IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000400-17

In the matter between:

MASCOM WIRELESS BOTSWANA (PROPRIETARY) LIMITED	**APPLICANT**
AND	
BOTSWANA COMMUNICATIONS REGULATORY AUTHORITY	**1ST RESPONDENT**
BOTSWANA TELECOMMUNICATIONS CORPORATION LIMITED	**2ND RESPONDENT**
ORANGE BOTSWANA (PROPRIETARY) LIMITED	**3RD RESPONDENT**

Advocate Mr F. G. Barrie (with Attorney Ms D. Makati-Mpho and Ms Molaodi) for the Applicant

Advocate Mr V. Maleka (with Attorney Mr B. D. Leburu) for the 1st Respondent
No appearance for the 2nd and 3rd Respondent

J U D G M EN T

Introduction

1. At the epicentre of this regulatory dispute, in the form of a review application, between a

communications regulator and a mobile telephone operator, is the lawfulness of a Directive, promulgated and issued by the former, to regulate Mobile Termination Rates (MTRs) in Botswana. The aforestated Directive sets out charges that mobile network operators charge each other for network interconnection. A resolution of this dispute will thus involve a studious examination of the relevant panoply of powers and functions of the regulator, in terms of its organic statute, being the Communications Regulatory Authority Act, 2012 (The CRA Act).

2. It is trite that a proper exercise of power must be fairly and reasonably traceable to some specific grant of power or justly implied from the enabling legislative and or common law framework, otherwise such purported exercise of power is susceptible and amenable to judicial review. The present

determination therefore seeks to trace the Directive in question to the Act.

The Parties

3. The Applicant, Mascom Wireless Botswana (Pty) Limited ("Mascom"), is a "regulated supplier" of "telecommunications services", as defined in section 1 of the CRA Act.

4. The first Respondent, BOCRA, is a governmental body established under section 3 of the CRA Act, as referred to in section 5 (1) of the Act, to regulate the supply of telecommunications services in Botswana.

5. The second Respondent, the Botswana Communications Corporation Limited ("BTCL"), like Mascom, is a "regulated supplier" of "Telecommunications services", as defined in section 1 of the CRA Act.

6. The third Respondent Orange Botswana (Pty) Limited ("Orange"), is similarly a "regulated supplier" of "telecommunications services", as defined in section 1 of the Act.

7. Mascom, BTCL and Orange are the only suppliers in Botswana of mobile cellular telephony services of the nature relevant to the proceedings. Their service to the public is regulated by BOCRA under the CRA Act.

The Issues Raised

8. The germane issues as presented by the Applicant, may be crafted as follows, namely:

   8.1 Whether BOCRA, in issuing regulatory Directive No 1 of 2017, on the 24 March 2017, determining charges that the mobile network operators have to charge each other for network interconnections:-

8.1.1 Acted in accordance with its statutory obligation to take regulatory decisions in an open, transparent, accountable, proportionate and objective manner, in terms of section 6 (2) (w), read with 6 (2) (5) of the Communications Regulatory Authority Act (The CRA Act).

8.1.2 Acted duly in terms of its common law duty, arising under public administrative law, to act fairly and in accordance with the legitimate expectations it had created with the operators that it would, regarding the charges in casu, complete the consultation process in which it was engaged with the operators.

9. The issues foreshadowed above, may be de-mystified and simplified as follows; namely, whether Regulatory Directive No 1 2017, issued by BOCRA is illegal, irrational, improper and if so, whether it should be reviewed and set aside.

10. First things first. A proper background and context will thus be given, for purposes of placing the aforestated issues into a sharper focus and perspective.

Background

11. On the 24th March, 2017 BOCRA issued Directive No 1 of 2017, which inter alia, set Mobile Termination Rules (MTR) that were to apply from the 1st June 2017 and further directed the operators (Mascom, BTC and Orange) to review their prices to remove the Off Net Mobile voice calls by the 1st June 2018.

12. Mobile Termination Rates (MTR) are the wholesale rates per minute that the operators charge each other for voice calls that terminate in their respective networks, but that originate from one of the other operator's networks. An example will drive the point home: if a mobile telephone customer of, say Mascom, makes a voice call to a customer of, say Orange, Mascom has to pay Orange for enabling the Mascom customer's call to be connected to the Orange customer's mobile telephone device via Orange network.

13. It is common cause that many such inter-operator calls are made on a daily basis and thus the operators settle the net fees payable (calculated with reference to the prescribed MTR) on a regular basis through a clearing house system. MTR's are a component of the cost (to operators as well as their

customers) of the "Off-Net" calls referred to in the Directive. Off-Net calls are voice calls that involve the network of an operator other than the network from which the call originates, as opposed to "On-Net calls" calls, which involve only the network of the operator on whose network the call originates.

14. Mobile termination rate per minute that is payable by the operators to one another is set and regulated by BOCRA, in terms of its statutory powers pursuant to section 90 (1) (c) which provides as follows:

> *"90. (1) The Authority –*
>
> *a) (not relevant)*
>
> *b) (not relevant)*
>
> c) *May set tariffs or other charges including price caps or other price controls, for different classes or categories of services or products*

and for different areas for the regulated services.

15. In exercising its general and plenary functions in terms of the Act, including the setting of tariffs and other charges including price caps etc, as stated in section 90 (1), above BOCRA is enjoined, in terms of its overarching powers to do the following and thus I reproduce such plenary of powers as listed in section (6) and (2) of the CRA Act as follows:

    6. (1) The Board shall ensure, that so far as is practicable there are provided throughout Botswana, safe, reliable, efficient and affordable services in the regulated sectors.

    (2) Notwithstanding the generality of subsection (1), the Board shall-

    a) Protect and promote the interests of consumers, purchasers and

other users of the services in the regulated sectors, particularly in respect of the prices charged for, and the availability, quality and variety of services and products, and where appropriate, the variety of services and products offered throughout Botswana, such as will satisfy all reasonable demands for those services and products;

b) Where relevant and so far as it practicable, ensure that the regulated sectors have and maintain the resources to provide those services and are otherwise fit and proper persons to provide the services;

c) Monitor the performance of the regulated sectors in relation to levels of investment, availability, quantity, quality and standards of services, competition, pricing, the costs of services, the efficiency of production and distribution of services and any other matters decided upon by the Authority;

d) Facilitate and encourage private sector investment and innovation in the regulated sectors;

e) Enhance public knowledge, awareness and understanding of the regulated sectors;

f) Foster the development of the supply of services and technology in each regulated sector in accordance with recognized standards;

g) Encourage the preservation and protection of the environment and conservation of natural resources in accordance with the law by regulated suppliers;

h) Process applications for and issue, licences, permits, permissions, concessions and authorities for regulated sectors as may be prescribed;

i) Notwithstanding subparagraph (h), Authority shall, prior to the issuance of public Telecommunications Operator and broadcasting licenses, notify the Minister;

j) Impose administrative sanctions and issue and follow of enforcement procedures to ensure compliance with conditions of licences, permits, permissions, concessions, authorities and contracts;

k) Promote efficiency and economic growth in the regulated sectors and disseminate information

about matters relevant to its regulatory function;

l) Perform all additional functions and duties as may be conferred on it by law;

m) Hear complaints and disputes from consumers and resolve these, or facilitate their resolution;

n) Consult with other regulatory authorities with a view to improving the regulatory services it offers, and obtaining market intelligence about the sectors it regulates;

o) Foster and promote the use of consumer forums to provide information to enable it to improve its regulatory duties and functions;

p) Ensure that the needs of low income, rural or disadvantaged groups of persons are taken into account by regulated suppliers;

q) Maintain a register of licences, permits, permissions, concessions, authorities, contracts and regulatory decisions which is available to the public and from which the public may obtain a copy of any entry for a prescribed fee;

r) Make industry regulations for the better carrying out its responsibilities under this Act including –

i) Codes and rules of conduct;

ii) Records to be kept by regulated suppliers, including the form and content of accounting and business records and information and documents to be supplied to the Authority;

iii) Definitions of, and information about cost accounting standards to be

adopted by regulated supplier;

iv) Standards applicable to regulated services;

v) Complaint handling procedures;

vi) Circumstances surrounding access rights by one regulated supplier to the facilities owned or controlled by another regulated supplier;

vii) Records, form and content for Subscriber Identity Module (SIM) card registration to be

kept by regulated suppliers, and

viii) Price control regulations;

s) Administer and comply with the provisions of this Act;

t) At the request of the Government, represent Botswana in international regulatory and other fora concerning the regulated sectors;

u) Advise the Minister on matters relating to the regulated sectors and proposed policy and legislation for those sectors;

v) Do anything reasonably incidental or conducive to the performance of any of the above duties;

w) Take regulatory decisions in an open, transparent, accountable, proportionate, and objective manner and not to show undue preference to any person or organization; and

x) Promote and facilitate convergence of technologies.

The Study or Consultancy

16. The stated purpose of the said Directive was to implement the final recommendations of the 2016 Cost Model and Pricing Framework Study. The said Study, was conducted by a United Kingdom firm of

consultants named and styled Interconnect Communications Ltd.

The Consultation Process

17. The said Final Report was preceded by an Interim Report in March 2016 and a Draft Final Report in September 2016.

18. Before the draft Reports and Final Draft Report were submitted, consultation with the operators, spanning over 14 months, was done and presentations were made to the operators during information sessions about the project or study, as will be amplified below.

19. Following upon public notice to all relevant stakeholders about the study, BOCRA initiated a one-on-one project meetings with each of the operators in January 2016; whereat a presentation

was made to each of the operators, including Mascom. The development of the relevant cost model and pricing framework required costs data from the operators as the necessary inputs. The project presentation notified the operators of the requests for data on pricing for each of their relevant services through Excel workbook format and such requests were made from 29th February to 7th March 2016.

20. Inevitably, data from Mascom and other operators were used as inputs to populate the first Draft Cost Model. In March 2016, BOCRA issued the Interim Report on cost modeling and pricing framework. The said Interim Report set out several proposals and posed 31 questions, which formed the basis of further consultation with the industry role players.

21. On 22nd March 2016, a stakeholder consultative workshop was held whereat all stakeholders were granted an opportunity to make representations, responses and input on the issues described in the Interim Report. Mascom elected not to make oral representations at the workshop. Instead, it chose to subsequently submit written comments on the Interim Report on 11th April 2016. In its written comments, Mascom acknowledged as a starting point that the approach in the Interim Report was a "well – balanced and sensible approach with respect to the considerations made on the key issues that underpin the development of costs models and a pricing framework suitable for Botswana".

22. In its written comments, Mascom further made its representations with respect to potential remedies to the pricing issues on off-net compared to "on-net" voice tariffs.

23. Arising from the said consultative workshop as well as written submissions by Mascom, BOCRA prepared a consolidated report which was issued to the stakeholders. The said consolidated Report set out the preliminary views on issues raised by the stakeholders.

24. On 15th June 2016, BOCRA held a collective meeting with Mascom, Orange and BTCL, whereat a presentation on the project status was given to the operators. On September 2016, BOCRA issued the Draft Final Report, which set out preliminary results of the study. The consultants, on 26th September 2016 made a presentation to stakeholders, based on the Draft Final Report. All stakeholders, including Mascom were afforded an opportunity to make representations and Mascom

obliged through its written representations on the 24th October 2016.

25. In its representations, Mascom complained that it had not been furnished with full access to the cost model, for purposes of verifying and validating the costs results and to provide a complete and well considered submission on the report. Mascom then proceeded to make further representations on the Draft Final Report and further requested a further opportunity to engage with BOCRA. Mascom complained that the level of the MTRs set out in the Draft Final Report were "too low".

26. On 2nd November 2016, BOCRA updated the Draft Final Report and came up with the Draft Final Report (Version 13). On 29th November 2016, BOCRA shared the cost model with Mascom and other stakeholders through Excel Mobile Cost Model

and Cost User Guide. On 17th January 2017, BOCRA held another meeting with Mascom whereat the latter was afforded an opportunity to raise its concerns on the Draft Final Report.

27. Mascom, per its email to BOCRA on 19th January 2017 further raised its concerns on the study and arising from such concerns, three tele-conferences between Mascom and the consultants were conducted and one was on the 31st January 2017.

28. The BOCRA Board, on 6th March 2017, it is common cause, adopted the final Report, but modified the recommendation of a three year glide path and adopted a two year glide path. It was the reduction from the 3 years to 2 years that formed Mascom's *casus belli*, hence the present review application.

Mascom's Complaint

29. According to Mascom, at all relevant times during the consultation process, the consultants and BOCRA executive management team, conveyed to the operators that a reduction in the MTRs will be implemented over a three year glide path period. The recommendation from the consultants was a 3 year glide path period; and further that BOCRA Regulatory Committee had accepted such recommendation, at its meeting on 30th January 2017.

30. The reductions from the said 3 year glide path period, according to Mascom, was effected by BOCRA Board without any prior notice or consultation and further that it legitimately expected that a 3 year glide path would be implemented and that if BOCRA was minded to vary same, it should have given Mascom a further

hearing. In short, Mascom contend that the consultation process was inchoate and incomplete.

Relief Sought

31. The Applicant, although attacking the entire process leading to the issuance of the said Directive, is not seeking to set aside the entire Directive. Mascom's sharp-pointed arsenal is directed at paragraphs 11.2 and 11.3 of the said Directive dealing with MTRs.

32. For purposes of brevity, I reproduce the said paragraphs below as follows:

"Mobile Termination Rates

11.2 The following costs oriented mobile termination rates shall apply for the periods as specified in Table 2:

Table 2: Mobile Termination Rates (BWP) excluding VAT.

Year	*Current*	*1st June 2017*	*1st June 2018*
Termination Rate	*0.295*	*0.220*	*0.130*

11.3 All Public Telecommunications Operators (PTOs) including Mascom Wireless, Orange Botswana and Botswana Telecommunications Corporation Limited (BTCL) shall review their prices to remove the off net premium for all Off Net mobile voice calls by 1st June 2018. The PTOs shall by 30 April 2017, file for approval with the Authority, the first instance of removal of Off Net premium charge. The revised prices shall be implemented by 1st June 2017. The PTOs shall have filed by 30th April 2018, for

approval by the Authority, the second instance and final removal of Off Net premium for Off Net mobile calls. The converged prices for Off Net and ON Net mobile voice calls shall be implemented on 1st June 2018. On removal of the Off Net premium, PTOs shall not alter any pricing component of the Off Net price or ON Net price in an attempt to make up for reduced Off Net prices.

The table 3 below is the reference for the above:

Table 3: Activity table for removal of Off – Net premium

Year	30th April 2017	1st June 2017	30th April 2018	1st June 2018
Activity	Retail Filling	First Implementation	Retail Filling	Final and Implementation and removal of Off – Net premium

33. The Applicant is essentially seeking the setting aside of the aforestated paragraphs 11.2 and 11.3 on grounds of irrationality, unlawfulness and unfairness.

34. Interestingly, other operators, namely Orange Botswana (Pty) Ltd and Botswana Telecommunications Corporation Limited, have adopted a passive role and have filed notices to abide by the decision of this court.

Grounds for Review

35. There are generally three grounds for judicial review, namely irrationality, illegality and procedural irregularity. I am fortified thereof by the cases of **Attorney General and Others v Tapela and Others**: in re: **Attorney General and Others v Mwale** CACGB 096-14 (CA); **Raphathela v The Attorney General** [2003] (1) BLR 591 (HC) **Academy of Business v Tertiary Education Council** [2011] (1) BLR 110 (CA) and **Zac Construction (Pty) Ltd v Public Procurement and Asset Disposal Board** and **Another** CACGB-020-16 (CA).

36. It is Mascom's case that the Directive sought to be impugned is illegal. An excursion on the regulatory powers and functions of BOCRA shall therefore

ensue, in order to fathom and determine the question of illegality of the said Directive.

Relevant CRA Act (Regulatory Framework)

37. In terms of section 5 (1) (a) the BOCRA Board is responsible for the effective regulation of the regulated sector (telecommunications, broadcasting and postal services). In discharging its mandate, the Board is enjoined to ensure, as far as it is practical, that the services rendered by licences are safe, reliable, efficient and affordable. See also section 6 (1) reproduced above.

38. Pursuant to section 6 (2) (w), BOCRA is obliged to take regulatory decisions in an open, transparent, accountable, proportionate and objective manner and not to show undue preference to any person or organization. Mascom has relied on this provision to

buttress its submission that the Directive is illegal improper, irrational and unfair.

39. The Board's responsibility is also to protect and promote the interests of consumers, purchasers and other users of regulated, services, particularly with respect to prices charged for such services. In this connection, see section 6 (2) (a) of the Act; which echoes public interest theory of regulation.

40. The Board may, for purposes of performing its regulatory functions, establish subcommittees as it considers appropriate, and may delegate to any such committee, its functions pursuant to section 20(1). Such committees are advisory in nature and such is abundantly clear and crisp from section 20 (7) (8) which *provides as follows:*

"(7) Any committee appointed by the Board shall have advisory powers only and shall not be authorized-

a) To take and implement regulatory decisions;

b) To resolve disputes.

(8) The committee appointed by the Board shall transmit to the board, in writing, its recommendations for the resolution of a dispute by the board".

41. Section 51 (7) (8) and (9) enjoin BOCRA to determine the terms and conditions of and interconnection charges as between network operators and such charges ought to be fair and reasonable.

42. According to Mascom, the Directive is illegal in that the process leading to its issuance was not transparent, fair (due to incomplete consultation process) and on account of breach of its legitimate expectation.

43. It is contended by Mascom that the Directive was issued prematurely before consultation with Mascom was concluded. BOCRA contends a *contrario* and has submitted that the consultation process preceding the Directive had been completed.

44. It is not in dispute that consultation was carried out by BOCRA spanning over 14 months with the operators. It is only at the time that the glide path was reduced that BOCRA did not consult Mascom immediately preceding the promulgation of the Directive.

Nature, Form and Content of Consultation Process

45. According to Prof Jowell in **De Smiths Judicial Review** (6th Ed, 2007), as a matter of general proposition, consultation does not mean or imply an obligation to reach consensus. The yardstick for consultation was thus crafted at p386, where the learned author states as follows:

> *"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation*

must be conscientiously taken into account when the ultimate decision is taken".

46. The above formulation on the consultation yardstick was embraced in the case of **Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius and Others** [2016] (1) Law Reports of the Commonwealth 248 (Privy Council).

47. Consultation, in essence, is an off-shoot of the right to be heard, or the *audi alterem partem* principle of natural justice. The essence of the rule of natural justice is the duty to act fairly in the exercise of a discretionary power. See **Makgong v Attorney General** [1987] BLR 518 (CA). **Arbi v Commissioner of Prisons and Another** [1992] BLR 246 (CA) **Mothusi v Attorney General** [1994] BLR 246 (CA) and **National Amalgamated Local and Central Government and Parastatal Manual**

Workers Union v The Attorney General [1995] BLR 48 (CA). The duty to consult is therefore implicit from the regulatory ethos embedded in section 6 (2) (w) of the Act, which envisage an open, transparent, accountable, proportionate, objective and fair regulatory framework.

48. The form of facilitating an appropriate degree of consultation or participation in Directive promulgation process by a regulatory entity, acting within its delegated legislative authority, varies from case to another, I posit. What is key and of fundamental importance is that all stakeholders ought to be granted a reasonable opportunity to comment thereon, before any decision is taken. What amounts to a reasonable opportunity will depend upon the exigencies of each case. In the case of **Hayes v Minister of Housing, Planning**

and Administration, Western Cape 1999 (4) SA 1229 the court pronounced as follows:

"In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. The parties or their representatives could be physically present at such meeting or conference; but not necessarily so. In these times of advanced communications technology, persons or parties can consult with one another in a variety of ways, such as by fax or e-mail or, in a somewhat less sophisticated way, by correspondence. Circumstances will dictate in what form the consultation should take place. As long as the lines of communication are open and the parties are afforded a

reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import."

49. On consultation, See also **Scalabrini Centre and Others v Minister of Home Affairs and Others** 2013 (3) SA 53; **R v Secretary of State for Social Services; Exparte Association of Metropolitan Authorities** [1986] 1 All ER 164 and **Sinfield v London Transport Executive** [1970] 2 All ER 264.

50. In the case of **R v Secretary of State for Social Services**, **Exparte Association of Metropolitan Authorities**, cited supra; with respect to the substantive consultation, the court held as follows:

" There is no general principle to be extracted from the case flow as to what kind or amount

of consultation is required before delegated legislation, of which consultation is a precondition, can be validly be made. But in any context, the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view, it goes without saying that to achieve consultation, sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled."

51. Reasonableness is an objective standard which is sensitive to the facts and circumstances of each case; and thus context is key. Stakeholders ought to be afforded an opportunity to participate effectively and meaningfully in the process, and not some lip service or hollow opportunity or a mere pretence of giving a person a hearing. Consultation should not be perfunctory or a mere formality. See **Heartherdale Farms (Pty) Ltd v Deputy Minister of Agriculture** 1980 (3) SA 476 at 486 D.

52. The need for meaningful and effective consultation or "hearing" is designed to afford the safeguard that the one who decides shall be bound, in good conscience, to consider the evidence, to be guided by that alone, and to reach a conclusion uninfluenced by extraneous consideration. If a decision maker, one who determines the facts which underlie a regulatory directive, has not considered

evidence or argument submitted, it is manifest that a hearing has not been given.

53. Regulatory agencies, it is trite, in the performance of their quasi-judicial functions, must accredit themselves by acting in accordance with the cherished concept of fair play and in the interest of consumers and operators. This is so because in carrying out their mandate of executing the relevant statutory provision and promulgating regulations under the enabling statute (e.g the current directive) such, delegatee will be acting both as an Executive and Legislative proxy [in terms of section 6(2)(v)(viii) dealing with promulgation and enforcement of regulations] and thus I emphasize, must exhibit fairness and act in the public interest. This public interest manifesto or <u>manifestum</u>, in the making of laws, regulation or statutory directives, is

constitutionally promised and declared in section 86 of the Constitution, which provides that:

> *"Parliament shall have power to make laws for the peace, order and good government of Botswana"*.

It therefore follows that as a legislative proxy, the regulator in casu, in promulgating regulations and directives, enjoined to comply with such public interest imperatives. See the decision of the Court of Appeal, dealing with delegated legislation, in **The Minister of Labour and Home Affairs and Another v Botswana Public Employees Union and Others:** CACGB-083-12 per Kirby J. P (with Lord Abernethy J. A.; Lesetedi J. A., Gaongalelwe J. A. & Lord Hamilton J. A. concurring).

Legitimate Expectation

54. According to Mascom, it had a legitimate expectation that BOCRA will accept and implement the recommendation of a three-year glide path because of the letter sent by BOCRA to Mascom on 11th January 2017 in response to the representations made by Mascom. The said letter is reproduced below as follows:

B O C R A

Ref: BOCRA/7/2 XXII (1)

11th January 2017

Jose Vieira Couceiro
Chief Executive Officer
Mascom Wireless
Private Bag BO 298
Gaborone

DRAFT FINAL REPORT ON DEVELOPMENT OF COST MODELS AND PRICING FRAMEWORK FOR ICT SERVICES

1. *The above subject matter refers.*

2. *Botswana Communications Regulatory Authority (BOCRA or the Authority) acknowledges your comprehensive input during the consultation on Development of Cost Models and Pricing Framework for ICT Services.*

3. *BOCRA has considered your input and made amendments to the model and the Draft Final Report where necessary. May you find attached a comprehensive response to your input of 24th October 2016.*

4. *On this note, we would like to engage Mascom to address, in particular, Mobile Termination Rates*

(MTRs) and the implications on your business. We would like to appreciate your calculation of estimated forgone revenue attributable to implementation of proposed MTRs.

5. We propose a meeting with yourselves on Monday

16 January 2016 at 1430 hours at BOCRA Head Office.

Yours sincerely

....
Noble Katse
For/ Chief Executive

55. On the basis of this letter, can legitimate expectation arise therefrom? The text of the letter and the context within which this letter was crafted will be dispositive; and I will come back to it later in my judgment.

56. The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from unfairness or abuse of power by an administrator. Legitimate expectation prohibits the arbitrary use of power by public authorities. Such expectations can arise where a decision maker has led someone to believe that he will be consulted or given a hearing before a decision is taken, which affects him to his disadvantage, otherwise termed procedural legitimate expectation; or that he will retain a benefit or advantage, aptly termed substantive right legitimate expectation.

57. It is trite that the source of the expectation may be either an express promise given by and or on behalf of the public authority or an established practice which the claimant can reasonably expect to continue. The expectation of a continuance of a

substantive right is not absolute because a sufficient public interest can still override a legitimate expectation to which a representation had given rise. In this connection, See **Council of Civil Service Unions v Minister of Civil Service** [1985] AC 374, 401 per Lord Fraser.

58. The courts will enforce an expectation only if it is legitimate. See **R v Inland Revenue Commissioners, Exp MFK Underwriting Agents Ltd** [1990] 1 WLR 1545, p1569 per **Bingham L J**.

59. The said BOCRA letter to Mascom, which formed part and parcel of the consultation process, contained an attachment of Mascom's comments, as recorded by BOCRA and BOCRA's comments in response thereto in the right hand columns.

60. As a starting point, there is no cognizable indication from the CRA Act of a right to a glide path in the setting of MTRs. A glide path is one of the many options that regulators employ in price controls, where operators are required to reduce prices over time, rather than an immediate move to the cost oriented level. This glade path allows operators to plan accordingly for possible decrease in revenue from MTRs over a period of time, rather than immediate implementation.

61. The context in which the aforestated letter was sent to Mascom, its purpose within the consultative sphere and process, in my judgment, does not evince a legal basis upon which legitimate expectation can arise. It is clear that the said letter did not represent a promise an undertaking or regular practice by BOCRA to maintain or implement the recommendation of the consultants

or its management. Simply put, the said letter does not contain any express promise or undertaking to Mascom that there will be a three year glide path.

62. The clear context of the letter and BOCRA's responses to Mascom's comments was to provide a record on BOCRA's views to Mascom's complaints, arising from the Draft Final Report, that the model and pricing framework in the Draft Final Report will result in the level of MTRs that is "too low".

63. In the absence of such promise or undertaking, viewed within the context so aforestated, as well as the text therein, the claim of legitimate expectation has no legal peg upon which it could, boisterously, be hung and displayed.

The BOCRA Board Approval of the Recommendation

64. At this juncture, it is pertinent that I peep into BOCRA's Boardroom and thus I reproduce the Minutes of the BOCRA Board of the 6th March 2017. The Minutes record and verbalize the following:

*"7.5 **REPORT ON DEVELOPMENT OF COST MODEL AND PRICING FRAMEWORK FOR ICT SERVICES IN BOTSWANA***

7.5.1 The Regulatory Committee reported on the findings of an exercise undertaken to calculate the cost of providing wholesale and retail services for mobile, fixed and internet services. The said exercise was also intended to develop Accounting Separation Guidelines. In Summary, the Regulatory Committee recommended as follows:

a) *That where BOCRA is of the view that there is adequate competition it will not intervene;*

b) *That BTCL and BOFINET or any other licences who offer wholesale services shall avail Wholesale Reference Offers to BOCRA by June 2017.*

c) *That Mobile Termination Rates and Fixed Termination Rates shall be reduced in order to attain P0.13/minute by Year 3.*

d) *That on-net mobile voice tariffs shall be converged with off-net mobile voice tariff by Year 3.*

7.5.2 *Having taken note of the above submission, the Board was concerned that the three-year period for reduction of mobile and fixed termination rates was rather too long. The same view was also extended to the period of converging on-net mobile voice tariffs with off-net mobile voice tariff. The Board acknowledged the duty of BOCRA to ensure that regulated entities are sustainable, however cautioned that BOCRA also has a duty to protect consumers in respect of prices charged for. In that regard, the Board was of the view that the glide path for reduction of mobile and fixed termination rates should be implemented by Year 2 instead of Year 3. The Board was also of the view that on-net mobile voice tariffs shall be converged with*

*off-net mobile voice tariff by Year 2. Management was directed to provide an impact analysis on BOCRA revenue stream attributable to 2 Year Glide Path reduction of MTRs, FTRs and convergence of Off Net tariffs with On Net tariffs. (**ACTION ITEM**). After due deliberations, the Board resolved to approve as follows:*

Mobile Termination Rates (MTR) and Fixed Termination Rates (FTR)

a) MTRs and FTRs shall be converged over a 2 year Glide Path.

b) MTR and FTR to be reduced to P 0.13/minute by Year 2 (ieJUne 2018). BOCRA to, amend the Glide Path and manage the implementation of reductions in quantum as deemed

appropriate in order to attain target of P0.13/minute by June 2018) The reductions may be front-loaded or back loaded as a way of managing possible adverse implications on revenues of service providers.

c) *Operators to file new retail tariffs annually in line with changes in MTRs and FTRs. The new retail tariffs shall be implemented annually at the same time that reduced MTRs and FTRs are implemented or earlier".*

65. It is abundantly clear from the Minutes above that the Board considered the interest of consumers, the operators and its financial resourcing, from regulatory fees, when it made the decision to reduce the glide –path from 3 years to 2 years. It is

common cause that in terms of section 24(1)(b), the regulator's funds consist of annual fees, which are a percentage of the net operating revenues of operators, attributable to regulated activities. Any reduction therefore in operator's revenue, in this context, will affect the regulated fees payable to the regulator.

Judicial Deference

66. Due to the specialized and technical role played by regulatory agencies, judicial deference, ceteris paribus, to the decision of such bodies, ought to embraced; as long as such decision does not run foul of any recognized judicial review grounds. The purpose of judicial review, it must be emphasized, is to scrutinize the lawfulness of administrative action, in order to ensure that the limits to the exercise of public power are not transgressed and it is not to give the courts the power to perform the functions

of the administrative agencies. See **<u>Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd</u>**; **<u>Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd</u>** 2003 (6) SA 407 (SCA) and **<u>Logbro Properties CC v Bederson No and Others</u>** 2003 (2) SA 460 (SCA).

67. What constitutes a reasonable administrative conduct, within any particular regulatory scheme or framework, will always be a contextual enquiry that depend upon the circumstances of each case. A court will need to consider a range of issues, including the nature of the 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. See the dictum of O'Reagan AJA, in the Namibian case of **Trust Co Ltd v Deeds Registries Regulation Board and Others** 2011 (2) NR 726 (SC) at para 31 and the case of **Mobile Telecommunications Ltd v Namibia Communication Commission and Others** Case No 26 of 2011 (Namibia High Court).

68. In determining the test for unreasonableness of an administrative decision, I adopt the test as outlined by Lesetedi J (as he then was) in the case of **Home Defenders sporting Club v Botswana Football Association** [2005] (1) BLR 400 at 403 where he lucidly stated as follows:

> *"The now accepted authority of the courts power to review a decision for unreasonableness, as an authority heavily relied upon by the Applicant, is the case of Associated Provincial Picture Houses*

Ltd v Wednesbury Corporation [1994] (1) QB 223 (CA). In that case Lord Green stated that a court can interfere with the exercise of a discretion for unreasonableness only when the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it".

69. See also **Attorney General and Others v Dickson Tapela and Others** CACGB-076-15(CA).

70. On whether the decision of an administrative agency is irrational, the test thereof is as formulated in the cases of **CCSU v Minister of Civil Science** [1984] 3 all ER 935 and **Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd** [1995] BLR 234 (CA).

71. The test for irrationality of a decision is whether the decision sought to be impugned is so illogical, based

on the facts that no decision maker, properly directing itself, could have arrived at that decision.

Analysis and Determination

72. In the present matter, it is common cause that before the Directive in question was promulgated, the regulator invited, *ab initio,* and during the formative stage, the relevant operators to participate in the study. A series of meetings were held. Presentations were made by the operators, including Mascom, to the regulator.

73. Over and above the said meetings, several documents or information was shared by the regulator, its consultants and the operators. Workshops were held. Telephone and teleconferencing, as a method of consultation was embarked upon. Draft Interim Reports were

prepared and revised up until version 13 (Draft Final Report).

74. In amplification, one on one meetings were held by BOCRA with the operators. Operators presented their data to the regulator. It was such data that provided the necessary scientific and statistical criteria to the Study. Written submissions were made by Mascom to the regulator on all aspects of the Study including pricing issues related to Off-net and On-net voice tariffs.

75. As the detailed consultation process outlined above evinces, Mascom fully participated in the consultation process, right from inception of the Study, up to and including the preparation of the Draft Final Report. The process of consultation was thus open and transparent.

76. The assertion by Mascom that the consultation process was incomplete and inchoate, before the Directive was promulgated, in my view, is bereft of substance. Mascom, like other operators, was consulted right from the initial formulation of the Study up to the preparation of the Draft Final Report. The period of consultation endured for about 14 months. It is in the interest of the public that there must be an end to consultation, so that certainty and predictability can prevail. Pursuant to the Directive sought to be impugned, it is now certain that a two year glide path triumphed. Consultation in perpetuity will thus defeat such public interest imperatives and purposes.

77. As gleaned from the BOCRA Board Minute, the Directive was issued for the public good, particularly the reduction in the MTRs rates as well as Off-net and On-net tariffs. The reasons provided

by BOCRA, within the context of its decision making powers in my view, demonstrate that a reasonable and rational choice and decision was made by BOCRA. By reducing the said glide-path, BOCRA, not only considered the foregone or lost revenue to Mascom. It also considered that it will suffer financial loss arising from regulatory fees payable by operators, but was swayed, primarily, by the interests of the consumers. In my view this is a decision of reasonable regulator, which took into account, in a fair and transparent manner, all the relevant considerations, in terms of section 6 of the Act. On public interest theory of regulation, See Breyer S. G. **Regulation and its Reforms**: Havard University Press (1982) p15-60, Posner. R. A.: **Theories of Economic Regulation**: The Bell Journal of Economics and Management Science; Vol 5 No 2 (1974) pp 335-358, and Crandal W. Robert: **Should Regulators Set Rates To Terminate Calls**

on Mobile Networks? Yale Journal on Regulation Vol 21, Number 2 (2004).

78. This court, even assuming that it may have erred in its final conclusion (which is stoutly not conceded), this is an exceptional case in which the decisions and actions of BOCRA should stand, as I hereby hold, based on public interest imperatives relating to reduction of the prices and or tariffs relating to interconnection prices and off-net and on-net voice tariffs.

79. The Directive is a decision that warmly embraces the needs of the general body of consumers, taking into account that the said Directive applies to interconnected and inter-operable networks of different operators. Interconnection, it is trite, facilitates universal access to services, as preached by section 6 above. See also International

Telecommunications Union (ITU) Regulation Handbook, (10th edition, 2011) Chapters 1,2 and 5; where the ITU specifically recognizes ICT as an enabler at p156 in the following terms:

> *"ICTs are present in all sectors of the economy and are recognized as a pillar of modern society. No sector seems to work efficiently without them. Diverse sectors such as governance, education, health, business, finance and tourism are critically depended upon information and communications. All countries, irrespective of economic status, must recognize the trend towards ubiquitous use of ICTs. This is why the term enabler is often used to describe ICTs".*

80. It is on the basis of the above formulation that public interests imperatives may, in appropriate

cases, trump legalism. I am fortified, in this connection, by ringing dictum of Kirby. JP in the case of **<u>The Attorney General v Botswana Landboards and Local Authorities and Others</u>** CACGB-053-12 (CA) at page 51, paragraph 76 (cyclostyled judgment) where he posited as follows:

> *"Further, since review is discretionary remedy, there are cases in which, although a declaration of unlawfulness may be made or justified, actions taken in consequence of an impugned decision are allowed to stand".*

81. See also **<u>Bergstan (Pty) Ltd v Botswana Development Corporation and Others</u>** CACGB - 020-12 (CA) and **<u>Oudekraal Estates (Pty) Ltd v City of Cape Town and Others</u>** 2004 (6) SA 222 (SCA); where public interest and or pragmatism

trumped legalism. The directive by BOCRA should thus not be impugned.

Conclusion

82. For reasons outlined above, fortified by a dearth of cited judicial authorities, Mascom has thus failed to make out a case for review.

83. Consequently, the application is dismissed with costs, inclusive of costs related to engagement of Senior Counsel.

DELIVERED IN OPEN COURT AT GABORONE THIS 22ND DAY OF MAY 2018.

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M. LEBURU
JUDGE

Desa Law Group for the Applicants
Monthe, Marumo and Company for the 1st Respondent