



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: A 158/2012

In the matter between:

GUINEA FOWL INVESTMENTS TWO (PTY) LTD

FIRST APPLICANT

POWERCOM NAMIBIA (PTY) LTD

SECOND APPLICANT

*versus*

THE COMMUNICATIONS REGULATORY  
AUTHORITY OF NAMIBIA

FIRST RESPONDENT

MINISTER OF INFORMATION AND  
COMMUNICATION TECHNOLOGY

SECOND RESPONDENT

TELECOM NAMIBIA LTD

THIRD RESPONDENT

Neutral citation: *Guinea Fowl Investments Two (Pty) Ltd v The Communications  
Regulatory Authority of Namibia (A 158/2012) [2012] NAHCMD  
3 (24 September 2012)*

**CORAM:** UEITELE, J

Heard: 21 AUGUST 2012

Delivered: 24 SEPTEMBER 2012

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ORDER

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In the result, I am satisfied that the applicant has made out a case for this application to be heard as one of urgency and I grant condonation to do so in the exercise of my discretion.

I am further satisfied that the conditions attached to the approval for the transfer of Powercom's telecommunications licence to Telecom are unauthorised by the Communications Act, 2009 and are thus invalid and set aside.

The matter is referred back to the Authority and I further direct that the Authority reconsider (on or before 19 October 2012) the conditions (if any) which it may attach to the approval. In doing so the Authority must comply with the *audi alteram* rule and it is also hereby enjoined to act fairly and reasonably, according to the dictates of art 18 of the Namibian Constitution.

I further direct that the Authority pays the applicant's costs. These costs are to include the costs occasioned by the employment of one instructed counsel and one instructing counsel.

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## JUDGMENT

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### UEITELE J:

#### **A INTRODUCTION AND BACKGROUND**

[1] This application concerns the validity of conditions imposed by the Communications Regulatory Authority of Namibia (I will in this judgment refer to it as the 'Authority', the first respondent in this application, upon the intended transfer of the second applicant's telecommunications licences to the third respondent.

[2] The first applicant, is the holding company of the second applicant (I will in this judgment refer to the second applicant as "Powercom") and has approached this court on an urgent basis to review and set aside the decision taken on 7 June 2012 by the Authority to approve the transfer of Powercom's telecommunications licences to the third respondent (I will in this judgment refer to the third respondent as Telecom), but subject to certain conditions which the first applicant alleges are *ultra vires* the Authority's powers. I will, before I deal with the issues which I am called upon to decide, briefly set out the way in which this application arose.



[3] Powercom was established as a second provider of mobile telephony services in Namibia during 2006 and was awarded a 15-year telecommunications license. The original shareholders of Powercom were Nampower, Telecom Management Partners AS, NAMIC, Education Trust and Old Mutual. The establishment of Powercom was financed by Nedbank and Investec.

[4] Powercom's initial mobile operations brand, 'Cell One' was launched on 16 March 2007, but was not a commercial success and it suffered significant losses. Powercom thus breached its debt covenants to Investec and Nedbank. As a result of the losses suffered, Nedbank and Investec in 2008 sought to introduce into Powercom a shareholder with a strong technical background. The predecessor of the Authority (the Namibian Communications Commission) and the Minister (the second respondent), approved the sale of Powercom to a foreign company, Telecel Globe Ltd which acquired the entire issued share capital in Powercom with effect from 2009. Telecel Globe Ltd is a subsidiary of the Egyptian telecommunications company, Orascom Telecom Holding SAE. Orascom rebranded 'Cell One' as 'LEO'. The first applicant alleges that Orascom invested N\$900 million in Powercom but LEO was still a failure. When Orascom realized the failure of LEO it attempted, as from February 2010, to sell its interest in Powercom.

[5] By March 2011 Orascom failed to secure a purchaser for its interest in Powercom, it (Orascom) agreed with Investec and Nedbank that Orascom's shareholding in Powercom would be sold to the first applicant 'Guinea Fowl' (I will in this judgment refer to Guinea Fowl as the applicant) to facilitate the sale of shares to a new operational shareholder. On 01 June 2011 Powercom issued a press release in which it gave indication that a process to purchase Powercom commenced. The applicant prepared an information memorandum<sup>1</sup> and sent the memorandum to identified parties<sup>2</sup>. At the end of the process only Telecom Namibia submitted a bid to purchase Powercom. After a period of negotiations the applicant and Telecom reached agreement with respect to the transfer of all ordinary shares in Powercom to Telecom. The agreement so reached was attached to the applicant's founding affidavit as Annexure 'MM'.

<sup>1</sup> An information memorandum is defined by the applicant as a marketing document as it seeks to evince interest from potential purchasers. The information memorandum further sets out the process which potential purchaser had to follow to submit their offers.

<sup>2</sup> The identified parties were, MTN, VODACOM, ECONET, FRANCE TELECOM (ORANGE), BHARTI, TELECOM NAMIBIA, DELTA PARTNERS, SATTATT, HOLDINGS, HARDIMAN TECHNOLOGIES, AND INSTONE CAPITAL.

[6] On 12 December 2011 the applicant submitted an application to the Authority for approval of transferring Powercom's telecommunications licence to Telecom. On 8 March 2012 (but the decision was only communicated to applicant by letter dated 13 March 2012) the Authority dismissed the application for change of ownership, transfer of licences and transfer of control of licences. The reasons advanced for dismissing the application were amongst others that the applicant was not the 'the rightful owner of the shares in Powercom'.

[7] On 20 March 2012 the Authority indicated that it was willing to further consider the application as soon as certain technical requirements were met. On 23 March 2012 the applicant wrote to the Authority indicating that it had rectified the defects which led to the dismissal of the application of 12 December 2011. It also indicated that all technical requirements have been met. On 30 March 2012 the Authority informed the applicant that it was considering the rectified application as reinstated. On 16 April 2012 the Authority again wrote to the applicant informing it that it was still reviewing the rectified application and requested further information from the applicant. The applicant provided the requested information on 19 April 2012. Between 19 April 2012 and 15 May 2012 further exchange of correspondence between the applicant and the Authority took place.

[8] On 7 June 2012 the Authority's Board of Directors held a meeting and at that meeting the Board of Directors resolved to approve the application for the transfer of Powercom's telecommunication licences to Telecom but subject to certain 'suspensive conditions'. Two of the conditions which are relevant to the present application read as follows:

- 'iv. The approvals set out in (i) and (ii) above are subject to the following suspensive conditions, as a means to striking a balance that favours the approval of the transaction, as measured by the goal of achieving the objects of the Act:
  1. Amendment of section 2(10)(a)(iv) of the Post and Telecommunications Companies Establishment Act No.17 of 1992 to allow for the partial privatization of Telecom Namibia Limited with not less than 25% private shareholding.
  2. Following the above amendment, the actual partial privatization of Telecom Namibia Limited with not less than 25%.



The above conditions are supporting the objectives of the Communications Act No.8 of 2009, specifically the objective of encouraging private investment in the telecommunications sector.'

[9] The decision of 07 June 2012 was communicated to the applicant on 13 June 2012. Two days later, that is, on 15 June 2012 the applicant's legal representative addressed a letter to the Authority and requested the Authority to reconsider the decision before 22 June 2012. On 22 June 2012 the Authority's legal practitioners' replied to the applicant's letter of 15 June 2012, stating that the Authority did not have sufficient time and that the Authority will respond in due course. The Authority's legal practitioner actually responded on 25 June 2012 indicating that the Authority will not reconsider its decision as it does not have a legal basis to do so and that it will also not grant an unconditional approval of the transaction because, says the Authority, an unconditional approval of the proposed transaction is prejudicial, at least to section 2(i) of the Communications Act, 2009 (Act. 8 of 2009). On 18 July 2012 the applicant approached this court on an urgent basis for an order to review and set aside the decision of 07 June 2012 alternatively to declare the decision of 07 June 2012 to be in conflict with Namibian Constitution and the Communications Act, 2009 and that the decision be set aside. The applicant furthermore seeks an order directing the Authority to unconditionally approve the transfer of Powercom's telecommunication licence to Telecom.

[10] The Authority opposes the relief sought. The second respondent (the Minister of Information and Communication Technology) and third respondent do not oppose the relief sought. In its opposition, the Authority raises two preliminary points. These are to dispute the urgency of the application and that the legal basis of the transfer has now fallen away, immediately after 30 June 2012, well before the review proceedings were initiated.

[11] I turn now to preliminary objections before turning to the merits of the application.

## **B POINTS IN LIMINE**

### **URGENCY**

[12] On behalf of the Authority it was submitted that the application was not of sufficient urgency to have justified the procedure adopted by the applicants. The notice of motion, the supporting and supplementary affidavits run into some 350

pages and the bundle of the record of the proceedings sought to be reviewed run into some 604 pages. The certificate of urgency and notice of motion are both dated 18 July 2012. They were served formally on the respondents on 18 July 2012 and the matter was set down for hearing on 21 August 2012. The first respondent filed an answering affidavit and supplementary and replying affidavits have also been filed of record.

[13] The urgency relied upon by the applicants is founded upon the following facts:

- '13.1 The agreement between Powercom and Telecom for the transfer of control of the telecommunications licences lapsed on 30 June 2012. The complexity of this matter and the time that is needed to be afforded to applicant to comply with Rule 53 (such as the provision of the record of decision-making) made it logistically impossible to finalize this application before the date (i.e. 30 June 2012) that the agreement lapsed.
- 13.2 It was only during the afternoon of 13 July 2012 that Telecom indicated that it was still, until 31 August 2012, interested in the potential purchase of Powercom as a going concern. This decision was conveyed to the applicant's legal representative on 16 July 2012.
- 13.3 If the impugned decision not set aside and the transfer of the shareholding from Powercom to Telecom is not approved before 31 August 2012, Powercom would be liquidated, given its existing exposure of N\$450 million and the monthly operational losses of between N\$2 million and N\$5 million.
- 13.4 Despite vigorous efforts on the part of applicant, it has been impossible to find another viable purchaser for Powercom.
- 13.5 The failure of Powercom would have a further negative effect of job losses and economic hardship for those employed by Powercom, currently 116 permanent workers and 35 temporary workers.
- 13.6 A failure of the transaction would also result in less competition and a monopoly for MTC with associated competition concerns and an undermining of the objectives of the Communication Act and Competition Act.'



[14] I will now turn to consider whether I ought to exercise my judicial discretion and hear the matter as one of urgency or not. It has been said in previous decisions of this Court that when an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought as far as practicable in terms of the Rules<sup>3</sup>.

[15] In **Bergmann's** case *supra*<sup>4</sup> the court also held that the procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of disputes. The court went further and held that

*'whilst Rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be 'as far as practicable' in accordance with the Rules constitutes a continuous demand on the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances. The benefits of procedural fairness in urgent applications are not only for an applicant to enjoy, but should also extend and be afforded to a respondent. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect service of an urgent application as soon as reasonably possible on a respondent and afford him or her, within reason, time to oppose the application. It is required of any applicant to act fairly and not to delay the application to snatch a procedural advantage over his or her adversary'*

[16] The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one and that discretion must be exercised judiciously. One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the

<sup>3</sup> **Bergmann v Commercial Bank of Namibia Ltd**, 2001 NR 48 (HC), at p. 50 J – 51 A: **MWEB Namibia (Pty) Ltd v Telecom Namibia Lt & 4 Others** an unreported judgment of this Court dated 31 July 2007; also compare **Radebe v Government of the Republic of South Africa and Others** 1995 (3) SA 787 (N),

<sup>4</sup> Footnote 3 at page 51

application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable remissness or inaction.

[17] In this case the applicant was informed that the Authority will not review the conditions on 25 June 2012 and the agreement between the applicant and Telecom was due to lapse on 30 June 2012. The applicant explains that 'given the complexity of this matter and the time that is needed to be afforded to CRAN to comply with Rule 53 (such as the provision of the record of decision-making) made it logistically impossible to finalize this application before the date that the agreement lapsed... and also that ...It was only during the afternoon of 13 July 2012 that Telecom indicated that it was still, until 31 August 2012, interested in the potential purchase of Powercom as a going concern.' As regards the procedural fairness I have indicated above that the application was launched on 18 July 2012, the respondents were given until 06 August 2012 (i.e. 18 days) to file an answering affidavit (The first respondent filed its answering affidavit on 13 August 2012) and the matter was set down for hearing on 21 August 2012.

[18] I have no reason to believe that the applicant has been dilatory in bringing this application or that it attempted to snatch a procedural advantage over the other parties, and I am consequently not prepared to refuse to exercise my discretion in favour of the applicants on that account. I accordingly condone the applicant's none compliance with rules of court.

## **B ABSENCE OF PROTECTABLE LEGAL RIGHT OR INTEREST**

[19] Mr. Maleka submitted that the legal basis (the Sale of Shares Agreement between applicant and Telecom having lapsed) of the transfer has now fallen away, and the judgment of this Court may ultimately be academic. He thus requested the Court to exercise its discretion, by declining the grant of the remedy of judicial review.

[20] In the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>5</sup> Ackermann J said

'a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

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<sup>5</sup> 2000 (2) SA 1 (CC) (2000) (1) BCLR 39 at n 18



[21] In the case of *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*<sup>6</sup> Didcott J remarked that there is, a well-established and uniformly observed judicial policy which directs courts not to exercise discretion vested in the Courts in favour of deciding points that are merely abstract, academic or hypothetical ones. In that case the constitutionality of certain provisions of the Indecent or Obscene Photographic Matter, 1967 (Act 37 of 1967) and of the Publications Act, 1974 (Act 42 of 1974) were challenged but before the Constitutional Court could pronounce itself Parliament repealed the two Acts and replaced it with a new Act (but had not yet been brought into operation). Declining to pronounce himself on the matter Didcott J said:

'...there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.'

[21] In the case of *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others*<sup>7</sup> the Court held that there may, however, be a need for the Court to give a judgment on a matter that has become moot in order to resolve the dispute which gave rise to the litigation between the parties, or for other reasons. In this regard, the Court should consider whether any order it may make will have any practical effect either on the parties or on others<sup>8</sup>. Also see the case of *Independent Electoral Commission v Langeberg Municipality*<sup>9</sup> where the Court held that 'even though a matter may be moot as between the parties in the sense defined by Ackermann J [In, the *National Coalition for Gay and Lesbian Equality* case] that does not necessarily constitute an absolute bar to its justiciability'

[22] Whether a dispute between parties is 'moot' is factual question which will depend on the facts of each case. It is true that in the present case the Sale of

<sup>6</sup> 1997 (3) SA 514 (CC) at page 525

<sup>7</sup> 1999 (4) SA 682 (CC)

<sup>8</sup> At page 688 paragraph F

<sup>9</sup> 2001 (3) SA 925 (CC) at page 933

Shares Agreement between applicant and Telecom lapsed on 30 June 2012 that is before the applicant instituted its review proceedings. But the applicant states in the affidavit deposed to on its behalf that after it received notification from the Authority that the Authority will not revisit its decision of 07 June 2012 it (applicant) engaged Telecom to establish whether Telecom will proceed with the transaction. The applicant further states that it is only on 13 July 2012 that it received confirmation that Telecom is still interested in purchasing (until at least 31 August 2012) Powercom as a going concern. Can it then, in these circumstances, be said that an order of this Court will have no practical effect on the parties to the litigation? I answer that question in the negative. I am of the view that the dispute between the parties presents an existing or live controversy and an order of this Court will be of practical effect at least to the applicant. I thus find that the dispute is justiciable.

### C THE MERITS

[23] The application for the main (review and declaratory) relief is based upon eight grounds raised in the founding affidavit. I will not repeat the grounds of review here but the quintessence of applicant's attack on the decision of the Authority to impose conditions on the approval to transfer Powercom's telecommunications licence to Telecomm is that the decision by the Authority is in conflict with the principle of legality, was taken without due regard to the *audi alteram* principle, is a breach of the separation of powers doctrine and has no rational basis.

[24] In amplifying its grounds of review in its founding affidavit, and repeated in its heads of arguments the applicant contended, *inter alia* that:

- '1 CRAN, as a creature of statute, has no powers beyond those which are provided for in the Communications Act, and the Regulations thereunder.
- 2 On the basis of the principle of legality, any action not covered by statutory authority, is *ultra vires* and a nullity.
- 3 CRAN explicitly stated that its finding that the proposed transaction was contrary to the objects of the Communication Act was made under section 35 of the Act. CRAN then attempted to propose conditions, referred to above, to mitigate these effects in terms of section 33 of the Act.
- 4 The decisions which CRAN may lawfully take in terms of section 35 are limited to the granting of or the refusal to grant consent, without the imposition of conditions. The imposition of conditions in terms of section 35, is accordingly incompetent and *ultra vires* the powers of CRAN in terms of the Act, incompetent and constitutes a material error in law. It is accordingly a nullity.



- 5 It is submitted that CRAN's decision should on this basis alone be reviewed and set aside.'

[25] The Authority denies that it acted *ultra vires* or contravened the principle of legality. Mr. Maleka who appeared for the Authority articulated the denial as follows:

- '1 The applicants contend that CRAN has no power to grant conditional approval of a transfer or assignment of transfer in terms of section 35 of the Act. They claim that the only power which CRAN has is to either unconditional consent to the transfer or refuse to grant that consent.
- 2 The contention is simply mistaken, and rest on an unworkable interpretation of section 35 of the Act:
- 2.1 First, the very fact that part of the powers vested upon CRAN, in terms of section 35(1) of the Act, require it to investigate whether the transaction would be prejudicial to the objects of the Act, necessary implies that CRAN may well be entitled to redress the identified prejudice, by way of imposing relevant conditions, as it has sought to do so, in this case.
- 2.2 Secondly, section 35(3) of the Act expressly confers powers on CRAN to, *inter alia*, impose "*measures*" to alleviate the change of control in respect of a transaction which resulted in a change of control without notification to CRAN, 15 days after the conclusion of the transaction.
- 2.3 It follows from the express provisions of section 35(3) of the Act that CRAN has the power to impose conditions, *ex post facto*, to deal with the change of control. That being the case, it would be otiose to contend that it does not have similar powers in respect of transactions which were notified to CRAN timeously. There is simply no sense for a distinction of that sort.
- 3 We therefore submit that the applicants' contention is based on an erroneous interpretation of section 35 of the Act.'

[26] I will, before I express any view on the above arguments, turn to the Communications Act, 2009 (Act 8 of 2009), which is pivotal to this review.

**(a) The long title to the Communications Act, 2009**

The long title of the *Communications Act, 2009* in material terms reads as follows:

'To provide for the regulation of telecommunications services and networks, broadcasting, postal services and the use and allocation of radio spectrum; for that purpose the establishment of an independent Communications Regulatory Authority of Namibia; to make provision for its powers and functions; the granting of special rights

to telecommunications licensees; the creation of an Association to manage the .na internet domain name space and for matters connected therewith”.

**(b) *The Objectives of the Communications Act, 2009***

Section 2, of the Communications Act is headed 'Objects of this Act' and in material terms reads as follows:

'2 The objects of this Act are-

- (a) to establish the general framework governing the opening of the telecommunication sector in Namibia to competition;
- (b) to provide for the regulation and control of communications activities by an independent regulatory authority;
- (c) to promote the availability of a wide range of high quality, reliable and efficient telecommunications services to all users in the country;
- (d) to promote technological innovation and the deployment of advanced facilities and services in order to respond to the diverse needs of commerce and industry and support the social and economic growth of Namibia;
- (e) to encourage local participation in the communications sector in Namibia;
- (f) to increase access to telecommunications and advanced information services to all regions of Namibia at just, reasonable and affordable prices;
- (g) to ensure that the costs to customers for telecommunications services are just, reasonable and affordable;
- (h) to stimulate the commercial development and use of the radio frequency spectrum in the best interests of Namibia;
- (i) to encourage private investment in the telecommunications sector;
- (j) to enhance regional and global integration and cooperation in the field of communications;
- (k) to ensure fair competition and consumer protection in the telecommunications sector;
- (l) to advance and protect the interests of the public in the providing of communications services and the allocation of radio frequencies to the public.'

**(c) *Promotion of Competition***

Section 33 of the Competition Act, 2009 provides as follows:

**'33 Anti-competitive practices**

- (1) Any practice or activity that has the object or effect of preventing, restricting or distorting competition in a market for the supply of



telecommunications or broadcasting services or any product or service used in connection with these services is prohibited.

(2) Any abuse of individual or collective dominant position by one or more persons in a market for the supply of telecommunications or broadcasting services or any product used in connection with these services is prohibited.

(3) The Authority may review any proposed acquisition of an interest conferring control in competing providers of telecommunications or broadcasting services, and any proposed major transaction between such providers and their affiliates for conformance with this Act and to ensure that the transaction will result in no reduction in competitive markets not offset by sufficient benefits to the public (as measured by the objects of this Act).

(4) *The Authority may impose conditions before or after such acquisitions or transactions to maintain competitive telecommunications or broadcasting markets.*

(5) Any agreements determined by the Authority to be anti-competitive will be automatically null and void.

(6) Any restrictive practice or activity whose pro-competitive effects outweigh its anti-competitive effects is deemed not to infringe the provisions of this section.

(7) Sharing of directors and officers among otherwise unaffiliated providers of telecommunications or broadcasting services without the approval of the Authority is prohibited.' (My emphasis)

Section 35, which deals with the approval of the transfer of telecommunications licence reads as follows:

**'35 Transfer of control of licensees and assignment of licences**

(1) No telecommunications service licence or broadcasting licence may be assigned by any person, and control of any person holding such a licence may not be transferred without the prior consent of the Authority, *which consent may be given if the Authority finds that the transfer or assignment would not be prejudicial to the objects of this Act.*

(2) The parties to any transaction transferring an interest in (or conferring or transferring a right to appoint or dismiss a director of) any holder of a licence referred to in subsection (1), must notify the Authority of that transaction within 15 days from the conclusion of that transaction whether it transfers control in the licensee or not.

(3) If the transfer has ultimately resulted in a change of control, the Authority may impose necessary measures to annul the transfer or alleviate the change of control.'

***Has the Authority properly understood sections 2, 33 and 35 of the Communications Act, 2009 and has it heeded them?***

[27] I have in the introductory part of this judgment indicated that the Authority approved the transfer of Powercom's telecommunications licence to Telecom, but on the conditions that section 2(10)(a)&(v) of the Post and Telecommunication Companies Establishment Act 17 of 1992 are amended to allow for the partial privatization of Telecom with not less than 25% private shareholding; and once the law is amended the actual partial privatization of Telecom with not less than 25%.

[28] The complaint of the applicant is that in imposing the conditions (referred to above and quoted in paragraph 8 of this judgment) the Authority has misconceived its powers under the Communications Act, 2009. Applicant argues that '*Section 2(i) refers to "encouraging" private investment; CRAN has no power under this section to force private investment, or to prohibit further public investment in the telecommunications sector.*'

[29] The Authority's reply to this complaint is simply that:

'... the Applicants do not place in issue the fact that the preference share arrangement between the parties in terms of the Sale of Shares Agreement (Annexure MM to the applicant's founding affidavit) fall within the prohibition of indirect acquisition of shares in the Third Respondent ( Telecom). That being the case the conditions imposed were nothing than simply exposing and reflecting a real and existing legal statutory impediment and requirement. First Respondent did not instruct the legislature to amend the law at all. The conditions further did not direct Minister to do anything. It is up to the parties involved to consult and lobby Minister if they so wish to achieve the fulfillment of the condition because it was not up to the First Respondent.'

[30] I pause here and observe that the alleged indirect acquisition of shares in Telecom was not the articulated rationale for the imposition of the conditions and cannot now be so put forward. The Authority justified the imposition of the conditions



as encouraging private investment in the telecommunications sector, it (the Authority) articulated the justification in the following terms:

- '(a) The proposed transfer of control transaction is prejudicial to the objects of the Act specifically objective 2(i) i.e. encouraging private investment. CRAN may only approve such a transaction if it is not prejudicial to the objects of the Act in terms of section 35(1). However, if CRAN were not to grant the application the probable result would be equally prejudicial to the objects of the Act i.e. liquidation of Powercom (Pty) t/a Leo"
- (b) Therefore in terms of section 33 and 35 of the Act and the Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licenses and Spectrum Use Licences published In Government Gazette No. 272 dated 29 August 2011:
  - i the board approves the application...
  - ii ...
  - iii ...
  - iv The approvals set out in (i) and (ii) above are subject to the following suspensive conditions, as a means to striking a balance that favours the approval of the transaction, as measured by the goal of achieving the objects of the Act:
    - 1. ...
    - 2. ...

The above conditions are supporting the objectives of the Communications Act No.8 of 2009, specifically the objective of encouraging private investment in the telecommunications sector.' (My emphasis).

[31] I am furthermore of the view that the denial by the Authority that it instructed the legislature to amend the law and the denial that it directed the Minister to do anything, is not convincing. I say so for the following reason, the condition which the Authority imposed actually requires that section 2(10)(a)(iv) of the Post and Telecommunications Companies Establishment Act 17 of 1992 be amended and once the law is amended Telecom Namibia Limited must be partially privatized. Article 44 of the Namibian Constitution provides that '*The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable,*

to the powers and functions of the National Council as set out in this Constitution.' It follows that it is only Parliament that can amend the Post and Telecommunications Companies Establishment Act 17 of 1992. I am thus satisfied that the conditions imposed by the Authority are an indirect instruction to the legislature. I will now turn to the dispute relating to the interpretation placed on sections 33 and 35 of the Telecommunications Act, 2009.

[32] The resolution of the dispute depends upon the meaning that one places on section 2(i) of the Communications Act, 2009. My point of departure is always to attach to any word used in a statute its ordinary grammatical meaning. See *Bhyat v Commissioner for Immigration*<sup>10</sup> where it was held that

'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.'

[33] Furthermore the process of arriving at the meaning of the words used must have regard to the spirit of that Act. Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ<sup>11</sup>. Where he said:

'Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in

<sup>10</sup> 1932 AD 125 (Per Stratford JA at 129.)

<sup>11</sup> in *Dadoo Ltd and Others v D Krugersdorp Municipal Council* 1920 AD 530 at 543



order to give effect to what he may think to be the policy or object of the particular measure.'

[34] In *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*<sup>12</sup> Schreiner JA said:

"Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and vice versa, the less clear it is the greater the part that is likely to be played by the context."

[35] With those preliminary remarks I now turn to the language used in section 2(i) of the Communications Act, 2009. As indicated above that section simply states that the '*objects of the Act are to encourage private investment in the telecommunications sector*'. What does this entail? According to ***The Shorter Oxford English Dictionary***,

(a) an objective is '*a thing aimed at or sought; a target, a goal, an aim*'; and

(b) encourage is

"1 Give somebody hope, confidence, or courage;

2 Make sufficiently confident or bold to do a specific act motivate somebody to take a course of action or continue doing something;

3 Urge, incite, recommend, advise;

4 Stimulate (a person, personal activity) by help reward etc; patronize;

5 Allow; promote or assist (an activity or situation) foster or cherish".

[36] Having regard to the definitions given in the Shorter Oxford Dictionary I am of the view that the Communications Act, 2009 seeks or aims to promote private investors to invest in the telecommunications sector. The question that one thus has to ask is 'did the process involving the transfer Powercom's telecommunications licence encourage private investors to invest in the telecommunications sector? I have no doubt that the process did. I say so for the following reason, when Powercom resolved to assign its telecommunications licence it issued a press release in which it gave indication that a process to purchase Powercom commenced. The applicant prepared an information memorandum and sent the

<sup>12</sup> 1950 (4) SA 653 (A) at 664E Schreiner JA

memorandum to identified parties<sup>13</sup>. At the end of the process only Telecom Namibia submitted a bid to purchase Powercom. Having found that the process of selling the shares of Powercom was in line with the objects of the Communications Act, 2009 I will proceed to enquire whether Authority has the power to impose the conditions which it did.

[36] Sections 33 and 35 are contained in chapter V of the Communications Act, 2009. That chapter deals with the ***promotion of competition***. Section 33 deals with anti-competitive practices. Section 33 (3) empowers the Authority to '*review any proposed acquisition of an interest conferring control in competing providers of telecommunications to ensure that the transaction will result in no reduction in competitive markets not offset by sufficient benefits to the public (as measured by the objects of this Act)*', and Section 33 (4) empowers the Authority to impose conditions before or after such acquisitions or transactions '*to maintain competitive telecommunications or broadcasting markets*'. The inevitable conclusion is thus that if conditions are imposed in terms section 33 (4) those conditions must be aimed at: ensuring that no reduction in competitive markets take place; and maintaining competitive telecommunications or broadcasting markets.

[37] Section 35 deals with the transfer of control of telecommunications licensees and assignment of telecommunications licences. Section 35(1) prohibits;

- (a) the assignment of telecommunications service licence or broadcasting licence;
- (b) the transfer of control of a person holding telecommunications service licence or broadcasting licence,

without the approval of the Authority or without the prior consent of the Authority. The section further provides that the consent may be given if the Authority finds that the transfer or assignment would not be prejudicial to the objects of this Act. Section 35(3) empowers the Authority to impose necessary measures to annul the transfer or alleviate the change of control if the transfer has ultimately resulted in a change of control.

[38] The Authority is a statutory body established by an Act of Parliament, it is a creature of statute with no jurisdictional powers or functions beyond those granted by the statute creating it, namely Act No 8 of 2009. The Authority is established in terms

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<sup>13</sup> See the background information above paragraph 6



of Act 8 of 2009 and has no inherent jurisdiction such as that possessed by the High Court. The Authority can claim no powers which cannot be found within the four corners of its constituent Act<sup>14</sup>. In fact Section 4 of the Communications Act, 2009 provides as follows:

**'4 Establishment of Authority**

(1) The Communications Regulatory Authority of Namibia (for which the abbreviation CRAN may be used) is hereby established.

(2) The Authority is a juristic person with the objects and powers provided for in this Act. (My Emphasis).

[39] From what I have said above, I have no doubt that:

(a) Section 2(i) of the Communications Act, 2009, simply empowers the Authority to stimulate, allow; promote or assist, foster or cherish private investment in the telecommunications and broadcasting sector;

(b) Section 33 of the Communications Act, 2009 only empowers the Authority to impose conditions that:

- (i) are aimed at ensuring that the transfer of Powercom's telecommunication's licence to Telecom will result in no reduction in competitive markets not offset by sufficient benefits to the public; and
- (ii) are aimed at ensuring that the transfer of Powercom's telecommunication's licence to Telecom will maintain competitive telecommunications or broadcasting markets.

(c) Section 35(3) empowers the Authority to impose necessary measures to annul the transfer or alleviate the change of control if the transfer of an interest in (or conferring or transfer of a right to appoint or dismiss a director of) any holder of a telecommunications licence has taken place without the knowledge of the Authority.

[40] The conditions imposed by the Authority go beyond stimulating, allowing; promoting, assisting, fostering or cherishing private investment in the telecommunications and broadcasting sector. Furthermore the conditions are not aimed at maintaining competitive telecommunications or broadcasting markets. I have thus come to the conclusion that the Authority has misconceived its powers under sections 2, 33 and 35. The result is that the conditions imposed are hereby set aside.

<sup>14</sup>

See Baxter L *Administrative Law* at 348

## APPEARANCES

PLAINTIFF:

ADV AW CORBETT (with him S PUDIFIN-JONES)

Instructed by Engling Stritter & Partners

**DEFENDANT:**

ADV V MALEKA SC (with him Mr. NAMANDJE)

Instructed by Sisa Namandje & Co Inc