

REPORTABLE

CASE NO: SA 47/2025

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GAMBLING HOUSE ASSOCIATION OF NAMIBIA	**First Appellant**
IRMGARD FOURTY CC	**Second Appellant**

and

MINISTER OF ENVIRONMENT AND TOURISM	**First Respondent**
GAMBLING BOARD	**Second Respondent**
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	**Third Respondent**
SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NAMIBIA	**Fourth Respondent**
PRESIDENT OF THE REPUBLIC OF NAMIBIA	**Fifth Respondent**
(ERSTWHILE) CHAIRPERSON OF THE (FORMER) CASINO BOARD	**Sixth Respondent**

BANDITS GAMBLING CC **Seventh Respondent**

THE CHAIRPERSON OF THE GAMBLING BOARD **Eighth Respondent**

Coram: ANGULA JA, SCHIMMING-CHASE JA and SMUTS AJA

Heard: 23 July 2026

Delivered: 19 November 2026

Summary: Licensed gambling-house operators relied on a settlement agreement concluded in High Court proceedings instituted in 2019 and made an order of that court on 17 June 2020. They contended that they were exempt from paying the levy imposed under s 62 of the Gaming and Entertainment Control Act 13 of 2018 (GECA) until all illegal gambling houses in Namibia had been legalised or closed. The dispute arose against the admitted backdrop of longstanding and widespread unlawful gambling operations, and complaints by licensed operators that the regulatory burden fell disproportionately on them. Following the commencement of a new statutory regime under which levies became payable and regulatory functions were vested in a newly established statutory board, the appellants sought to enforce the settlement order. In the alternative, they challenged the constitutionality of s 40A and s 57 of GECA and impugned certain regulations published under it. They further sought an order compelling the Minister to exempt them from s 62 under s 109, and an order directing the enforcement of the Act against unlicensed operators. The Gambling Board and its chairperson counter-applied for a declaration that the levies were payable. The principal questions were whether the settlement order relieved the appellants of liability under s 62, whether s 40A constituted an impermissible delegation of legislative power, whether s 57 infringed art 16 of the Constitution, whether the impugned regulations were invalid, and whether the counter-application was properly granted.

Held, that an order of court embodying a settlement binds until it is set aside.The question was not whether the order bound the parties to it, but what it lawfully required.

Held, further, that the levy is imposed by s 62(1) of GECA. The Minister's function under s 62(2) is to prescribe the rate, manner and date of payment, and the Board's function

relates to *inter alia* collection. A settlement between the Minister and the licence holders could not relieve them of a liability imposed by Parliament.

Held, further, that clause 2 of the settlement agreement was framed to operate prospectively. The lawful content of clause 2, which concerned the Minister's powers under the 1994 Act, was exhausted when those powers ceased to exist on the repeal of that Act. However, to the extent that it purported to dictate in advance how the Minister would exercise the power in s 62(2), under a statute not then in force and until a condition beyond the Minister's control was met, it was an undertaking that the Minister could not lawfully give and a court cannot enforce. Regulation 29 was therefore not liable to be set aside as having been made in breach of the order, and the order should not have been granted in those terms.

Held, further, that s 109 does not require a prior application as a precondition to the grant of an exemption. It confers a discretionary power which the court could not direct the Minister to exercise in a particular manner.

Held, further, that the challenge to s 40A was not premature, the power having been exercised in regs 2 and 29(3). Read in the context of GECA as a whole, s 40A is subject to ascertainable limits and safeguards against arbitrariness, including the power in s 40A(2)*(d)* to prescribe fees or levies. It does not amount to an unconstitutional delegation of legislative power.

Held, further, that the challenges to regs 2, 29 and 33 failed. Regulation 2(3) was a transitional measure authorised by s 40A(2)*(e)*. The levy did not infringe art 10(1), because the appellants' complaint was one of unequal enforcement rather than unequal treatment. Nor was art 18 infringed, because the appellants were not denied a reasonable opportunity to participate in the consultative process.

Held, further, that assuming in favour of the appellants that licences issued under the former regime constituted property for purposes of art 16(1), s 57 affected regulation and not expropriation and was constitutionally valid. The complaints founded on arts 21(1)*(j)* and 8 also failed.

Held, further, that a *mandamus* confined to compelling the Board to perform its statutory enforcement duties is in principle available, but in this instance the appellants did not establish a present duty to act. When the relief was sought, the purported extensions of the transitional period afforded unlicensed operators time to regularise their position. The appellants treated the extensions as void but did not seek to have them reviewed and set aside. The relief was, in addition, incapable of effective supervision in this case, and in substance it sought to direct criminal prosecutions, a matter for the Prosecutor-General under art 88 of the Constitution, and to require police action without the joinder of the Inspector-General of the Namibian Police Force.

Held, further, that the counter-application was duly authorised. However, the relief sought against the first appellant, a voluntary association holding no licence, was not competent in the circumstances. The declaration of liability binds the second appellant and the members identified in the founding papers. The order for *mora* interest, which the respondents did not defend, and the direction to pay could similarly not succeed.

Held, further, that the constitutional challenges were genuine and not frivolous, and the *Biowatch* principle applied to them and to the opposition to the counter-application. The court *a quo* did not consider that principle, so its costs orders fell to be set aside.

Consequently, the appeal succeeded only to the limited extent of setting aside the costs orders of the court *a quo*, and varying paragraph 2 of its order so as to exclude the first appellant, and to delete the direction to pay, and the order for *mora* interest. The appeal was otherwise dismissed, with no order as to costs.

APPEAL JUDGMENT

SCHIMMING-CHASE JA (ANGULA JA and SMUTS AJA concurring):

Introduction

[1] At its core, this appeal concerns the statutory regulation of the gambling industry in Namibia. The central question to be determined, is whether the holders of gambling

house and casino licenses originally issued under the Casinos and Gambling Houses Act 32 of 1994 (the 1994 Act) remain liable to pay the levy imposed by s 62 of the Gaming and Entertainment Control Act 13 of 2018 (GECA) with effect from 1 December 2021, or whether they are relieved of that liability by virtue of a settlement agreement concluded in June 2020 and made an order of the High Court on 17 June 2020 (the order). Clause 2 of that settlement agreement recorded the undertaking of the responsible Minister not to impose any levy whatsoever on any duly registered gambling house until all illegal gambling houses in Namibia have either been legalised or closed.

[2] The appellants' case does not rest on that order alone. They also attack the constitutionality of s 40A and s 57 of GECA, and of regs 2, 29 and 33 of the Regulations promulgated under it.[1] They seek the review and setting aside of reg 29 on the grounds that it was made in violation of the order, without affording them a hearing, and in an irrational manner. In the alternative, they seek an order compelling the first respondent to publish a notice exempting the first appellant's members from s 62 in terms of s 109 of GECA. In the further alternative, and by way of an amended notice of motion, they seek a *mandamus* directed at the enforcement of GECA against unlicensed operators.

[3] The appeal is against the whole of the judgment and orders of the High Court delivered on 2 April 2025, which dismissed the appellants' application with costs and granted a counter-application brought by the second and eighth respondents.[2]

[4] The appeal must be seen against a factual background which is, in the main, not

[1] Regulations published under GN 254, GG 7693, 1 December 2021.
[2] *Gambling House Association of Namibia v Minister of Environment and Tourism* (HC-MD-CIV-MOT-REV-2022/00428) [2025] NAHCMD 147 (2 April 2025).

in dispute. On the appellants' evidence, and the first respondent's admissions, a substantial and longstanding illegal gambling industry has operated in Namibia for decades, unlicensed, unregulated, untaxed and unprosecuted. Licensed operators, including the appellants, have borne the regulatory and fiscal burdens of the statutory regime.

The parties

[5] The first appellant is the Gambling House Association of Namibia, a voluntary association constituted by written constitution, with the capacity to sue and be sued. Its members hold gambling house licenses issued under the 1994 Act, some 71 in number, under which approximately 579 gambling machines are operated. The second appellant, Irmgard Fourty CC, is a close corporation and the holder of one such license. Mr Jaco Horn, who deposed to the founding papers, is the secretary of the first appellant and the managing member of the second, which is itself a member of the first appellant.

[6] The first respondent is the Minister of Environment and Tourism,[3] who is responsible for the administration of GECA. The decisions in issue were taken by her predecessor. I refer to him as 'the erstwhile Minister' when dealing with those decisions, and to 'the Minister' when dealing with the powers of the office. The second respondent is the Gambling Board, established as a juristic person by GECA,[4] and the eighth respondent is its chairperson. The third, fourth, and fifth respondents are, respectively, the Attorney-General, the Speaker of the National Assembly, and the President of the Republic of Namibia. The sixth respondent is the erstwhile Chairperson of the former

[3] The decisions in issue were taken by Mr Pohamba Shifeta, who then held the office.
[4] See s 5 of GECA.

Casino Board, a creature of the 1994 Act[5], which ceased to exist upon the repeal of that Act and the coming into force of GECA. The seventh respondent, Bandits Gambling CC, is a duly registered close corporation, and was a co-applicant with the first appellant in the 2019 proceedings and a party to the settlement agreement resulting in the making of the order. The eighth respondent is the Chairperson of the second respondent, who was cited *a quo* for any interest he might have in the matter, as review relief was not sought against the Gambling Board.

[7] No substantive relief was initially sought against the second to eighth respondents. They were cited to the extent that their interests might be affected. The first, second, third and eighth respondents opposed the application and delivered answering affidavits. The second and eighth respondents delivered a counter-application. The fourth to seventh respondents have taken no part in the appeal.

[8] It is common cause that the appellants and the first appellant's members hold valid licenses and conduct their businesses lawfully. By operation of s 57 of GECA, licenses issued under the 1994 Act are regarded as having been issued under the corresponding provisions of GECA.

Background facts

[9] The record in this matter is particularly voluminous, and much of the evidence is directed at a factual controversy that, for the reasons given below, need not be resolved. I set out only so much of the background as is necessary for an understanding of the issues, and deal with the remainder, where it matters, in the analysis of the grounds upon

[5] In terms of s 3 of the 1994 Act.

which it bears in this appeal.

The 1994 Act and the fiscal regime under it

[10] The 1994 Act commenced on 2 December 1994. Under it, the Minister was the regulator. The powers to grant, refuse, suspend and withdraw licenses, to appoint inspectors, and to prescribe fees and levies were vested in the Minister.[6] The former Casino Board established by s 3 of the 1994 Act was recommendatory and advisory only. Section 41 imposed the levy, and reg 20(1) of the regulations published under that Act prescribed its incidence and rate.

[11] A casino license required an accommodation establishment graded at not less than four stars with at least 100 guest rooms in Windhoek, or three stars and 50 rooms elsewhere. A gambling house license required the holder to conduct an accommodation establishment or to carry on a retail liquor or bookmaker's business. Mr Horn, the appellants' deponent, put the aggregate investment of the first appellant's members at between N$70 million and N$90 million, and the second appellant's at some N$4 million. Importantly for the appellants, licenses under the 1994 Act were of indefinite duration.

[12] In February 1996, a previous Minister appointed a commission of enquiry chaired by Mr (as he then was) Petrus T. Damaseb. The commission recommended, among other things, a moratorium on issuing new casino and gambling house licenses; an independent executive board as licensing authority and monitoring agent; a dedicated enforcement cadre; and strengthened regulation of gambling machines. The recommendation as to a moratorium was accepted by Cabinet and given statutory effect

[6] Sections 16, 24, 41, 42 and 54 of the 1994 Act.

by the insertion of s 21A into the 1994 Act. The moratorium took effect on 31 December 1996 and was lifted only upon the commencement of GECA on 1 December 2021. Effectively, a suspension on the issue of new casino and gambling house licenses for some 25 years.

[13] Following the enactment of the Value-Added Tax Act 10 of 2000, the former Casino Board and the Commissioner of Inland Revenue agreed on the mechanism recorded in Value Added Tax (VAT) Practice Note 11-2000, in terms of which the value-added tax portion was set at 15 per cent and the levy reduced to 5 per cent, so that gambling houses paid an aggregate of 20 per cent. That position changed with the publication of Government Notice 95 of 27 April 2017, which amended the regulations under the 1994 Act to impose the s 41 levy at a flat 10 per cent of nett monthly income, uniformly and without differentiation. The annual gambling house license fee was set at N$10 000, plus an additional N$1000 per machine. It was the implementation of that notice that prompted the formation of the first appellant.

The complaint concerning unlicensed operations

[14] The grievance which lies behind everything that followed is the appellants' complaint that illegal gambling houses have proliferated throughout Namibia, that they pay no levies, license fees, value-added tax or income tax, and that they are subject to none of the controls imposed upon licensed operators as to the number and standard of machines, the configuration of premises or the fitness of the holder. Further that the machines they operate outnumber those lawfully operated by approximately ten to one, with a consequent progressive decline in the revenues of the licensed operators.

[15] The erstwhile Minister accepted that unlicensed gambling machines and premises have proliferated, though the parties differ as to the precise extent of that proliferation.

[16] For purposes of this appeal, it is unnecessary to resolve those differences. The proliferation itself is admitted. Beyond that, I assume in favour of the appellants, without deciding, that illegal gambling remains extensive and that enforcement has been inadequate.

The correspondence and the 2019 application

[17] Between May 2018 and December 2018, the licensed operators, acting first individually and later through the first appellant, addressed a series of letters to the erstwhile Minister, proposing engagement on GN 95, and on the establishment of a commission to review the effectiveness of the regulatory regime, and a due process by which unlicensed establishments might either comply or face legal action. The correspondence having come to nothing, the first appellant and Bandits Gambling CC instituted proceedings in the High Court in 2019 under case no HC-MD-CIV-MOT-GEN-2019/00142 seeking a *mandamus* compelling enforcement against unlicensed operators. No answering affidavit was ever delivered, and the case advanced was also not gainsaid.

The settlement agreement and order

[18] The application was settled. A settlement agreement was concluded on 14 June 2020 and made an order of the High Court on 17 June 2020. Two clauses matter for this appeal. Clause 1 required the erstwhile Minister to, within 60 days, amend sub-reg 20(1) of the regulations under the 1994 Act to read as follows:

> 'The levy imposed by s 41 of the Act shall not apply to gambling houses and shall be calculated and be payable by the holder of a casino license at a rate of 10 per cent of the net monthly income which such holder derives from conducting the casino, as the case may be.'

[19] Clause 2, upon which the appellants' principal case rests, provides the following:

> 'The First Respondent or any successor in title, or such other Minister as may become the responsible Minister for Gambling Houses in terms of any amended or substituting statute shall not impose any levy whatsoever on any Gambling House duly registered in terms of the Act or any substituting statute, until such time as all illegal gambling houses in Namibia have either been legalised or closed, whether under existing legislation or any future legislation.'

[20] The appellants' case is that the underlying rationale of the settlement, as understood by all parties to it, was that levies would not be payable by licensed gambling houses until all illegal operators had been licensed or shut down and were paying their fair share.

[21] In compliance, or partial compliance with clause 1, the erstwhile Minister published GN 255 of 15 October 2020, expressed to take effect from 30 September 2020, by which regulation 20 (which since 27 April 2017 had prescribed a levy of 10 per cent of nett monthly income payable by the holder of a casino or gambling house license) was repealed in its entirety, and regulation 21 was substituted so as to confine the late-payment penalty to the annual license fee.[7]

[7] GN 255 of 2020 (GG 7361), GN 84 of 1995 (GG 1084); the levy itself being imposed by s 41 of the Casinos and Gambling Houses Act 32 of 1994, at such rate as may be prescribed.

GECA, the amendment and the Regulations

[22] GECA had by then already been enacted, though not yet brought into force. It was published under GN 341 in GG 6793 in 2018. On 14 July 2020, less than a month after the order, s 40A was inserted into GECA by s 5 of the Gaming and Entertainment Control Amendment Act 5 of 2020.[8] The appellants say that this was done without notice to the first appellant or its members. Section 40A(1) empowers the Minister to prescribe 'other licenses' which may be issued under GECA. Section 40A(2) lists matters which regulations made under it may cover, among them the fees or levies payable in respect of such a licence, and transitional arrangements for persons engaged in unlicensed gambling. The section is quoted in full below, where the challenge to it is considered.

[23] The first appellant takes issue with the timing of the amendment. The settlement negotiations were protracted and took months to conclude, yet an amendment of this nature was drafted and published in less than a month, which suggested to the appellants that drafting instructions had been given before the settlement was signed, without disclosure and without any opportunity to make representations.

[24] GECA came into force on 1 December 2021, some 18 months after the order. The 1994 Act was repealed and the moratorium on new licenses lifted. The Regulations were also published at the same time. Two features are important. Firstly, reg 2 created two new categories of licenses not provided for in GECA itself, namely the bar gambling license and the shebeen gambling license, which could be prescribed only under s 40A. Regulation 2(3) allows a person keeping gambling machines at commencement of

[8] GN 150 of 2020 (GG 7269) 14 July 2020. The appellants allege that drafting instructions predated the settlement.

GECA, six months within which to apply for the relevant license. Secondly, reg 29 imposes a levy of 10 per cent of nett monthly income. Regulation 29(1) defines nett income as gross income derived from gambling operations, excluding income from the sale of liquor, food or other commodities, and less winnings paid out. Regulation 29(2) provides that the levy imposed by s 62 must be calculated and paid by the holder of a license at that rate. Regulation 29(3) opens with the words 'For the purposes of section 40A(2)*(d)* of the Act' and imposes a levy at the same rate on the holders of the two new categories of license. Regulation 33 prescribes a penalty for late payment.

Events following commencement

[25] Following the commencement of GECA and its regulations on 1 December 2021, the appellants maintained that the order remained fully operative and unaffected by the new legislative regime, communicating that view to the erstwhile Minister and receiving no substantive response. At the time the present application was instituted, none of the first appellant's members was paying the statutory levy. No respondent had demanded payment either, and, on the appellants' evidence, no illegal gambling house had been closed as contemplated in the order. The appellants accordingly contended that the condition upon which clause 2 of the order depended had not been fulfilled, and that the suspension of their obligation to pay the levy therefore remained in force.

<u>The relief sought in the court *a quo*</u>

[26] The application was launched in 2022, and the notice of motion was amended on 6 February 2023. In summary the appellants sought:

(a) First, a declaration that the Minister was and is not entitled to impose any levy whatsoever on any gambling house duly registered under the 1994 Act or any substituting statute, including GECA, until all illegal gambling houses in Namibia have either been legalised or closed.

(b) Second, an order declaring s 40A of GECA unconstitutional and striking it down, together with any steps taken under it, including the Regulations particularly, regs 2, 29 and 33.

(c) Third, a series of alternatives directed at reg 29, namely a declaration that in making reg 29 and in failing to exempt the first appellant's members under s 109 of GECA, the erstwhile Minister violated the order, with reg 29 to be set aside on that basis; alternatively, the setting aside of reg 29 as unconstitutional and void; alternatively, its review and setting aside as contrary to art 18 of the Constitution and the common law.

(d) Fourth (prayer 4), an order directing the erstwhile Minister to publish within ten days a notice in the GG exempting the first appellant's members from s 62 in terms of s 109, with effect from 1 December 2021 and enduring until all illegal gambling houses have been legalised or closed; failing which a declaration that in the light of the order they are not required to pay the levies provided for in reg 29 read with s 62 until that condition is met.

(e) Fifth, declarations that s 57, and the reference to s 57 in the introductory part of s 56(1), are unconstitutional insofar as they limit the duration of licences issued under the 1994 Act, and that s 88 is unconstitutional.

(f) Sixth and finally (prayer 6), introduced by the amended notice of motion and directed at the eighth respondent alone, an order that the eighth respondent, acting through inspectors appointed under s 18 and where necessary accompanied as contemplated in s 19(5), identifies all premises upon which unlicensed gambling is conducted, remove machines and other items which may furnish proof of a contravention, and formally charge every person conducting unlicensed gambling.

[27] In response to the application, the second and eighth respondents launched a counter-application seeking a declaration that the appellants and the members of the first appellant are obliged to pay the statutory levies under GECA and the Regulations with effect from 1 December 2021, together with payment and *mora* interest from the date of presentation of invoices.

The findings of the court *a quo*

[28] The court *a quo* dismissed the application with costs, including the costs of one instructing and two instructed counsel. It granted the counter-application with costs in favour of the second and eighth respondents, declaring the appellants and the first appellant's members liable for the statutory levies with effect from 1 December 2021 together with *mora* interest from the date of presentation of invoices.

[29] The court identified three questions, namely, whether the order could be enforced; whether ss 40A, 57 and 88 of GECA and reg 29 are unconstitutional; and whether the appellants and the members of the first appellant could be ordered to pay the levies. On the first question, it held that the order had been overtaken by GECA. GECA introduced an entirely new dispensation, under which the power to determine licence applications, and to impose and collect levies, vests in the Board and no longer in the Minister. [9] The Board was neither a party to the settlement nor the Minister's successor in title, and the terms of the settlement were not carried into GECA. The court held that enforcing the order in those circumstances would amount to the judiciary usurping the legislature's powers.

[30] For that conclusion the court relied on *Minister of Home Affairs v Eisenberg & Associates*,[10] for the proposition that where Parliament has replaced an old regime with a new one, a court may not direct that the old regime remain in force. It relied also on this Court's judgment in *Minister of Finance & another v Hollard Insurance Co of Namibia Ltd & others*,[11] for the proposition that the separation of powers binds the courts, and that it is doubtful whether a Namibian court may order that legislation not have the force of law for an indefinite period. It concluded that the order fell away by operation of law when the 1994 Act was repealed. It followed that the appellants could not rely on the settlement to escape the levy. Section 62(1) imposes it, and its validity was not challenged. The only route to exemption lay in s 109, which confers a discretion rather than an obligation, and no application for exemption had been made. [12]

---

[9] Judgment *a quo* para 132.
[10] *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) paras 69–70.
[11] *Minister of Finance & another v Hollard Insurance Co of Namibia Ltd & others* 2019 (3) NR 605 (SC) paras 117–119.
[12] Judgment *a quo* para 136.

[31] The court held that the challenge to s 40A was premature, because no regulations had yet been made under it, and it was not known whether or how the appellants would be affected.[13] It added that the section would in any event pass constitutional muster. The industry is fast-changing and driven by digital technology, and the Minister must be able to prescribe new licences without returning to Parliament each time. Since the order had fallen away and s 40A was valid, reg 29 and the other impugned regulations stood.

[32] As to ss 57 and 88, the court held that a gambling licence is a privilege subject to regulation, and not a property protected by art 16(1) and (2).[14] It likened a gambling licence to a liquor license, which *Aquatur (Pty) Ltd v Sacks & others*[15] described as a purely personal statutory privilege, and to the ownership of a firearm.[16] Sections 57 and 88 were accordingly held not to infringe arts 8, 16(1) or 21(1)*(j)*.[17]

[33] The court also dismissed the appellants' three points *in limine* against the counter-application. It held that annexure BS7 authorised the Board's chairperson to oppose the application and to bring related applications, and that the counter-application was plainly related. Applying *Minister of Health and Social Services & others v Medical Association of Namibia Ltd & another*,[18] it held that the appointment of the Board's members before GECA commenced was necessary groundwork. And it rejected the contention that the Minister imposes the levies which the Board collects, holding that s 62 places the

---

[13] Judgment *a quo* para 138.
[14] Judgment *a quo* paras 140–145.
[15] *Aquatur (Pty) Ltd v Sacks & others* 1989 (1) SA 56 (A) at 64H–I.
[16] Applying by analogy the holding of the South African Constitutional Court in *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC); 2018 (10) BCLR 1268 (CC) para 1, that gun ownership is a privilege regulated by law rather than a fundamental right.
[17] Judgment *a quo* para 145.
[18] *Minister of Health and Social Services & others v Medical Association of Namibia Ltd & another* 2012 (2) NR 566 (SC) para 68.

obligation on the licence holder.

The issues on appeal

[34] The notice of appeal runs to 27 pages. It is prolix. It also does not comply with the rules governing the preparation of notices of appeal. [19] Grounds 1.1 to 1.6 constitute broad and undifferentiated complaints against the judgment, and grounds 3.1 to 3.56 substantially re-argue the merits. Counsel for the appellants helpfully narrowed matters considerably in the heads of argument and at the hearing. There are effectively four main issues. They are:

(a) whether the settlement agreement of 2020, made an order of court, confers upon the appellants an enforceable entitlement not to pay the levy imposed by s 62 of GECA;

(b) the constitutional challenge to s 40A, and with it the challenge to the Regulations made under it;

(c) the constitutional challenge to s 57; and

(d) the appellants' opposition to the counter-application.

[35] To those must be added, because they were argued and must be disposed of, the construction of s 109 and the competence of prayer 4 in the notice of motion, the 'enforcement' relief in prayer 6, and costs. The challenge founded on s 88 was

[19] *President of the Republic of Namibia & others v Shivute* 2024 (2) NR 561 (SC) paras 60–61.

abandoned in argument and is not dealt with.

The submissions of the parties

[36] The principal dispute concerned the effect of the order of 17 June 2020. The appellants contended that it was directed at the future, and bound the erstwhile Minister, his successors and regulatory authorities under future legislation not to impose a levy on licensed gambling houses until illegal gambling houses had been legalised. Relying on *Municipal Manager, OR Tambo District & another v Ndabeni,*[20] they submitted that the order binds until it is set aside. Relying on *Eke v Parsons*[21] and *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others,*[22] they argued that it operates *in rem.* They also argued that *Hollard*[23] and *Eisenberg*[24] are distinguishable, and did not justify disregarding the order.

[37] The respondents submitted that neither Parliament nor the Board was bound by the order. The Board exercises original statutory powers conferred by GECA and is not a successor in title to powers exercised under the 1994 Act. They argued that no court order can suspend the operation of a valid legislation absent a declaration of invalidity, and that the settlement was a temporary dispensation which did not survive the enactment of a new statutory regime.[25]

[38] On s 62 and reg 29, the appellants argued that reg 29 perpetuates the very

---

[20] *Municipal Manager, OR Tambo District Municipality & another v Ndabeni* 2023 (4) SA 421 (CC) paras 23–26.
[21] *Eke v Parsons* 2016 (3) SA 37 (CC) para 23.
[22] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC).
[23] *Hollard* supra fn 11.
[24] *Eisenberg* supra fn 10.
[25] *Woolwashing & Processing Mills Ltd v The President, Industrial Court & other*s (1987) 8 ILJ 79 (D); *Itula v Minister of Urban and Rural Development* 2020 (1) NR 86 (SC); *Hollard* supra fn 11; and *Eisenberg* supra fn 10.

inequality which the order addressed, because licensed operators alone bear the levy while illegal operators remain outside the licensing net. The respondents answered that liability arises from s 62 itself, that reg 29 merely prescribes how the levy is calculated and paid, and that the unlawful conduct of others cannot excuse compliance by licensed operators.

[39] On s 40A, the appellants contended that the section delegates impermissibly broad legislative powers to the Minister, leaving core matters such as licences, qualifications, disqualifications, fees and levies to regulation. They relied on *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa and others*,[26] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & others*[27] (*CRAN 2018*), *South African Reserve Bank & another v Shuttleworth and another*[28] and *Scalabrini Centre of Cape Town & another v Minister of Home Affairs & others*[29]. The respondents answered that s 40A is constrained by the detailed framework of GECA itself. They distinguished *CRAN 2018* and relied on *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement*[30] for the proposition that Parliament may lawfully delegate subordinate regulatory powers. They also submitted that the regulations followed a public consultation process and complied with art 18.

[40] The appellants attacked the regulations on four grounds. First that they fall with s

---

[26] *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC).
[27] *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & others* 2018 (3) NR 664 (SC).
[28] *South African Reserve Bank & another v Shuttleworth & another* 2015 (5) SA 146 (CC).
[29] *Scalabrini Centre of Cape Town & another v Minister of Home Affairs & others* (CCT126/25) [2026] ZACC 30 (7 July 2026).
[30] *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement* 2018 (3) NR 800 (SC).

40A; second, that reg 2(3) conflicts with s 70 by allowing unlicensed operators a period of continued operation; third, that reg 29 results in unequal treatment; and fourth, that the regulations were made in breach of art 18 and the *audi alteram partem* principle. The respondents disputed each ground and maintained that adequate consultation had preceded the regulations.

[41] With regard to s 109, the appellants argued that the order itself furnished a sufficient basis for the exercise of the exemption power, and that no prior application was required. The respondents contended that the power is discretionary, that it may be exercised only after the circumstances of the person seeking exemption have been considered, and that a court cannot compel its exercise in a particular manner. For the last proposition, they relied on *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism* [31] and *Burns, Administrative Law*.[32]

[42] The appellants contended that, by replacing licences of indefinite duration with licences of 25 or 50 years, s57 diminishes existing rights and infringes art 16. Reliance was placed on *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd.*[33] The respondents answered that the rights of former licence holders are now governed by s 57; and that renewal mechanisms remain available. Further, that licenses in a regulated industry are statutory privileges, not vested property rights. They relied on *Aquatur,*[34] *South African Hunters*[35] and *Black Range Mining*.[36]

---

[31] *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 298C–299D and 305C–D, applied in a different context in *Phillemon v Minister of Justice* 2024 (2) NR 326 (HC) para 38.
[32] Burns *Administrative Law* 4 ed at 567–568.
[33] *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (2) SA 1 (A) at 12E–F.
[34] *Aquatur* supra fn 15 at 64H–I.
[35] *South African Hunters* supra fn 16 para 1.
[36] *Minister of Mines & Energy and another v Black Range Mining (Pty) Ltd* 2014 (2) NR 321 (SC).

[43] Finally, the appellants pressed the *mandamus* in prayer 6, contending that ss 18 and 19 of GECA give the Board sufficient powers to deal with unlawful gambling. The respondents submitted that the relief concerns policing, and so implicates authorities who were not joined.

Analysis

[44] I begin with the order, because the appellants' principal case rests on it, and because the balance of the relief is in large measure alternative to it.

[45] The order has not been set aside. It was not appealed or reviewed, and no application was brought to set it aside. The appellants rely on *Ndabeni*[37] for the principle that an order of court binds until it is set aside, whatever view may be taken of its correctness, and that a party bound by it may not simply ignore it. That principle is not in doubt. Counsel for the respondents also expressly and correctly disavowed any contention that the order could be disregarded.

[46] The question, therefore, is not whether the order binds, but what it requires, and of whom. A settlement agreement made an order of court is an order like any other and is interpreted like any other. Its manifest purpose is ascertained from its language, read in context, and because it records an agreement, the principles of the interpretation of contracts apply. Because a settlement agreement may be made an order of court only if its terms accord with the Constitution and the law, a court will not give such an order an effect that the law does not permit. That follows from the court's supervisory role when

[37] *Ndabeni* supra fn 20 paras 23–24 and 33 and the authority collected there. See also *Municipal Council of the Municipality of Windhoek v Lady Pohamba Private Hospital Operations (Pty) Ltd and others* 2025 (2) NR 556 (SC) paras 76–79.

invited to convert a private agreement into a public act of judicial authority. As Madlanga J explained in *Eke v Parsons*; [38]

> 'This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement.'

[47] The starting point is the source of the obligation which the appellants seek to avoid. The levy is not imposed by contract, by judicial order or any decision of the Minister. Section 62(1) of GECA provides that the holder of a casino license or gambling house license **must** pay to the Board a levy on the income derived from conducting the licensed activity. The liability in terms of the section is imposed by Parliament, in peremptory terms. Section 62(2) leaves to the Minister the prescription of the rate, and of the manner and date of payment, and reg 29 is the exercise of that power. The Board's function in this regard is collection-related.

[48] The court *a quo* held that it is the Board which is authorised to impose levies. That holding is not defended on appeal and, in my view, cannot be supported. It also underlays the court's conclusion that the order could not operate against the second respondent, because it was the Board, a stranger to the settlement, that now imposes the levy. The Board was indeed not a party to the settlement, and it exercises powers conferred on it by GECA rather than by delegation from the Minister. But it imposes nothing. It *inter alia* collects a levy imposed by Parliament, at a rate prescribed by the Minister, and the Minister is precisely the functionary whom clause 2 purports to bind as 'successor in title'

---

[38] *Eke v Parsons* supra fn 21 paras 23 and 29–30 and the authorities there collected. See also *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D–H.

or ‘such other Minister as may become the responsible Minister’. The fact that the Board was not a party to the settlement therefore carries little weight.

[49] It follows that nothing in the settlement agreement could relieve licence holders of a liability which Parliament itself imposed in s 62(1). Clause 2 is an undertaking by the erstwhile Minister not to do certain things. Parliament was not a party to it and was not bound by it, and the appellants did not contend otherwise. That also disposes of the complaint about the timing of the amendment that inserted s 40A. Regardless of the sequence of events, Parliament remained free to legislate constitutionally. The appellants’ argument conflates two distinct questions: whether the erstwhile Minister acted inconsistently with the undertaking in clause 2, and whether licence holders remain liable for a levy which Parliament has imposed on them. Even if it were assumed that the erstwhile Minister acted inconsistently with clause 2, the consequence would be a remedy against the Minister, not the release of licence holders from an obligation imposed by statute.

[50] That is not, however, the end of the matter. The rate is not fixed by Parliament. It is prescribed by the Minister in terms of s 62(2). Counsel for the appellants submitted that s 62(1) does not by itself bring about any levy, and that without the Minister acting under s 62(2) there is none. He argued that the Minister could rationally have determined that the levy would become payable by gambling houses only in, for example, three years’ time, to allow time for legalisation or closure. The appellants’ case, in the first alternative of prayer 3, is that by prescribing a rate in reg 29 the erstwhile Minister did what clause 2 forbade, and that reg 29 must be set aside on that ground. Clause 2 is indeed expressed to bind any successor Minister ‘in terms of any amended or substituting

statute', and to apply 'whether under existing legislation or any future legislation'. On its terms, therefore, it reaches the power in s 62(2). The real question, however, is whether clause 2 could lawfully constrain the exercise of that power.

[51] In my view it could not. The point was put to counsel for the appellants at the hearing. The principle is not that a public functionary may never assume obligations capable of influencing future conduct. Public administration would be impossible if every undertaking affecting the future were considered to be an unlawful fetter of a functionary's discretion, and a functionary who lawfully exercises an existing power may thereby assume obligations with future consequences. What the law does not contemplate is the irrevocable commitment, in advance, of the manner in which a statutory discretion will be exercised, regardless of the circumstances prevailing when the occasion for its exercise arises. The repository of a statutory power must remain free to consider the matter entrusted to him or her when the power falls to be exercised, and to decide it according to the statute and the circumstances then obtaining.

[52] The High Court applied this principle in *Wlotzkasbaken Home Owners Association & another v Erongo Regional Council & others*[39]. There, a regional council had agreed, in a settlement made by an order of court, to sell the erven in a township once it was proclaimed. The council later argued that the agreement unlawfully fettered its power to lease the erven in the meantime. The court rejected that argument. The council had entered into the agreement in good faith, in the proper exercise of a power it already had, and the fact that the obligation might later prevent it from using its powers

[39] *Wlotzkasbaken Home Owners Association & another v Erongo Regional Council & others* 2007 (2) NR 799 (HC) paras 31–32 and 36–38. The appeal was dismissed on other grounds, without reference to the fettering issue, in *Erongo Regional Council & others v Wlotzkasbaken Home Owners Association & another* 2009 (1) NR 252 (SC).

in some other way did not make it an unlawful fetter. That is the situation described above, in which the lawful exercise of an existing power carries consequences for the future. Clause 2 is of a different kind. Their very object was to settle in advance how a future statutory discretion would be exercised.

[53] Clause 2 has two aspects to it, and they should be considered in that light. The erstwhile Minister undoubtedly had the power to settle the 2019 litigation, and counsel for the respondents rightly did not suggest otherwise. That power extended to undertakings about the powers he then held under the 1994 Act, including the power to prescribe the income on which, and the basis and rate at which the levy imposed by s 41 of that Act was to be calculated. [40] He gave effect to the settlement in that respect when he repealed reg 20. To that extent the undertaking was to all intents and purposes lawfully given, and it was performed. The power to settle litigation is not without limits. It does not authorise agreement to terms that the functionary could not lawfully have adopted independently, nor does the subsequent making of the settlement an order of court confer such authority.

[54] Clause 2, however, went further. It is expressed to bind 'any successor in title' and 'such other Minister as may become the responsible Minister', and to apply 'whether under existing legislation or any future legislation'. Those words make plain that it was meant to survive the repeal of the 1994 Act. When the settlement was concluded in June 2020, Parliament had already passed GECA, although it had not yet come into force, and s 62 formed part of it. Clause 2 therefore purported to bind unnamed future holders

[40] Section 41(1) of the 1994 Act, as substituted by s 7 of the Casinos and Gambling Houses Amendment Act 12 of 1995, read with s 54(1)*(j)* of the 1994 Act, as amended by s 11 of that Act.

of the office as to how they would exercise a power which Parliament had already conferred in a statute awaiting commencement. It did so until a condition was met over which neither the holder of the power nor the court has any control, and which may never be met at all. That is precisely the advance commitment which is not accepted.

[55] Counsel for the appellants submitted that clause 2 bound only the Minister, not Parliament, and that the undertaking was rational when given. Both propositions may be accepted. However, the difficulty is not that clause 2 purported to bind Parliament, nor that its object was irrational. It is that it purported to bind in advance the holder of a power under a statute not yet in force, and to dictate how that power would be exercised irrespective of the circumstances later prevailing. Counsel answered that clause 2 does not preclude a different decision if circumstances change, because the order itself provides that the levy is imposed once illegal gambling houses have been legalised or closed. But clause 2 allows only the change of fulfilling its own condition, and that lies outside the Minister's control. Short of it, the erstwhile Minister could not respond to any other change in circumstances, however material, by exercising the power in s 62(2).

[56] There is a further consideration. When GECA came into force, the 1994 Act was repealed, and with it the powers to which the lawful aspect of clause 2 related. The power to prescribe the levy was not abolished. Section 62 follows the pattern of s 41 of the 1994 Act. Under both, the statute imposes liability, and the rate is left to be prescribed. But the power in s 62(2) is a new power conferred by a different statute, and within a different regulatory scheme. Under that scheme it is the Board, and not the Minister that grants licences, and the levy is paid to the Board rather than to the State Revenue Fund. Clause 2 had therefore ceased to have any operative effect, because the powers to which it

related no longer existed. What remains of clause 2 is only the part that purports to reach the powers conferred by GECA. However closely those powers may resemble the old ones, an undertaking which dictates in advance how they will be exercised could not lawfully be given in these circumstances.

[57] This conclusion does not involve disregarding the order, and it is consistent with the principle in *Ndabeni*. A settlement agreement made an order of court takes its content from the agreement, and making it an order of court cannot give an undertaking a legal effect which the party giving it had no power to give. A court asked to give effect to such an order must determine what it lawfully requires. In *Ndabeni* itself, the Constitutional Court, while insisting that even flawed orders bind until set aside, accepted that a court would not compel compliance with an order if that would be 'patently at odds with the rule of law'.[41] To compel the Minister to refrain from exercising a power which Parliament has since conferred on that Office, until a condition beyond the Minister's control is met, and to set aside a regulation because the erstwhile Minister exercised it, would be such a case. To the extent that clause 2 purported to dictate the future exercise of the power in s 62(2), it is not an obligation the erstwhile Minister could lawfully undertake, or that a court can enforce.

[58] It follows that reg 29 was not made in breach of any obligation which the order could lawfully impose, and the first alternative in prayer 3, which seeks to have reg 29 set aside on that ground, fails. So does prayer 1. Liability for the levy arises under s 62(1), and the rate payable was prescribed in the exercise of a power that clause 2 could not constrain.

---

[41] *Ndabeni* supra fn 20 para 23 (emphasis in original).

[59] The submission founded on *Ferreira v Levin*[42] that the order operates *in rem* can be disposed of shortly. An order which embodies a settlement between identified litigants determines the *lis* between those parties. It creates no status operating against the world, and it confers no rights upon persons who were strangers to it. The argument does not assist the appellants.

[60] The order should not have been granted for these reasons. One further observation should be made. A court asked to make a settlement an order of court does not act as a rubber stamp. It must satisfy itself that the order sought is competent and proper, that its terms accord with the Constitution and the law, and that they are not at odds with public policy.[43]

Section 109 and prayer 4

[61] Section 109 empowers the Minister, by notice in the Gazette, to exempt categories of machines, persons or activities for such period as the Minister may determine. The section contains no requirement that the exercise of that power be preceded by an application. Whether, in a given case, the submission of an application may be a practical precursor to the exercise of the power does not arise for determination here. It suffices to say that the section does not expressly make an application a jurisdictional prerequisite to the exercise of the Minister's discretion. To that extent, the reasoning of the court *a quo* cannot be sustained.

[62] Section 109 confers a power, rather than a duty. The record discloses no decision

---

[42] *Ferreira v Levin* supra fn 22.
[43] *Eke v Parsons* supra fn 21 paras 25–26.

by the first respondent declining to exercise that power, nor any refusal to consider whether it should be exercised. Prayer 4 would require this Court to direct the Minister to exercise the power in a particular manner, retrospectively from 1 December 2021 and for an indefinite period. Such relief ordinarily exceeds the proper limits of judicial review and is justified only where the facts admit of but one lawful outcome. [44] This is not such a case. Whether an exemption should be granted, to whom and on what terms and for how long, involves considerations of policy, administration, revenue and fairness. Parliament has entrusted those matters to the Minister, and they do not admit of a single answer.

[63] Although the absence of an application is not dispositive, it is a relevant consideration. The power conferred by s 109 has not previously been invoked in relation to the appellants. In response to a question from the bench, counsel for the respondents indicated that, should the appellants' members apply in terms of s 109, the Minister may be open to considering their applications, particularly during the grace period. Counsel maintained, however, that the section confers a discretion, which must be triggered by a request and exercised on the facts of each applicant's case. That would then be a matter for the Minister.

[64] Prayer 4 accordingly fails, albeit for reasons different from those relied upon by the court *a quo*.

Section 40A

[65] The court *a quo* held the challenge to s 40A to be premature. On this record, that cannot be right, and the respondents did not press that point in argument. Regulation 2

[44] *Van Huyssteen* supra fn 31 at 298C–299D and 305C–D; *Phillemon* supra fn 31 para 38.

creates two categories of licence for which the Act itself makes no provision, and reg 29(3) opens with the words 'For the purposes of section 40A(2)(d) of the Act'. The power has been exercised. The challenge is ripe and must be decided on the merits.

[66] The principle relied upon by the appellants is not in doubt. Parliament may delegate authority to make subordinate legislation within the framework of the statute under which the delegation is made, but it may not assign plenary legislative power to another body.[45] Allied to that principle is the requirement that a statutory measure conferring discretionary power must not simply grant a wide and unconstrained discretion without accompanying guidelines on its proper exercise, for the rule of law requires that the law be ascertainable in advance so that those affected may arrange their affairs accordingly.[46]

[67] It was on that basis that this Court in *CRAN v Telecom* (2018) declared s 23(2)*(a)* of the Communications Act 8 of 2009 unconstitutional and struck it down, together with the regulations made under it. The provision set no upper threshold for the levy and identified no circumstances in which such a threshold might be exceeded. It left the regulator with unchecked discretion, without any ascertainable limitation, or even executive or legislative oversight, and the legislature had thereby failed to guard against the risk of an unconstitutional exercise of that discretion.[47]

---

[45] *Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC) para 51, applied in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & another* 2018 (3) NR 664 (SC) (*CRAN v Telecom* (2018)) para 17 and *Communications Regulatory Authority of Namibia v Mobile Telecommunications Ltd & others* 2024 (2) NR 340 (SC) (*CRAN v MTC* (2024)) para 99.

[46] *Medical Association of Namibia and another v Minister of Health and Social Services and others* 2017 (2) NR 544 (SC) para 85; *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* 2010 (2) NR 487 (SC) para 59; both applied in *CRAN v Telecom* (2018) para 18.

[47] *CRAN v Telecom* (2018) paras 91–93.

[68] This Court clarified the content of that principle when s 23, as amended, returned to this Court in *CRAN v MTC* (2024). The Court rejected the contention that *CRAN v Telecom* (2018) required Parliament itself to fix an upper limit. An upper limit was one possibility the Court had left open, but the constitutional defect identified in the earlier case was the absence of ascertainable limits and guidelines.[48] The relevant inquiry is whether the statutory scheme, read as a whole and together with the other provisions of GECA, contains sufficient safeguards against arbitrariness and the unbridled exercise of discretionary power.[49] A generalised complaint that the delegation could have been more restrictively formulated does not suffice,[50] and the question is whether the course chosen by the legislature falls within the range of reasonable alternatives open to it.[51] The Court upheld the amended provision because, viewed in its totality, the scheme established objectively justiciable criteria, standards and restrictions which adequately constrained and regulated the exercise of the discretion.[52]

[69] Section 40A, inserted by s 5 of the Gaming and Entertainment Control Amendment Act 5 of 2020, provides:

> '40A. Other licences
>
> (1) The Minister may prescribe other licences which may be issued under this Act and to which this Act applies.
>
> (2) Without derogating from the generality of subsection (1), regulations made under that subsection may include provisions in respect of —
>
> (a) the requirements that must be complied with before a licence is issued;

[48] *CRAN v MTC* (2024) paras 78 and 80.
[49] *Ibid* para 86.
[50] *Ibid* para 85.
[51] *Ibid* para 87.
[52] *Ibid* para 131; see also paras 98 and 119.

(b) the manner of making an application for a licence, persons that are disqualified from obtaining a licence and grounds for the suspension or cancellation of a licence;

(c) the type of games that are authorised to be played under a licence and the number of gambling machines that may be kept or played under the licence;

(d) conditions applicable to a licence, including the fees or levies payable in respect of the licence;

(e) transitional matters regarding persons that are engaging in unlicensed gambling activities and premises that are not licensed but which are required to be licenced on commencement of the regulations; and

(f) any other matter which the Minister considers necessary or expedient to prescribe in order to facilitate the issuing of a licence.'

[70] Measured against the test in *CRAN v MTC* (2024), the challenge to s 40A cannot succeed, save that the power to prescribe levies requires separate consideration. The appellants argue that the matters listed in s 40A(2), including the requirements for a license, the manner of application, disqualifications, grounds for suspension or cancellation, permitted games, the number of machines, and conditions attaching to a license, including fees or levies, are matters which the legislature itself regulated in considerable detail in ss 34 to 40 in relation to the various categories of license it created. That submission carries some force. But s 40A(2) does not define or limit the Minister's power. The listed matters are included 'without derogating from the generality of subsection (1)' and para (f) extends to any other matter the Minister considers necessary or expedient to facilitate the issuing of a license. The subsection is therefore illustrative rather than exhaustive. Elsewhere, the limits upon the Minister's power must accordingly be found in s 40A(1), read in the context of GECA as a whole.

[71] Section 40A(1) authorises the Minister to prescribe only ‘other licenses which may be issued under this Act and to which this Act applies’. It does not permit the creation of a licensing regime outside GECA. Any license prescribed under s 40A remains subject to GECA’s existing framework, including the Board’s licensing powers, the application procedures in ss 44-52, the disqualifications in s 42, the limitations in s 41, the statutory procedures governing suspension or cancellation, and the rights of appeal in ss 101 and 102. Nor does s 40A(2)*(f)* confer an unconfined power, being limited to matters necessary or expedient to facilitate the issuing of licenses.

[72] Taken together, these features provide ascertainable and judicially enforceable limits on the exercise of power. The complaint that Parliament did not itself prescribe the detailed attributes of every future category of license is, in substance, a complaint that the delegation could have been more restrictively formulated. As *CRAN v MTC* (2024) makes clear, that does not itself establish invalidity. Parliament was entitled to permit additional categories of license to be created within the framework of the Act rather than requiring legislative amendment whenever a new form of gambling activity required regulation.

[73] That leaves the power in s 40A(2)*(d)* to prescribe ‘conditions applicable to a licence, including the fees or levies payable in respect of the license’. Regulation 29(3) was made pursuant to that provision. This aspect of s 40A most closely resembles the delegation considered in *CRAN v Telecom* (2018) and therefore requires separate examination. Section 40A neither prescribes an upper limit for such a levy, nor a basis for its calculation, nor the circumstances in which any prescribed limit may be exceeded. Significantly, however, the Act adopts the same approach in relation to levies payable

under the categories of licence created by Parliament itself. The levies imposed on casino and gambling-house income under s 62, on totalizator takings under s 64, and on bookmakers' winnings under s 65 are each payable at a rate or percentage to be prescribed.

[74] Indeed, in the case of the levy under s 64, the Act leaves to regulation not only the rate but the income on which, and the basis on which, the levy is to be calculated.[53] In that respect s 40A(2)*(d)* is no more open-ended than the regulation-making power the legislature conferred in respect of the levies it imposed itself. None of those provisions is challenged, notwithstanding that s 62 governs the levy payable by the appellants themselves.

[75] The absence of a statutory ceiling is not decisive. An upper limit is only one means by which Parliament may confine a delegated power. The relevant question is whether GECA, viewed as a whole, subjects the power to ascertainable limits and safeguards against arbitrariness. In my view it does. The power is conferred on a minister accountable to the President and Parliament, not on a self-funded regulator acting in its own interest. The Board itself is funded through parliamentary appropriation, while GECA regulates the purposes for which levy revenue may be applied. In addition, the exercise of the power remains subject to the principles set out in s 3, and a levy bearing no rational relationship to those principles would be susceptible to review. Although these safeguards fall short of the detailed methodology upheld in *CRAN v MTC* (2024), that is not the test. The question is whether the legislative choice falls within the range of reasonable alternatives open to Parliament. In my view it does. A levy fixed by regulation

[53] Section 108(1)*(k)*. See also s 108(1)*(m)* and *(n)*, in respect of the totalizator and bookmaker levies.

as a condition of a license under a comprehensive statutory scheme, by a Minister subject to constitutional accountability, differs materially from the levy regime invalidated in *CRAN v Telecom* (2018). The challenge to s 40A(2)*(d)* therefore fails. A complaint that a particular exercise of the power exceeds its bounds is answered by a challenge to that exercise, not to the section. The appellants have made such challenges to the Regulations, and I now turn to them.

Regulations 2, 29 and 33

[76] The first attack on the Regulations was that they fall with s 40A. Since s 40A stands, that attack falls away.

[77] The second is directed at reg 2(3), which affords a person keeping gambling machines at commencement of the Act, six months within which to apply for the relevant licence. The submission is that this conflicts directly with s 70, which prohibits and criminalises unlicensed gambling activity despite any other law, and that a transitional provision cannot legalise what the Act criminalises. The respondents' heads do not address s 70, but the point must nonetheless be decided. Section 40A(2)*(e)* expressly contemplates regulations dealing with 'transitional matters regarding persons that are engaging in unlicensed gambling activities and premises that are not licensed but which are required to be licensed on commencement of the regulations'.

[78] Regulation 2(3) requires persons who were keeping gambling machines when the new licensing regime came into force to apply for the relevant license within six months, failing which the activity must cease. It therefore permits a limited period within which existing operators may regularise their position. That is precisely the type of transitional

arrangement contemplated by s 40A(2)*(e)*. Section 40A was enacted against the backdrop of s 70 and must be read as an express qualification to the extent necessary to give effect to such arrangements. Regulation 2(3) is accordingly authorized by s 40A(2)*(e)*, and the challenge to its validity fails.

[79] The purported extensions stand on a different footing. The erstwhile Minister's evidence is that the period in reg 2(3) was extended from 1 September 2022 to 28 February 2023, and thereafter to 31 August 2023. The appellants contend that the extensions are invalid, that they were purportedly issued under s 91 (which is concerned with the registration of gambling machines rather than licensing), and under which any power to extend vests in the Board rather than the Minister, that they were never gazetted, that they do not amend reg 2(3) and that they have since expired.

[80] The appellants say that the extensions are null and void and of no force and effect, but sought no order reviewing and setting them aside. When this was put to counsel at the hearing, the answer was that the extensions were *ultra vires* on their face. It is neither necessary nor appropriate to pronounce on their validity in these proceedings, given that they were not duly challenged and have in any event since expired. The appellants relied on their invalidity principally to contend that the condition in clause 2 of the order had not been fulfilled, but nothing turns on that condition, since clause 2 could not constrain the exercise of the power in s 62(2). The significance of the extensions lies rather in their bearing on prayer 6, to which I return below.

[81] The third challenge is founded on art 10(1) of the Constitution. The appellants contend that the Regulations infringe the guarantee of equality by re-imposing the levy

on licensed operators while unlawful operators continue to trade without being legalised or compelled to cease their activities. The contention cannot be sustained.

[82] Article 10(1) is concerned with differentiation between persons who are similarly situated. A differentiation that bears a rational connection to a legitimate governmental purpose does not contravene the guarantee of equality.[54] Licensed and unlicensed operators are not in the same position. Licensed operators enjoy the statutory entitlement to conduct gambling activities lawfully and are correspondingly subject to the obligations imposed by the regulatory framework. Unlicensed operators enjoy no such entitlement and act in contravention of s 70.

[83] Properly understood, the appellants' complaint is not directed at the differentiation created by the Regulations themselves. Rather, it is directed at the failure to enforce the statutory scheme against those who operate unlawfully. That concern is neither trivial nor illusory. If unlawful operators are permitted to continue trading, the commercial value of the rights enjoyed by licensed operators may be materially diminished. The complaint is therefore one of unequal enforcement rather than unequal treatment, and I deal with it below in the context of prayer 6.

[84] The levy remains rationally connected to the regulatory regime under which license holders are permitted to operate lawfully.[55] The fact that the regulatory scheme may not have been enforced with equal vigour against unlawful operators does not negate that connection. Nor does it relieve license holders of the obligations that attach

[54] *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC).
[55] *CRAN v Telecom* (2018) paras 81 and 85.

to the privilege of lawful operation. The appropriate remedy for any failure by the authorities to enforce the Act lies in the enforcement of the Act by those charged with it, which in an appropriate case may be compelled,[56] not in exempting compliant operators from obligations that arise as an incident of their licensed status.

[85] It follows that the continued existence of unlawful operators does not render the levy unconstitutional. The unlawfulness of others cannot absolve a license holder from compliance with obligations that are inseparable from the statutory privilege it enjoys.

[86] The fourth challenge is based on art 18 of the Constitution and the *audi alteram partem* principle. The appellants contend that the public consultation relied upon by the respondents took place before the court order and that regs 2 and 29(3) derive their authority from a statutory provision introduced thereafter. On that basis, they argue that those regulations could not have formed part of the consultative process.

[87] The respondents accept that the Minister's regulation-making power under s 40A is subject to procedures of notice, public comment and consultation. Assuming in favour of the appellants that such procedural obligations apply, as they would accord with good governance and accountability, the challenge cannot succeed on the facts.

[88] The record demonstrates that a public consultative process concerning the draft regulations was in fact undertaken by the erstwhile Minister, who conducted a consultative process on the draft regulations and held consultative meetings in Swakopmund for the Erongo region, Keetmanshoop for Hardap and Karas, Windhoek

[56] Section 6(1)*(l),* read with ss 18 and 19.

for Khomas and Omaheke, Otjiwarongo for Otjozondjupa and Kunene, Oshakati for Omusati, Oshana, Oshikoto and Ohangwena, Rundu for Kavango and Katima Mulilo for Zambezi. It was during that process that stakeholders raised the constant change in the industry and the continued mushrooming of gambling houses, and members of the public suggested that more licence types than those prescribed in GECA might be required, the requirements and conditions for licences were said to be restrictive and out of step with conditions on the ground. According to the erstwhile Minister, he heeded that request and tabled the amendments that became s 40A of Act 5 of 2020. He also averred that when the settlement agreement was concluded on 14 June 2020, he had already engaged in consultations on the draft regulations to implement the new framework under GECA.

[89] The appellants do not contend that they were excluded from that process or denied an opportunity to make representations. Their complaint, in context, is a narrower one. They maintain that they ought to have been afforded a further, or separate, opportunity to be consulted after the introduction of s 40A, especially in light of the settlement agreement and order, it would seem.

[90] That contention cannot be upheld. The requirements of procedural fairness in relation to subordinate legislation of general application are satisfied where affected persons are afforded a reasonable opportunity to make representations. They do not extend to individual consultation or successive rounds of consultation following every legislative development. Absent any suggestion that the appellants were denied a reasonable opportunity to participate in the consultative process that was undertaken, no infringement of art 18 or the *audi* principle has been established. The challenge must

therefore fail.

[91] Regulation 33, which prescribes a penalty for the late payment of the levy, was also impugned in the notice of motion but was not the subject of any distinct argument. It rests on s 66, which empowers the Minister to prescribe penalties for the late payment of any amount due under the Act and which is not challenged. The attacks on s 40A and on the Regulations as a whole having failed, the challenge to reg 33 fails with them.

Section 57 and article 16

[92] The court *a quo* held that a gambling licence is a privilege and not property within the meaning of art 16(1).

[93] Article 16(1) guarantees the right to acquire, own and dispose of all forms of movable and immovable property, and this Court has interpreted the phrase 'all forms' generously.[57] The respondents' reliance on *Aquatur (Pty) Ltd v Sacks & others*[58] and *South African Hunters*[59] is misplaced. *Aquatur* addressed the personal character and consequent non-transferability of a liquor licence. It did not consider whether a licence may constitute property for constitutional purposes. *South African Hunters* is cited for the introductory observation that firearm ownership is a privilege regulated by law rather than a fundamental right. That observation was not part of the court's *ratio* and, in any event, was made in the context of firearms legislation under a different constitutional dispensation. Neither authority supports the proposition that a licence of indefinite

[57] *Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *Government of the Republic of Namibia & another v Cultura 2000 & another* 1993 NR 328 (SC); *Namibia Grape Growers and Exporters Association & others v Ministry of Mines and Energy & others* 2004 NR 194 (SC).
[58] *Aquatur* supra fn 15 at 64H–I.
[59] *South African Hunters* supra fn 16 para 1.

duration granted under the 1994 Act falls outside the protection afforded by art 16.

[94] There is force in the proposition that a licence of indefinite duration, into which substantial capital has been invested over many years and which was terminable only upon transgression, is not obviously excluded from the protection of art 16(1).

[95] The nature of the right conferred by the license is to be understood within its statutory context. It does not follow that every legislative alteration of the incidents of that licence amounts to an infringement of that right. Gambling is, by its nature, a heavily regulated activity. The entitlement acquired by a licensee exists within, and is necessarily subject to the statutory framework governing that industry. A licensee cannot acquire an unfettered or unlimited constitutional right that the regulatory regime under which the licence was granted will remain unchanged indefinitely. Parliament may, in the public interest, amend that regime by prescribing periods of validity, imposing additional conditions, providing for renewal mechanisms, or otherwise regulating the continued conduct of gambling activities. Such measures are incidents of regulation and would not, without more, amount to a deprivation of property in conflict with art 16 within the context of that regulated activity.

[96] A licence holder therefore, acquires and retains a licence subject to the regulatory framework and to such lawful amendments to that framework as Parliament may enact. Fixed periods of validity are a commonplace feature of licensing legislation. The respondents referred, by way of example, to liquor licences issued under the Liquor Act 6 of 1998. Secondly, s 58 permits renewal upon application, and the second respondent, in exercising its powers under that section, is required to have regard to the period initially

fixed by s 57. The availability of renewal bears directly on the extent of any deprivation. The appellants' argument based on *Pretoria North Town Council*[60] is that the distinction between renewal and a fresh application is one of degree, and that an existing operator who has invested substantially stands in no materially different position from a newcomer if renewal is refused. Even if that is correct as a matter of general law, it does not establish that prescribing a period of validity coupled with a statutory entitlement to seek renewal, amounts to an infringement of their right to property, protected by art 16. Thirdly, the appellants adduced no evidence of any actual diminution in value of investments made, in reliance upon perpetual duration, or of any disproportionate impact arising from s 57. The challenge is therefore advanced as a legal proposition rather than on an established factual foundation, and constitutional challenges of this nature are not determined in the abstract.

[97] The challenge to s 57, and consequently to the reference to s 57 in the introductory portion of s 56(1), must therefore fail.

[98] The complaint under art 21(1)*(j)* may be dealt with shortly. The appellants continue to trade. The right to practice a profession or carry on an occupation, trade or business does not imply an entitlement to do so free of regulation, and is subject to reasonable and rational regulation.[61] The complaint founded on art 8 was raised in the papers but was not argued by either side, and no basis was advanced upon which the levy or the duration provisions could be said to offend the inherent dignity of the appellants or their members. It accordingly fails.

---

[60] *Pretoria North Town Council* supra fn 33 at 12E–F, concerning a new licence and 'renewal'.
[61] *Black Range Mining* supra fn 36 paras 48–49.

Prayer 6 and the enforcement of GECA

[99] Prayer 6 seeks an order directing the eighth respondent, through inspectors appointed under GECA, to identify all unlicensed gambling premises in Namibia, to remove machines and other items capable of furnishing proof of contraventions, and to ensure that persons conducting unlicensed gambling are charged.

[100] The appellants are correct that the eighth respondent is before the Court and that GECA confers upon inspectors appointed under s 18 extensive powers of inspection, search, seizure and investigation under s 19, including the power, under s 19(5), to be accompanied by members of the Namibian Police Force. The Board is charged by s 6(1)*(l),* read with ss 18 and 19, with the enforcement of the Act. A *mandamus* confined to compelling the performance of a specific statutory duty by the functionary on whom it rests is in principle available to a person with a sufficient interest who establishes a clear right and a failure to perform that duty. The difficulty confronting the appellants is not the existence of the duty, but whether, when they introduced prayer 6, they could establish that the Board had breached it.

[101] On the facts, the appellants introduced prayer 6 in the amended notice of motion of 6 February 2023. At that time, the respondents were acting on the extensions, which, on their face, afforded unlicensed operators until 31 August 2023 to regularise their position. The appellants say that the extensions are null and void and of no force and effect. But an administrative act, however vulnerable to challenge, exists in fact and has legal consequences until it is set aside by a court in proceedings brought for that

purpose.[62] A collateral challenge to the validity of such an act is ordinarily available to a person against whom a public authority seeks to enforce it. It is a shield. The appellants in this case seek to deploy the invalidity of the extensions as a sword, to found an order compelling immediate enforcement against third parties on the premise that the period for regularisation had ended. This would require the extensions to be reviewed and set aside, which was not sought. While the extensions were in place, the appellants could accordingly not establish that the Board was under a duty (at the time the relief was sought) to take enforcement action against operators who, on the footing of the extensions, remained within the period allowed for regularisation. The subsequent lapse of the extensions does not assist the appellants either. The relief must be assessed on the case made out in the papers, and that case rested on a premise which, when it was advanced, had not been established. For the foregoing reasons, prayer 6 fails.

There are also, some further difficulties with the prayer as framed, which reinforce the above conclusion. Its third component seeks, in substance, an order that persons conducting unlicensed gambling be charged. The investigation of offences and the arrest of offenders fall within the functions of the Namibian Police Force, and an order of the breadth sought would in substance require the police to act, yet the Inspector-General was not cited. The citation of the President as head of the executive does not cure that difficulty. Moreover, the order sought is unlimited in duration and undefined as to location, and it would require the identification of all unlicensed gambling premises throughout Namibia. Such an order would be incapable of effective judicial supervision and would

[62] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) paras 26 and 31–36; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) paras 101–103; *Rally for Democracy and Progress* supra fn 46; *Black Range Mining (Pty) Ltd v Minister of Mines and Energy & others NNO* 2014 (2) NR 320 (SC);and *Municipal Council of the Municipality of Windhoek v Lady Pohamba Private Hospital* (SA104/2022) [2025] NASC (13 June 2025).

place the Court in the position of overseeing the ongoing discharge of functions entrusted by statute to the second respondent and its inspectors.

[102] That is not, however, the end of the matter. The Court raised with counsel for the respondents its concern that, on the record, including the erstwhile Minister's own admission that unlicensed gambling has proliferated, there has been no sustained effort to enforce the Act and its predecessor against unlicensed operators. In answer, counsel submitted that where the evidence discloses matters calling for the attention of law-enforcement authorities, courts have on occasion directed that the judgment be brought to the attention of those authorities, without prescribing the steps they are to take, and that such an order would not be out of place here. I agree. The persistent failure over many years to enforce the Act by its predecessor is inimical to the rule of law. That the appellants have not established an entitlement to the order sought in prayer 6 does not mean that what the record discloses should pass unremarked. An order of that kind respects the independence of the authorities concerned and the limits of this Court's role, while ensuring that the matters raised in this judgment reach them. I would accordingly direct the Registrar to bring this judgment to the attention of the Inspector-General of the Namibian Police Force.

The counter-application

[103] A counter - application brought by the second and eighth respondents succeeded in the court *a quo*. It is challenged in the appellants' heads of argument on three grounds, namely the authority of the deponent to institute it, the competence of the relief against the first appellant, and the absence of any invoices. The appellants also contend that the counter-application was in substance a means of coercing compliance with reg 29. At

the hearing, counsel for the appellants elected to stand on the written argument. Counsel for the respondents, however, was questioned by the Court on the order for *mora* interest and on the utility of the counter-application, and made concessions on both, to which I return below. Otherwise, I consider the grounds on the basis of the written argument.

[104] The first point is one of authority. The appellants contend that the deponent to the founding affidavit in the counter-application did not allege that he was authorised to institute it, and that annexure BS7 ('the resolution'), produced after the point was taken, does not confer the necessary authority. That construction cannot be sustained. The resolution is an extract of special resolution GB05/09/2022, adopted by the Board at a meeting held on 21 September 2022 in respect of these proceedings. Clause 2 records that Mr Shikongo, 'in his capacity as the Chairperson of the Gambling Board', is 'to depose to the answering affidavit and any subsequent and necessary affidavits required to institute or oppose the application'. Clause 2.1 (which follows) from clause 2, authorises him 'to bring any interlocutory or otherwise related application on behalf of the Gambling Board and make such affidavits as may be advised by the Gambling Board attorneys of record'. Whatever the infelicities of their drafting, these clauses authorise the chairperson both to oppose the appellants' application and to institute, on the second respondent's behalf, any application arising out of the same dispute. The words 'or otherwise related' extend that authority beyond interlocutory applications. A counter-application brought within the same proceedings, seeking the converse of the principal relief claimed by the appellants, falls squarely within them. The resolution accordingly authorised its institution.

[105] Nor does it avail the appellants that the resolution was produced only after

authority had been challenged. What requires authorisation is the institution of the proceedings, not the deposing to the supporting affidavit. Where authority is challenged, it may be established thereafter, and a resolution produced in answer to the challenge constitutes sufficient proof of the requisite authority. Here the resolution was adopted on 21 September 2022, some seven months before the counter-application was instituted with the answering affidavit on 24 April 2023. The authority therefore existed when the proceedings were instituted; it was merely proved later. The extract was signed by the chairperson and the Board's secretariat on 23 August 2023, after the challenge was raised. That the Board furnished an authenticated extract rather than the full minutes is of no consequence. Neither the authenticity of the extract nor the occurrence of the meeting was challenged.[63]

[106] The appellants' reliance on *Duntrust* is not of assistance. There, Hannah J, adopting *Ganes*, conclusively established that authority to depose to an affidavit is distinct from authority to institute proceedings, and that it is the latter which must be established. The application failed because the applicant, faced with a direct averment that no resolution existed, filed no reply and produced no resolution, leaving the court to infer that the proceedings may not have been authorised. The present case is the reverse. When authority was challenged, the second respondent answered the challenge by producing the resolution, which predates the institution of the counter-application. Properly understood, *Duntrust* supports the conclusion that the counter-application was authorised. The objection to authority accordingly fails.

---

[63] *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624F–H, adopted in *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration* 2005 NR 147 (HC) at 148. See also *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351H, where a resolution was described as the best, though not the only, evidence of authority. See also *Simana v Agricultural Bank of Namibia* (SA143/2023) [2026] NASC (3 November 2026).

[107] The second point concerns the competence of the relief granted against the first appellant. The first appellant is a voluntary association which represents the interests of its members. It holds no licence and derives no income from conducting a casino or gambling house. The levy imposed by s 62(1) attaches to the income derived by a licence holder from the conduct of the licensed business, and no obligation to pay it rests on the first appellant. The respondents did not seek to defend order 2 in this respect. Their own heads of argument describe the counter-application as directed at the members of the first appellant, including the second appellant. To the extent that order 2 declared the first appellant liable for the levy and directed it to pay, it was not competent and falls to be varied.

[108] The position of the members is different. The first appellant instituted the application on their behalf and with their support, and the appellants themselves defined 'the applicants' to include the members. Having invoked the jurisdiction of the court on the members' behalf to obtain a declaration that they were not liable to pay the levy, the appellants cannot complain that the converse declaration binds those same members.

[109] The third point is that no invoices were rendered. On the appellants' uncontradicted evidence, that is so, but it does not affect the existence of the liability. The counter-application did not seek judgment for a liquidated amount, and the liability arises from s 62(1) read with reg 29. It does not depend on the prior rendering of an invoice. The absence of invoices does, however, bear on the order for *mora* interest. The court *a quo* ordered interest to run from the presentation of invoices when none had been presented, and when there was no evidence of what would be invoiced, to whom, or when. Counsel for the respondents, correctly in my view, did not seek to defend that part

of the order. He accepted that interest will follow as a matter of law once invoices are rendered and remain unpaid. The order for *mora* interest accordingly cannot stand. Any dispute about the amount due, the correctness of a particular invoice, or the date from which interest runs is a matter for the ordinary process of collection and does not arise in this appeal.

[110] A further question raised by the Court at the hearing was what the counter-application added if the application is dismissed. The appellants' principal relief was a declaration that no levy may be imposed on them until all illegal gambling houses have been legalised or closed. If that relief fails, s 62(1) operates according to its terms in any event. Counsel for the respondents accepted the force of the point. He explained that the counter-application was brought because the parties were at odds over whether the Minister imposes the levy or s 62 itself. He accepted, however, that if the court upholds the dismissal of the application, the members of the first appellant are liable to pay the levy under s 62 by operation of law. He also accepted that this would have been so even had the enforcement of the relief in prayer 6 been granted. He did not press the counter-application further and stood on his heads of argument.

[111] That concession was properly made. The declaration sought in the counter-application neither creates the liability nor adds to it. But when the counter-application was instituted there was a live dispute between these parties. The appellants were withholding payment on the strength of an order of court that had not been set aside, and they sought a declaration that they were not liable. The declaration resolves that dispute between the parties to it and binds the members on whose behalf the application was brought. The appellants did not contend on appeal that it was superfluous. To that

limited extent, and as varied below, there is no reason to interfere with it. The direction to pay upon presentation of invoices stands on a different footing. It adds nothing to the obligation imposed by s 62(1) and reg 29, and it invites the same uncertainty about quantum and timing that undermined the order for interest. It should not be retained.

[112] Finally, the contention that the counter-application amounted to coercion to comply with reg 29 stands or falls with the challenges to that regulation, all of which have failed for the reasons already given. Regulation 29(2) having been validly made under s 62(2), the rate at which the levy is payable has been lawfully prescribed, and the declaration of liability is properly founded. The challenge to the appointment of the members of the second respondent before the commencement of GECA was not pursued on appeal and need not be considered.

Costs

[113] The ordinary rule is that costs follow the result. In constitutional litigation between a private party and the State, however, a different consideration may apply in appropriate circumstances. A litigant who raises a genuine constitutional question against the State should not ordinarily be deterred by the risk of an adverse costs order, and where the challenge is genuine and not frivolous, the courts have a discretion to direct that each party should bear its own costs.[64]

[114] In their heads of argument, the respondents invoked the unclean-hands principle, submitting that the appellants seek constitutional and equitable relief while refusing to

[64] *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) para 24; *Itula v President of the Republic of Namibia & others* 2025 (1) NR 267 (SC) para 197; *Kambazembi* supra fn 30 at 826H–827A.

comply with the very levy regime whose lawfulness is in issue. At the hearing, however, the Court asked counsel for the respondents whether this was not a case for the *Biowatch* approach, the constitutional challenges being genuine and by no means frivolous. Having taken instructions, counsel informed the Court that the respondents accept that the *Biowatch* principle ought to apply. That stance was, in my view, correctly taken, although the question remains one for this Court's discretion.

[115] It must be acknowledged that the litigation was of a mixed character. The appellants' principal relief was the enforcement of the settlement order, and it had an evident commercial dimension. But that is not a reason to withhold the protection of the principle. The appellants are licence holders who, on the evidence, have complied with the statutory regime and paid levies for decades. They came to court not to escape regulation, but to vindicate the authority of an order of court and to challenge the constitutionality of provisions which affect them directly. The challenges to s 40A and s 57, and the review of the regulations under art 18, raised genuine constitutional questions of general importance, and they were not frivolous. The effect of a settlement made an order of court on powers later conferred by Parliament is itself a question that engages the rule of law. The constitutional and non-constitutional aspects of the case were inseparable parts of a single dispute about the lawfulness of the levy regime as applied to the appellants, and I do not consider it appropriate to divide them for the purposes of costs.

[116] In light of that stance, and in any event, I would not accede to the unclean-hands submission. The non-payment relied upon was itself the subject matter of the dispute. The appellants asserted, on legal advice and on the strength of an unrescinded order of

court, that no levy was payable. Withholding payment in those circumstances, while the question was before the courts, is not the kind of conduct which should attract an adverse costs order.

[117] Two matters require separate consideration. The first is the counter-application. It was not itself a constitutional challenge brought by a private party against the State, but relief sought by an organ of State against the appellants. The appellants' opposition to it, however, rested entirely on the grounds advanced in the main application, namely the effect of the order of 17 June 2020 and the validity of reg 29. The counter-application was, in substance, the obverse of prayer 1. Counsel for the respondents accepted that, were the application to fail, the liability which the counter-application sought to have declared would follow by operation of law. To visit the appellants with the costs of resisting it would impose indirectly the very burden from which the principle shields them. The same considerations therefore apply, and with greater force given that the appellants have succeeded upon it to the extent that order 2 falls to be varied so as to excise the first appellant, the direction to pay and the order for *mora* interest. The second matter is the costs orders made below. The court *a quo* did not consider the principle, and its discretion as to costs was accordingly not exercised on a correct basis. This Court is therefore at large to interfere.

[118] There will accordingly be no order as to costs in this Court. As to the costs orders made below, the same considerations apply, and orders 1 and 3 of the court *a quo* should be set aside and replaced with an order that each party bear its own costs.

Conclusion

[119] The appellants have not established a basis for the substantive relief sought. The settlement order cannot relieve licence holders of the liability imposed by s 62(1), and it could not constrain the exercise of the power later conferred on the Minister by s 62(2). The appeal therefore succeeds only to the limited extent reflected in the variation of the counter-application and costs orders.

[120] In the result, the following order is made:

1. The appeal is dismissed, save for aspects relating to the counter-application, interest and the question of costs.

2. Paragraph 1 of the order of the High Court dated 2 April 2025 is set aside and replaced with the following:

> '1. The application is dismissed. Each party is to bear its own costs.'

3. Paragraph 2 of the order of the High Court is set aside and replaced with the following:

> '2. It is declared that the second applicant and the members of the first applicant listed in annexure D to the founding affidavit are liable to pay the levy imposed by section 62 of the Gaming and Entertainment Control Act 13 of 2018, calculated in accordance with regulation 29 of the Regulations published under Government Notice 254 in Government Gazette 7693 of 1 December 2021, with effect from 1 December 2021.'

4. Paragraph 3 of the order of the High Court is set aside and replaced with the following:

> '3. Each party is to bear its own costs of the counter-application.'

5. There is no order as to costs in this appeal.

6. The Registrar is directed to bring this judgment to the attention of the Inspector-General of the Namibian Police Force.

_____
SCHIMMING-CHASE JA

_____
ANGULA JA

_____
SMUTS AJA

APPEARANCES

APPELLANTS:	R Tötemeyer SC (with him D Obbes)
	Instructed by Ellis & Partners
FIRST, SECOND, THIRD	V Maleka SC (with him E Nekwaya)
AND EIGHTH RESPONDENTS:	Instructed by the Government Attorney