

PETITION IN TERMS OF SECTION 31 OF THE COMMUNICATIONS ACT, 2009
(ACT 8 OF 2009) (READ WITH REGULATION 20 REGULATIONS REGARDING
LICENCING PROCEDURES FOR TELECOMMUNICATIONS AND BROADCASTING
SERVICE LICENCES (GENERAL NOTICE 272 OF 2011) (AS AMENDED))

PETITION

In the matter between –

PARATUS TELECOMMUNICATIONS (PROPRIETARY) LIMITED

PETITIONER

and

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA
MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF
WINDHOEK

1ST RESPONDENT

2ND RESPONDENT

BE PLEASED TO TAKE NOTICE THAT the abovenamed petitioner seeks, in terms of Section 31 of the Communications Act, 2009 (Act 8 of 2009) read with Regulation 20 of the Regulations Regarding the Licencing Procedures for Telecommunications and Broadcasting Service Licences, that the first respondent reconsider the decision to award to the second respondent a Class Comprehensive Telecommunications Service Licence (ECNS and ECS) (announced in General Notice 155 of 29 April 2020), set aside such licence and deny the application made to the first respondent, and referred to in greater detail in the petitioner affidavit.

BE PLEASED TO TAKE FURTHER NOTICE THAT the affidavit of ANDREW HALL is used in support of this petition.

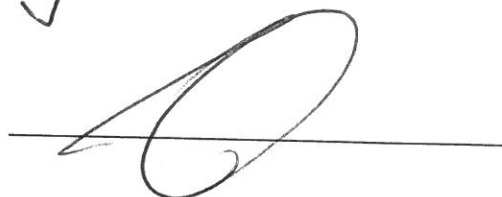
BE PLEASED TO TAKE FURTHER NOTICE THAT the petitioner has appointed ENS

AFRICA I NAMIBIA (INCORPORATED AS LORENTZANGULA INCORPORATED), of Unit 4, LA Chambers, Ausspenn Plaza, Dr Agostinho Neto Road, Windhoek (Reference Mr C H J Visser, 061 371731) as the petitioner's legal practitioners of record in this matter and directs that any and all communication and/or papers exchanged concerning this petition be directed to the petitioner's aforementioned legal practitioners of record.

BE PLEASED TO TAKE NOTICE THAT the petitioner seeks that this matter be set down and that oral submissions also be made within the timeframes allowed for, and before the first respondent reconsiders.

DATED at WINDHOEK this 22nd day of May 2020.

Legal Practitioners for the Petitioner



ENS AFRICA I NAMIBIA
(INCORPORATED AS LORENTZANGULA INCORPORATED)

3RD FLOOR, UNIT 4
LA CHAMBERS
AUSSPENN PLAZA
DR AGOSTINHO NETO ROAD
WINDHOEK
(Ref: Mr CHJ Visser)

TO: COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA
First Respondent
No. 5 Peter Muller Street
Moth Centre
Windhoek

AND TO: MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF WINDHOEK
Second Respondent
80 Independence Avenue
Windhoek



Received
P.W. Schuman
E. Schuman

PETITION IN TERMS OF SECTION 31 OF THE COMMUNICATIONS ACT, 2009
(ACT 8 OF 2009) (READ WITH REGULATION 20 REGULATIONS REGARDING
LICENCING PROCEDURES FOR TELECOMMUNICATIONS AND BROADCASTING
SERVICE LICENCES (GENERAL NOTICE 272 OF 2011) (AS AMENDED))

PETITION AFFIDAVIT

In the matter between –

PARATUS TELECOMMUNICATIONS (PROPRIETARY) LIMITED

PETITIONER

and

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA
MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF
WINDHOEK

1ST RESPONDENT

2ND RESPONDENT

I, the undersigned,

ANDREW HALL

hereby state under oath –

1. I am –

1.1. a major male person;

1.2. the managing director of the petitioner;

1.3. duly able and authorised to initiate this petition on the petitioner's behalf;




1.4. located at 106 Nichol Street, Prosperita, Windhoek;

1.5 able to depose to this affidavit. The facts herein fall within my personal knowledge and belief, save where the context otherwise indicates, and are, to the best of my knowledge and belief, true and correct. Where I make submissions of a legal nature, I do so on advice received.

2. The petitioner is –

2.1. PARATUS TELECOMMUNICATIONS (PROPRIETARY) LIMITED, a private company duly registered and incorporated in terms of the laws of Namibia and with its principal place of business at 102 – 105 Nickel Street, Prosperita, Windhoek;

2.2. the holder of a Class Comprehensive Telecommunications Service Licence (ECS and ECNS) in terms of the Communications Act, which it has held since 13 September 2012. It was issued by the first respondent. In terms of the Regulations Setting Out Broadcasting and Telecommunications Service Licence Categories (General Notice 124 of 2011, Government Gazette 4714 of 2011) (as amended) (annexure "AH1"), the petitioner's said licence falls within the category of telecommunications service licences which are technology and service neutral. The petitioner is a "carrier" as envisaged in Part 5 of the Communications Act. A true copy of the licence is annexed, marked "AH2". Because of its relevance, I also refer to Notice 308 of Government Gazette 5037 containing licence conditions, marked "AH3";

2.3. an aggrieved party as envisaged in section 31 of the Communications Act, 2009 (Act 6 of 2009) ("the Act").

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3. The first respondent is THE COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA, established in terms of the applicable provisions of the Communications Act, and with its offices located at No. 5 Peter Muller Street, Moth Centre.

4. The second respondent is the MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF WINDHOEK, a juristic person established as such in terms of the applicable provisions of the Local Authorities Act, 1992 (Act 23 of 1992) ("the Local Authorities Act"), and which has its main offices at 80 Independence Avenue, Windhoek.

5. This petition requires of the first respondent to reconsider its decision to award to the second respondent a Class Comprehensive Telecommunications Service Licence (ECNS and ECS) ("the impugned licence"), which award was announced by the first respondent in General Notice 155 (published in Government Gazette 7916 on 29 April 2020) (annexed, marked "AH4"), and to set aside the impugned licence and deny the purported application to which reference is made further below.

6. A central feature of this petition is the rule of law. It is well-established that the rule of law is a founding principle of the Namibian Constitution.¹ It is entrenched in the first provision of the Constitution.² The principle provides that "the exercise of public power under the statute is only legitimate if lawfully exercised and within the confines of the powers conferred upon the repository of that power by law".³ For reasons delineated herein, this did not occur in the present instance. The petitioner, as stated, is also a licence holder. It has an interest in ensuring that persons who seek to obtain licences, particularly those of the same or similar type of that held by it, or which could impact on the exercise of its rights thereunder, do so in an intra vires manner, compliant with the

¹ South African Poultry Association v Minister of Trade and Industry 2018 (1) NR 1 (SC) at para 69.

² Article 1(1) of the Namibian Constitution: "The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all" (emphasis added).

³ South African Poultry Association v Minister of Trade and Industry supra at para 69.

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law, and that the first respondent processes and considers same in compliance with, and properly cognizant of, the applicable law.

7. On 22 February 2019, General Notice 30 was published in Government Gazette 6846 (annexed, marked "AH5"). In terms thereof the public was informed that the second respondent had made application for a Class Network Facilities Service Licence ("the purported application"). It subsequently emerged from documents obtained from the first respondent, that an unauthorised person made the purported application. The petitioner disputes that the application was made by the second respondent. The notice to the public was, thus, also inaccurate on this score. This is addressed further below. Nothing in this affidavit should be construed as the petitioner acknowledging that the purported application was indeed made by or on behalf of the second respondent.

8. By letter dated on 08 March 2019 (addressed to the first respondent), the petitioner responded to General Notice 30 (annexed, marked "AH6"). The content is self-explanatory and I refer thereto. It was pointed out that the petitioner did not – at that time – have the benefit considering the purported application. The petitioner reserved the right to augment its comments after receipt of the purported application (which was then requested from the first respondent). It was furthermore pointed out that –

8.1. the powers, duties, functions, rights and obligations of the second respondent are delineated in Part 5 of the Local Authorities Act;

8.2. the second respondent is a creature of statute and must – by law – operate within the four corners of its empowering legislation;

8.3. such powers, duties, functions, rights and obligations do not provide for or envisage (whether expressly or impliedly) the second respondent applying for and being granted a class network facility service licence.

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9. On 26 March 2019, the first respondent published General Notice 67 in Government Gazette 6863 (annexed, marked "AH7"). Again, General Notice 67 signalled to the public that the second respondent applied for a Class Network Facilities Service Licence. For reasons already stated above, the petitioner disputes that the application was made by the second respondent.

10. The petitioner, by way of letter dated 11 April 2019, responded to General Notice 67 (annexed, marked "AH8"). In terms thereof, it was *inter alia* pointed out that –

10.1. the second respondent is not competent in law to apply for such a licence;

10.2. the powers, duties, functions, rights and obligations of the second respondent are delineated in Part 5 of the Local Authorities Act;

10.3. it was again emphasized that the second respondent is a creature of statute and must – by law – operate within the four corners of its empowering statute. It was further pointed out that such powers, duties, functions, rights and obligations do not provide for or envisage (whether expressly or impliedly) the second respondent applying for and being granted a Class Network Facility Service Licence;

10.4. attention was drawn to Regulation 5A (2) (c) to (j) of the Regulations Regarding Licencing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences (General Notice 272 of 2011) (as amended) ("the Regulations"), which detail what is (mandatorily) required in respect of applications of that type. It was further pointed out that except for clause (h), none of the other parts had been completed in respect of the purported application. The petitioner pertinently asked of the first respondent why the purported application was incomplete and it was further pointed out that given the incomplete nature of the purported application, the petitioner could not determine

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what the purpose was of apply for the licence mentioned in General Notice 67, and would also not be able to adequately comment on the purported application;

10.5. in the event of the first respondent being inclined to consider the purported application nonetheless, the petitioner queried what conditions would be imposed on the second respondent as a network facility licensee;

10.6. the petitioner opposed the purported application.

11. The first respondent did not reply to the letter of 11 April 2019. No explanation was provided to the petitioner as to how an incomplete application could be considered by the first respondent in such circumstances and what it would take into account in doing so.

12. From information obtained after the award of the impugned licence was announced, the following further emerged –

12.1. The second respondent resolved per Council Minutes of 2017-10-31 (item 9.1.3) (resolution 229/10/2017) (annexed, marked “AH9”) that its Strategic Executive: Electricity apply for the Network Facility Service Licence. The purported application, however, reflects that the purported application was made by an unauthorised person ex facie the said resolution, being Mr R Kandiiriumuni, who described himself as “SE: Information Comm Technology”. Further, the authority in terms of the mentioned resolution was for the second respondent to apply for the aforementioned licence only. The impugned licence is not a Network Facility Service Licence. This is also further addressed below.

12.2. The first respondent seemingly entered into “engagements” with the second respondent, and to which the petitioner was not privy. The second respondent was allowed to submit a “revised business proposal” (which differed from the “pre-tender proposal” attached to the purported application) under cover of a letter

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dated 12 December 2019. The petitioner never had sight thereof prior to the awarding of the impugned licence and was not afforded an opportunity to make representations thereon. The first respondent also seemingly made "recommendations" to the second applicant concerning the purported application. Again, the petitioner was not afforded an opportunity to make representations thereon;

13. At least eight issues emerge from all of the aforementioned –

13.1. the purported application was unauthorised and should have been denied on this basis alone;

13.2. there was no proper and intra vires application made by the second respondent. The purported application was substantially deficient and incomplete. Regulation 5 A of the Regulations was not complied with in material respects;

13.3. the first respondent was not competent to consider the purported application and award the impugned licence in such circumstances;

13.4. the first respondent failed to properly apply its mind to the purported application and failed to take into account relevant considerations, including that it (the purported application) was unauthorised and the deficient and incomplete nature of the purported application, and further failed to appreciate: the remit of its statutory powers, duties and functions, and the governing provisions concerning applications of that type (and the consequences of an application non-compliant with the mandatory requirements of the Regulations). The deficient and incomplete nature of the purported application also means that necessary information that was to be placed before the first respondent by way of the purported application was not, and it could – in such circumstances – simply not have awarded the impugned licence to the second respondent in the absence of same. The first respondent is

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permitted to request "further information or documentation" in terms of the Regulations, but this cannot be employed by the first respondent to remedy or augment a patently deficient and lacking application, such as the purported application;

13.5. the petitioner was deprived of its right to make representations concerning the purported application. No full and meaningful representations were possible on the basis of a deficient and incomplete application and given the petitioner's exclusion from the processes which followed. Where there is no transparency, there can be no meaningful representations. In law, "fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations"⁴;

13.6. the same, with respect, applies given the first respondent's failure to reply to, and inform the petitioner of any conditions which it sought to impose (if any), and the basis of same;

13.7. the transparency demanded by section 40 of the Communications Act and the Regulations was thwarted and the petitioner's (and the public's) rights in terms thereof infringed;

13.8. the petitioner's rights under Article 18 of the Namibian Constitution and the applicable common law have accordingly also been infringed. Article 18 "requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent"⁵. The decision to award the impugned licence was unreasonable and unfair, not based

⁴ Onesmus v Permanent Secretary: Finance and Others 2010 (2) NR 460 (HC) at 466

⁵ Aonin Fishing (Pty) Ltd and Another v Minister of Fisheries and Marine Resources 1998 NR 147 (HC), at 150 F-H

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on reasonable grounds and occurred without a fair and transparent procedure having been followed.

14. To compound matters, the licence which the public was informed the second respondent was applying for, is not the licence which the first respondent decided to award to the second respondent and is also not the licence which the second respondent resolved should be applied for. The impugned licence is not a Class Network Facilities Service Licence. To the petitioner's knowledge, no prior notice was placed in the Government Gazette informing the public that –

14.1. the purported application had been amended to seek a different licence (in as far as such an amendment is even possible in law);

14.2. a new application has been submitted for the impugned licence;

14.3. the first respondent intended awarding a licence different to that applied for.

15. Regulation 5A of the Regulations details what an application for a Class Network Facilities Licence must contain. Regulation 4 of the Regulations details what an application for a Class Telecommunications Service Licence must contain. The purported application failed to fully comply with the mandatory requirements of the Regulations. And, in any event, the second respondent did not make application under Regulation 4. The petitioner's representations were also based on the second respondent having made an application for a Class Network Facilities Licence and not a Class Telecommunications Service Licence.

16. Apart from the fact that, in law, and given the provisions of section 40 and Regulations 4, 5A and 11 of the Regulations, the first respondent is not simply at liberty to award any licence to an applicant, despite the applicant not have properly (if at all) applied for same, and without following the prescribed and transparent processes for doing so, but the award of a licence type in respect of which the petitioner was not

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afforded an opportunity to make representations serves to infringe its rights under Article 18 of the Namibian Constitution and the applicable common law (for reasons already addressed above) and undermined the statutory processes referred to above.

17. The petitioner has convincingly demonstrated that the process which preceded the award of the impugned licence to the second respondent is fundamentally tainted in a number of critical respects and, on these grounds alone, the first respondent should reconsider its decision to award the impugned licence and deny the purported application.

18. Quite apart from the fatally deficient application and the process which followed, referred to above (and without derogating from the points raised in this regard), the first respondent clearly did not properly apply its mind (if at all) in regard to the pertinent aspects raised by the petitioner in both its letters of 08 March 2019 and 11 April 2019.

19. The first respondent failed to appreciate or properly take into account (if at all) (and made a vitiating mistake in law), in that –

19.1. the second respondent, as a local authority, is a creature of statute and has no inherent powers;

19.2. the second respondent only has those powers that are expressly or implicitly conferred on it by statute;

19.3. a licence under the Communications Act does not vest the second respondent with power. A licence granted under the Act merely frees a party from the general obligation in section 37 of the Act against operating a telecommunications service other than in accordance with a licence;

19.4. the second respondent cannot exercise the powers of a Class Network Facilities Telecommunication Service Licence (or, for that matter, as a Network

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Facilities Service Licence) unless there is some statute authorising it to exercise those powers;

19.5. section 30 of the Local Authorities Act vests a long list of powers in local authorities, but none of these would appear to include the power to provide telecommunication services to the public;

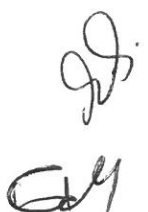
19.6. even in South Africa, where local authorities have original constitutional authority and more far-reaching powers than in Namibia, it is clear that local authorities have no powers over telecommunications⁶;

19.7. section 30(1)(ab) vests the second respondent with the power to *“commercialise, subject to any regulations which may be made relating thereto, any service rendered by it or any function or duty exercised or carried out by it”*;

19.8. the aforementioned section, however, only empowers the second respondent to commercialise services and functions that it is empowered to provide or perform. It does not for instance empower the second respondent to commercialise the infrastructure that it uses incidental to the performance of these functions or for the provision of these services. The second respondent is no more empowered to commercialise the telecommunications networks that it uses in the performance of its functions than it is empowered to open a commercial trucking business because it uses trucks in the performance of its road building function;

19.9. the second respondent, it is respectfully submitted, will be acting *ultra vires* if it purports to perform the commercial acts for which it applied for its licence and the award of its licence to the second respondent falls to be reviewed and set aside

⁶ City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others (Dark Fibre Africa (RF)(Pty) Limited and Others as Intervening Parties) 2015 (6) SA 440 (CC) at paras 80 and 186

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because *inter alia* –

19.9.1. the grant of such licence to the second respondent is unlawful;
and

19.9.2. the first respondent operated under a vitiating mistake of law in granting the licence to the second respondent on the assumption that the second respondent could lawfully exercise the powers which it was purportedly licenced to exercise.

20. The petitioner is aggrieved by the fatally deficient application and the process which followed, resulting in the impugned licence, and by the infringement of its rights (and those of the public) referred to above. The petitioner is further aggrieved by the decision to award the impugned licence because –

21. For all of the above reasons, it is respectfully submitted that this is a matter which calls for the immediate reconsideration of the decision to award the impugned licence. The purported application stands to be reconsidered, the impugned licence set aside and the purported application denied.

22. All the petitioner's rights are and remain expressly reserved, including to rely on such further or other grounds to assail the purported application, the process which followed, and the decision to award the impugned licence, and to engage such other fora as it may be advised to engage.



ANDREW HALL

I hereby declare that the deponent has sworn to and signed this statement in my presence



at WINDHOEK the 22ND day of MAY 2020 and he declared as follows: that the facts herein contained fall within his personal knowledge and that he understands the contents hereof; that he has no objection to taking the oath; that he regards the oath as binding on his conscience and has declared as follows:

"I swear that the contents of this Sworn Affidavit are true and correct, so help me God."



COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

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