there are considerations relevant to this case that suggest the converse. These include the following. First, the effect of a fixed tariff has not been shown to be a material barrier to the practice of the profession of conveyancer. Secondly, the service performed by conveyancers is a service that must be used by all those who wish to own property, as it is only conveyancers who are permitted to arrange for the transfer of ownership of property and the registration of other rights against property in the deeds office. Accordingly, it is appropriate that the service be regulated in the public interest. Thirdly, although there may be other advantages were competition on price to be permitted, a fixed set of tariffs also has advantages. It permits people who are calculating whether they can afford to buy a*

[11] Par [32]

property to know at the outset what the conveyancing charges will be... Fourthly, the board that sets the tariff...is a committee of experts in conveyancing, well placed to make the decision as to the approach in setting the tariffs"[12]

and concluded:

"...(W)hile it may be that it would be reasonable to permit competition on price, it cannot be said that to prohibit it is, in the circumstances of this case, an unreasonable course. Accordingly, the appellants have not established that the tariffs constitute an infringement of art 18 of the Constitution."[13]

[70] The approach of MTC would appear to be premised upon the need for a range of specific findings by the Commission such as a market failure and an abuse on its part of a dominant position and/or of anti-competitive practices to exist before the Commission could make its decision to set prices in the way in which it did. That is in my view not required and thus not correct.

[71] The setting of prices for specific services is an option open to the Commission. It would need to justify the course selected by it with

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[12] Par [34]

[13] Par [35]

reasons. These would thus need to be reasonable and justifiable and have a rational basis. The Commission did not in my view first need to establish a market failure or wait for that to occur before it made its decision, although it could have done so. Nor did it need to make any specific findings against MTC before it could make its decision to set prices. It needed to select a reasonable option from those open to it. At the industry hearing, a presentation was made to the operators on the options open to the Commission, expanding upon four options which had been referred to in correspondence by the Commission to the operators.

[72] When the Commission made its decision, it also provided reasons to operators so as to justify it. The reasons are set out in the letter to operators, as later published in the Gazette. They are quoted in paragraph [13] above. There is a rational connection between them and the decision taken by the Commission and its statutory objectives, as set out in the Act and the licence conditions.

[73] Mr Frank's attack was largely devoted to paragraph 2 of the notice. It referred to fair competition and that operators are not permitted to engage in anti-competitive cross subsidisation. It also tellingly stated that without an objective cost difference there existed no reason for discriminating in prices against other networks. As I have said, there was no need to have premised this upon any specific finding adverse to MTC. It was one of the considerations and reasons

underpinning the decision to introduce a price cap for off net call prices. This and the other reasons thus provided in my view are rationally connected to the decision and justify it

[74] The reasons provided by the Commission within the context of its decision making in my view demonstrate that a reasonable choice was made by the Commission, exercising one of the reasonable options open to it. It is not for this Court to consider whether there may have been better options open to the Commission in setting prices, particularly in the context of a decision of a specialist administrative body, as long as the decision taken represented a reasonable option open to the NCC, as was stressed by the Supreme Court in the conveyancing fees matter. As was also emphasised by Shivute CJ in Waterberg Big Game Hunting Lodge v Minister of Environment[14]:

> **"The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves."[15]**

Shivute, CJ also referred to the need for deference to administrative

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[14] 2010(1) NR 1 (SC)

[15] Supra at 31 H-I

agencies when making decisions of a technical nature, in following the Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environment Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd [16] where it was stated:

> **"Judicial deference is particularly appropriate where the subject matter of administrative action is very technical or of a kind which the Court has no particular proficiency."** [17]

This approach was also carefully explained by Cameron JA in Logbro Properties CC v Bederson NO and others [18] with reference to well reasoned articles by academics on the subject.

[75] In respect of MTC's complaint that it was not accorded its right to *audi alteram partem* by the Commission because the interest of the consumer had not been put to MTC in the consultative process, this is likewise to be seen within the context of the decision making viewed as a whole. It had entailed a consultative process which had extended over a period of some 18 months.

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[16] 2003(6) SA 407 (SCA) at par [53]

[17] At par [53]

[18] 2003(2) SA 460 (SCA) at par [21] followed by the Supreme Court in Minister of Mines and Energy v Black Range Mining 2011(1) NR 31 (SC) at par [20] – [21] and in the Waterberg – matter at p 32-3.

[76] It had been initiated by a complaint by LEO. At an early stage of the process and in May 2010 already, the operators were specifically informed that the Commission considered a price cap and rate of return regulation should termination rate reductions not be passed on to consumers. Operators were then plainly put on notice that the interests of consumers were to be taken into account in determining the issue of setting prices by the Commission. This after all also encapsulates the public interest which the Commission would in my view be required to take into account in the exercise of its discretion in performing its functions and in reaching its decisions.

[77] It is thus accordingly not correct to assert, as is done by MTC, that it was not on notice to address the issue of consumer interests in the context of the complaint raised and in the context of the Commission's range of options in addressing the complaint. Even if it had not been pertinently raised in the correspondence or at the industry meeting in the way in which the reason was subsequently given, it is an aspect which in my view the Commission was entitled to consider and address in its decision making and had apprised the operators would be a factor. But MTC could in any event in my view reasonably have expected that the Commission should take into account the interest on consumers[19].

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[19] Dawn v Malan NO en andere 1960(2) SA 734(A)

[78] In taking into account the consultative process viewed as a whole, it would seem to me that MTC had been accorded a very ample opportuninty to be heard. At a very early stage, its views were invited in respect of four specific options which the Commission considered taking. Instead of addressing those specific options in its representations, MTC chose rather to call foul before any decision was taken. It did so repeatedly, despite the reiteration of the invitation. It was only after the industry hearing, when point taking about the process was again raised, that there was an attempt to address those four options and a compromise was proposed. MTC only has itself to blame if it considers that its right to be heard had not been fully utilised or explored by it. Not only had the proposed options been spelt out, but MTC was repeatedly invited to place its views on the proposals to the Commission. It elected not to do so but instead chose to engage in point taking about the process.

[79] It follows in my view that MTC has likewise not established this review ground.

[80] It further follows that the application to review the decision taken by the Commission as communicated to the operators must fail. As I have indicated, the amplification of that decision in the Gazette, in the absence of a further resolution of the Commission to adopt that amplification, is set aside to that extent and the underlined portions of

the Gazette referred to in paragraph [13] above are to be excised from the decision published in the Gazette.

[81] In view of the conclusion I have reached, the respondents including the Commission have been substantially successful in resisting the review application. The Commission would thus ordinarily be entitled to its costs. But the way in which it has approached this litigation cannot be overlooked. From the outset, it has been dilatory in dealing with this review. It was necessary for the applicant to compel it to comply with Rule 53(1) to provide a record of its decision making after failing to do so for some two months. Even after an order to this effect was granted, the record filed was found to be lacking in significant respects. Documents were requested but again not provided for an extended period. This court granted a further order directing the Commission to provide documents within 5 days of that order, (some four months after the record should have initially been provided). Not even the minutes of the meeting where the decision was taken had been provided at that stage and were included in the further documents sought. I have already referred to this aspect. The order was not timeously adhered to and further delays ensued. It was thus necessary for the NCC to apply for condonation for failing to comply with that Court Order and for its extremely late answering affidavit. Condonation was ultimately granted.

[82] When I raised these aspects with Mr Corbett, and whether these

could result in this Court exercising its discretion not to grant the Commission the full measure of its costs, Mr Corbett correctly pointed out that the Court in the various orders and in granting condonation, had made costs orders adverse to the Commission. He submitted that the usual rule should follow and that the Commission, as a successful litigant, should be entitled to its costs. Even though the NCC has been required to pay the costs of the interlocutory applications involving its dilatory conduct, I consider that the exceedingly slovenly manner in which the NCC dealt with this litigation has unnecessarily protracted and delayed these proceedings. This in my view warrants censure and a mark of this Court's disapproval. It is after all a litigant's duty to avoid a course which unduly protracts a lawsuit or unduly increase its expense[20]. I have accordingly decided in the exercise of any discretion to deprive the Commission of a measure of its costs, namely 25%, even though successful, because of its conduct of consistently failing to act in accordance with the rules of Court. This conduct has led to these proceedings becoming unduly protracted. The parties were in agreement that any order as to the costs would include costs of two instructed counsel where they have been engaged.

[83] It follows that the order I make is that, save for excising those underlined portions in paragraph [13] from the decision as set out in the Government Gazette, the application is dismissed with costs,

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[20] Joubert et al The Law of South Africa (First Re-isse) Vol 3 part 2 at par 304.

subject to the first respondent only being entitled to 75% of its costs. The applicant is thus required to pay 75% of the first respondent's costs and the full measure of the party and party costs of the second and third respondents. These costs include the costs of two instructed counsel, where engaged.

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Smuts, J

ON BEHALF OF APPLICANTS	**T. FRANK SC**
Assisted by:	**S. AKWEENDA**
INTRUCTED BY:	**HENGARI, KANGUEEHI, KAVENDJII INC.**
ON BEHALF OF 1ST RESPONDENT	**A. CORBETT**
INSTRUCTED BY:	**SISA NAMANDJE & CO. INC.**
ON BEHALF OF 2ND RESPONDENT:	**R. HEATHCOTE SC**
Assisted by:	**N. BASSINGTHWAIGHTE**
INSTRUCTED BY:	**SHIKONGO LAW CHAMBERS**
ON BEHALF OF 3rd RESPONDENT:	**R. HEATHCOTE SC**
Assisted by:	**N. BASSINGTHWAIGHTE**
INSTRUCTED BY:	**ENGLING STRITTER & PARTNERS**