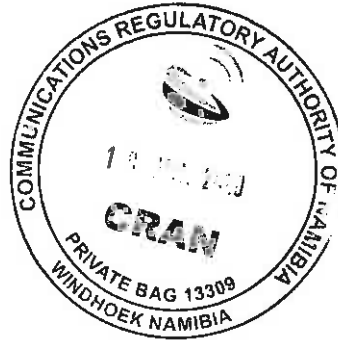




Filed by:
Uanivi & Gaes Inc
Per: Mr Uanivi
Legal Practitioners for the
Second Respondent
Windhoek- West
WINDHOEK



**BEFORE THE COMMUNICATION AUTHORITY OF NAMIBIA
PETITION**

In the matter between:

PARATUS TELECOMMUNICATION
(PROPRIETARY LIMITED)

PETITIONER

AND

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA 1ST RESPONENT

THE MUNICIPAL COUNCIL FOR THE
MUNICIPALITY OF WINDHOEK

2ND RESPONENT

ANSWERING AFFIDAVIT

T.B


I, the undersigned

ROBERT KAHIMISE

Do hereby make an oath and state as follows

1.

- 1.1 I am the Chief Executive Officer of the Municipal Council for the Municipality of Windhoek with its offices at 80 INDEPENDENCE AVENUE, WINDHOEK, NAMIBIA. The Second Respondent was created in terms of Article 102 of the Namibian Constitution read with Section 6 of the Local Authorities Act 23 of 1992. The second respondent is a creature of statute and therefore in that capacity has jurisdiction as a local authority providing such relevant services within the municipality of Windhoek.
- 1.2 The relief that is sought by the petitioner for reconsideration of this matter is of concern to the second respondent.
- 1.3 I am competent to depose to this affidavit and to deal with issues relevant in this petition for reconsideration of the decision of CRAN which granted a licence to the second respondent. I am able and authorised to depose to this affidavit on behalf of the second respondent.
- 1.4 The facts that I depose to herein are within my personal knowledge and are true and correct unless the context thereof indicates otherwise.


T.B


1.5 Whenever I make submissions of a legal nature, I do so on the advice of second respondent's legal representatives, which advice I verily believe to be true and correct.

2.

In this affidavit I shall address allegations contained in, amongst others, the petitioner's affidavit filed by Paratus Telecommunications (Pty) Ltd in support of the relief sought in the petition. I will also respond to the letter filed by Telecom Namibia Ltd as well as the letter filed on behalf of Dimension Data, H. Mudge and H Barnard (the other commentators on the issues petitioner herein). I will not address each and every allegation therein. I will only do so to the extent that same may be relevant for the consideration of issues in this petition. It is important to state that to the extent that a response given herein addresses similar allegations in other petitions it should be deemed to responding to all the petitioners and persons who provided support for the petition for reconsideration of the decision of the Authority.

3.

At the onset I point out that I have read the affidavit of Mr. Andrew Hall ("Hall"), filed in support of the petition and I am advised that it might help to set out second respondent's understanding of the petitioner complaint and to give a broad outline underpinning second respondent's answer thereto.


T. B

THE SECOND RESPONDENT'S MANDATE

4.

It will be highlighted on behalf of the second respondent that this petition stands to be struck off and/or dismissed for the following reasons:

- 4.1 The thrust of the petitioner's attack on the granting of the license to the second respondent (hereinafter referred to as the Council) by the first respondent is in my understanding threefold. In the main, it is alleged that the Council is not authorised in law to apply or to be granted a telecommunications license by CRAN. The petitioners argue that there is no provision in the Local Authorities Act upon which the Council could have sought to apply and/or be granted a license. The argument goes further that the Council, in applying and being granted a license, it acted beyond the scope of its powers under the Local Authorities Act. The argument is that the granting of the license to the Council in circumstances where the Local Authorities Act prohibits and/ or does not permit such an act is in petitioners' contention unlawful. The question is whether the petitioner's stance has support in law?
- 4.2 I hasten to point out that the petitioner's interpretation of the Local Authorities Act 23 of 1992 does not do justice to the provisions of the same Act they purport to rely on. The petitioner's contentions misconstrue the extent and ambit of the relevant provisions of the Local Authorities Act 23 of 1992. We will deal with these contentions in detail herein below.
- 4.3 The second angle of the attack mounted by the petitioner is that the second respondent submitted what Paratus terms *an incomplete application*. The petitioner mounts this attack to bolster the contention that the Authority – somehow



T. B.

– failed to apply its mind properly and/or was influenced by irrelevant considerations.

- 4.4 In the further evolution of its contentions the petitioner also argues that the Council application for a license was signed by an unauthorised person being – the Strategic Executive – Information Com Technology. It is argued that the signatory to the application – Mr. R Kandjiriomuini – was allegedly on a frolic of his own – so the argument goes.
- 4.5 In a final throw of a proverbial dice, the petitioner also argues that there was misconduct on the part of the Authority when it held further '*engagements*' with the second respondent. The thrust of the complaint being that the petitioner itself was not privy to those further engagements. The petitioner however, provided no specific regulation or section in the Communications Regulatory Authority of Namibia that entitles it to be invited to such further engagement. Nevertheless, the petitioner strenuously contends that it holds entitlements to be proxy to consultation/s that goes on between the second respondent (as an applicant for a license) and the Authority.
- 4.6 Perhaps it is necessary to consider that the petitioner is not a regulator and is not clothed with legal authority to be proxy to consultations between the Authority and the second respondent. Consequently – so the argument goes – the petitioner concludes that there was no proper/ fair process in the determination of second respondent's application for a licence as the petitioner was unable to exercise its alleged rights.


T.B

INTRODUCTION TO THE SECOND RESPONDENT'S CASE

5.

As already stated above the second respondent was created in terms of chapter 12 of the Namibian Constitution, particularly Article 103 read with Articles 108, 110 and 111 of the Namibian Constitution.

6.

The Local Authorities Act 23 of 1992 is of paramount importance in dealing with the ambit and extent of the second respondent powers, duties, functions, rights and obligations which are stated in part 5 of that Act.

7.

I do not seek to overburden this affidavit with extensive references to the provisions of the Local Authorities Act. The relevant section is section 30(1)(o), 30(1)(u), 30(1)(z) 30(1)(aa) 30(1)(ab) 30(1)(ad) and 30(1)(ae) as well as 30(4). In terms of Section 30(1)(o) the Council is empowered to establish and maintain any building or structure for any community requirement. It therefore goes without saying that whatever structural requirements necessary for the applicant's network in terms of the license issued by CRAN on 26 March 2020 will be met per this requirement.

8.

In addition, in terms of Section 30(1)(u) the second respondent is entitled to determine by notice in the gazette the charges, fees and other monies payable in respect of any service, amenity or facility established and provided by it under the Local Authorities Act or provided by the Council under any other law (*including under the Communications Act*). The second respondent is entitled to exercise the rights that it enjoys under the license


T.B

issued by the Authority and will charge such fees as it may publish in line with both the Communications Act and the Local Authorities Act.

9.

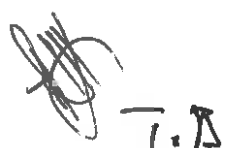
The provisions of section 30(1)(aa) provides that the second respondent has the power to enter into joint business ventures with anyone for the purposes of achieving its objectives. I state that the provisions of section 30(1)(aa) gives second respondent the power to enter into commercially viable enterprises including joint ventures. Simply put, the Local Authorities Act gives the second respondent the power and authority to participate in the commercial space. This demonstrates the latitude that the second respondent has in participating in services and arrangements for the fulfilment of its public mandate including services which are the subject matter license issued by the Authority on 26 March 2020.

10.

I also refer to section 30(1)(ab) which gives the second respondent the power to commercialise any services rendered by the second respondent or any function or any duty carried out by it. In a nutshell, the second respondent is entitled and empowered to commercialise its services – and this can only mean in accordance with viable commercial aspiration including for a profit. This provision again gives weight to the Council's stance that the license was properly sought and properly issued. The contentions of the petitioner are, with respect, untenable.

11.

I state that the very same law that the petitioner places reliance on is the one that gives the second respondent the power to apply and to be granted the license.


Handwritten signature and initials in the bottom right corner of the page.

12.

A simple glance at the provisions of section 30(1)(ab) show that the second respondent also has the power and obligation to promote, subject to the provisions to any other law (including under the Communications Act 8 of 2009) tourism in its jurisdiction. I again highlight that the importance of world class, affordable and widely available, communication infrastructure and services in Windhoek in the promotion of tourism cannot be understated. I point out that widely available and affordable communications serve a vital effective marketing tool for tourism. It is a fundamental tool utilised by suppliers and consumers of tourism services. In my humble view this is evidenced by a rapidly increasing number of users as well as online transactions that are concluded in Namibia. Hence affordability and availability of these services is an important factor which also constitutes part of the mandate of the second respondent. This communications service are a critical driver of the tourism industry. It is the second respondent submission that these services should be available to all its residents irrespective of whether they reside in affluent or **less** affluent areas of the municipal area of Windhoek.

13.

It is important to make these services available especially to many of the Windhoek Municipality community members who are at the tail end of the economic ladder and hence may not be the most attractive constituent to investment. In conclusion on this point, it is contended that access to affordable and widely available communication services is no longer a luxury but a basic human right. This requires the shift in the mentality in the current players in telecommunications to accept that functionaries such as the second respondent will provide similar services in order to promote the well-being of their residents and afford them opportunities to improve their well-being. The second respondent has a constitutional mandate to enhance the well-being of its residents and

7.12 

will do so despite the spirited opposition that is reflected in the objections placed before the Authority in this petition.

14.

Furthermore the provisions of section 30(1)(ae) gives the second respondent the power to exercise any other power conferred to it either in terms of the Local Authority Act and or any other law – including the Communications Act. It is the second respondent's contention that by virtue of it being granted the license by the Authority, it has the power and authorisation to utilise that license in accordance with Communications Act 8 of 2009 and Regulations made thereunder. This provision should give comfort to the Authority that the notion that the Council does not have the power to apply for and to be issued a licence is, with great respect to the petitioners, a fallacious. The second respondent's application for the license and the issuing of the license to the second respondent does not go beyond the Local Authorities Act.

15.

It is imperative to state that the Local Authorities Act gives the second respondent the rights that are in tune with the license issued by the Authority. The Authority can further take comfort in the concluding wording of section 30 (1) which states that the second respondent shall generally do anything that is necessary and conducive to the exercise of its powers and performance of its duties and functions in terms of the Local Authorities Act. I have already stated herein above that the second respondent is enjoined to provide services to its residences. I have already alluded to the importance of availability and affordability of world class communications network and services in the development and social advancement of Namibians within the Windhoek Municipality. This is more so when the special circumstances of Windhoek – which is a capital city of Namibia and the largest Municipality in Namibia – are taken into consideration.

T.B. 

16.


It is paramount to state that Authority does not exercise the powers it enjoys under the Communications Act in consultation or jointly with any other person – especially the petitioner. I therefore fail in the main to understand why the petitioner which does not have any Authority at all under the Communications Act can demand that the first respondent – should be proxy in the engagements between the Authority and an applicant for a telecommunications licence as well as in the manner in which it assessed second respondent's application. I strongly dispute the petitioner's alleged entitlement to access to information in the application as well as to engagements between the Authority and an applicant for a licence.

17.

In my humble view the Authority has already made its determination to grant a licence to the second respondent and this was made after following its internal processes. The Authority also assessed the completeness of the application for the license by the second respondent and in its wisdom – and correctly so – granted the license to the second respondent. In my view this ground of attack that the application was incomplete lacks merit and stands to be ignored and/or rejected by the Authority.

18.

I further state that in the determination of the application for the license the Authority in its sole discretion and power has the power to and can request such further information as it deems appropriate. There is nothing wrong about that and this is not a matter that can be unique to the second respondent. The second respondent was also entitled to

T.B 

submit further information to the Authority to amplify its application. That information had the object of clarifying and bolstering its application was submitted to the Authority. The Authority then was in a better position to assess and to determine second respondent's application.

19.

I hasten to state that I am surprised as to how, in law the petitioner seemingly gained access to the full information of the second respondent's application without the second respondent's permission. It is not clear to me how and what procedure was followed by the petitioner itself in obtaining details of the second respondent for a license before the Authority which information was also to a large extent confidential. I raise an objection to how exactly and to what extent the petitioner seemingly gained access to information that is, in my view, confidential. I therefore challenge the petitioner to disclose to the Authority what information exactly it has of the second respondent's application and how exactly and in terms of which law exactly it gained access to that information. The second respondent takes issue with the petitioner's access to that information as some of that information contained in the application is confidential and includes the second respondent's business case for the utilisation of the license as well as the details of the services it wishes to provide.

20.


T.B

I state that it is unfair that a potential competitor of the applicant for a license can already have an unfair competitive edge by accessing confidential information availed by an applicant (the second respondent) in good faith to the Authority. I state that at the hearing of this petition, submissions will be made that this constitutes unfair conduct and could have potentially harmful competition effect.

21.

Needless to point out that the information provided to the Authority by the second respondent was satisfactory, complete and deserving of a decision to award a license to the second respondent.

22.

22.1. Insofar as the contention is made that the official that signed the application form was not duly authorised to do so I commence by referring to the provisions of section 31 pertaining to the delegation of the powers by the Local Authority Council. It is important to note that the Council may direct and authorise its officials including the Chief Executive Officer, who may in turn also further delegate such powers to any staff member.

22.2. I point out that in its administration; the second respondent has a single and integrated administrative structure which is composed of various internal divisions headed by the Strategic Executives. Those divisions and officials do not have separate legal *persona* outside of the second respondent. Those officials, headed by the Chief Executive Officer, work together as a single unit to discharge the mandate of the second respondent. Under my direct supervision the officials complement each other in order to achieve the mandate of the second respondent.

T.B



22.3 The application for a license was authorised by the second respondent. That is an important fact that cannot be controverted. Although the resolution mandated the Strategic Executive: Power and Electricity to apply for the licence, the same resolution does not prohibit another equally placed official to sign the necessary papers for the application of the licence. In the end it is not an official that applied for a licence but it was the Council that applied for the licence. In any event the same resolution also mandates the Strategic Executive: Information and Communication Technology to also play a leading role in further decisions of the second respondent pertaining to the commercialisation of the license.

22.4 I also point out that there is no individual within the Municipality specifically named Strategic Executive: Power and Electricity. There exist, however, a function titled Strategic Executive: Electricity within the Municipality. The Strategic Executive: Electricity is an internal administrative function not a particular person. The Strategic Executive: Electricity is also not a statutory functionary operating separately from my supervision within the Municipality. There is nothing that prohibited Mr Reckliff Kandjiriomuini from completing the application form for the second respondent in pursuing the mandate of the second respondent. I submit that nothing turns on this cold technical objection by the petitioner that seeks to split hairs and has no proper and significant bearing on the decision of the second respondent to apply for a licence – a fact that cannot be disputed.

22.5. In any event I also do not understand the prejudice suffered by the petitioner which hinges on this aspect. Needless to state that the second respondent itself was also aware that Mr. Reckliff Kandjiriomuini completed the application form and that in many subsequent meetings thereafter he was the official that was leading the discussions and guiding the second respondent on further developments on the application for the license. The Council was aware that he was the focal point



T.B

official under my supervision regarding the application and progress with the Authority on the licence.

22.6. In the premises the attack based on the ground that the applicant was signed by Mr Reckliff Kandjiriomuini, is at best unsustainable and cannot be relied upon to achieve the far-reaching relief sought by the petitioner in this petition.

At this stage I will attend to deal the specific allegations contained in the petition affidavit.

23.

Ad paragraph 1 thereof

Save to deny that all the facts are true and correct; the remainder of the allegation therein are noted.


24.

Ad paragraph 2, 3 and 4

Allegations therein are noted.

25.

Ad paragraph 5 thereof

T.B 

In the introductory part of this affidavit, I have already stated why the petition lacks merit. I incorporate those averments under this paragraph and rely thereon.

26.

Ad paragraph 6 thereof

Legal argument contained therein is noted. I however dispute that legal arguments set out therein are of any assistance to the petitioner. If ever, the legal contentions therein support the granting of the license to the second respondent by the Authority.

27.


Ad paragraph 7 thereof

The content therein is noted. However, in so far as the allegations are made to support the petition, they are denied and placed in dispute. The application was made by the second respondent and properly signed. This is already addressed herein-above, and the same response is to the extent necessary incorporated by reference.

28.

Ad paragraph 8 thereof

28.1. The contents therein are noted and denied to the extent that it is alleged that the second respondent was in law not authorised to apply and to be granted a license by the first respondent. In any event the Notice for public comment is proper notice as required in terms of the Regulations Regarding Licencing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Licences, of 2011 as amended.

 T.B

28.2 The powers and duties of the second respondent are set out above; I pray that the averments be incorporated in this paragraph.

29.

Ad paragraph 9 thereof

The petitioner's contentions that the application was not made by the second respondent are also to the extend necessary denied and placed in dispute.

30.

Ad paragraph 10 thereof

The petitioner's contentions have already been addressed above. The second respondent attached annexures to the Application Form that was completed, which contained the information required by the Authority to enabled it to determine the application.

31.

Ad paragraph 11 thereof

I have no knowledge of the allegation therein.

32.

Ad paragraph 12 thereof


T.O.B 

- 32.1 I deny that the licence is improper or was issued incorrectly in any manner whatsoever. In so far as the issue of authority to apply for the licence is concerned, I have already addressed that aspect above.
- 32.2 I accept that there were further consultations between the second respondent and the Authority officials in order to obtain more information and to get clarity of the second respondent business case and to provide further information as was sought by the Authority. Such information assisted the Authority in the determination of the license.
- 32.3 In any event I am advised that there is no legal basis upon which the petitioner could demand to have sight of the information exchanged between the Authority and the second respondent prior to the granting of the license. Needless to point out that the petitioner provided comments to the Authority, on the second respondent's application, which were entertained. The second respondent similarly provided comments to the petitioner comment on 11 April 2019. The petitioner's complaints are untenable.

33.

Ad paragraph 13.1, 13.2 and 13.3 thereof

Each and every allegation therein is denied. In particular it is denied that second respondent's application was unauthorised or that it was not proper and/ or that it did not comply with the regulations. The petitioner is raising technical arguments which have no bearing of the determination for a license. The petitioner's clerical complaints are, in any event, untenable.

T.B. 

34.

Ad paragraph 13.4 thereof


34.1 The attack is aimed at the decision of the Authority, which the petitioner is privy to. The Authority's decision clearly sets out all the considerations it took into account including the condonation application by the petitioner and the petitioner's comments thereafter. The petitioner attacks the Form because in its (the petitioner's) view a '*complete application*' must have been physically completed and all the blanks spaces on the Form completed and therefore a failure to do so renders the application incomplete. There is no basis provided by the petitioner for this startling conclusion which is also untenable.

34.2 As already pointed out, the second respondent's application including the annexures to the Application Form provided the necessary information which the Authority required to considered sufficient for the Authority to adjudicate the second respondent's application. The petitioner is not the Authority and has no power to dictate to the Authority what the Authority may regard as a '*complete application*'.

35.

Ad paragraph 13.5 thereof

35.1 I state that the petitioner was afforded an opportunity to make comments and did so. The petitioner is not permitted to have disclosure of the second respondent's business case in order to exercise its rights to comment. The petitioner's limitation to comments are as set out in the Notice calling for public comments.


T.B

36.

Ad paragraph 13.6 thereof

The second respondent has no knowledge of the allegations.

37.

Ad paragraph 13.7 to 13.8 thereof

37.1 In so far as notification to the public is concerned, the Authority has complied with section 40 of the Communications Act read with the Regulations. The Authority has published such notices in the gazette comments were received by the Authority from the petitioner Paratus). No other comments were received as the second respondent only received comments, from the Authority, by Paratus.

38.2 The Authority has provided a transparent procedure in respect of the second respondent's application, and such is evident from the decision to which the petitioners are privy. The purpose of Article 18 of the Constitution requires an administrative body – the Authority - to afford the party affected by the decision to make representations. Indeed, the affected parties have made the comments and the Authority has considered the comments before it made the decision to award the licence to the second respondent. I refer to the detailed and well -reasoned decision of the Authority.

39.

Ad paragraph 14, 15 and 16 hereof

T.B



The Authority is empowered in terms of the Communications Act and Regulations to grant an applicant a licence that it deems appropriate. Further arguments will be made orally at the hearing in due course.

40.

Ad paragraph 17 thereof

The Authority has pronounced that the procedure has been followed, further consultations were held with the second respondent and after due consideration of all the information before the Authority including the public comments, the Authority made the decision.

41.

Ad paragraph 17 & 18 thereof

The allegations are denied. The second respondent has complied with the procedure and has through oral submissions clarified information which was required by the Authority. There is no indication in the Authority decision that the Authority acted outside the scope of the Communications Act and the Constitution of Namibia. In fact, the Authority made it clear in its decision that it considered the Communications Act, Regulations made there under, second respondent's application including annexures together with oral submissions and the petitioners comment.

42.

Ad paragraph 19 thereof



T.B

The allegations contained herein are addressed in the introductory paragraph; same are incorporated under this paragraph in so far as they relate to the powers of the second respondent to apply for a telecommunication licence, and the power to provide telecommunication service. The second respondent powers are to be exercised in line with the Local Authority Act and any other law.

The petitioner reliance on South Africa position is misplaced. The Local Authorities Act and the Namibian constitution sets out the powers of the Municipal council, which authorises the Council to provide telecommunications services subject to any other law (the Communications Act).

43.

Ad paragraph 20 & 21 thereof

It is denied that the second respondent's application was incomplete. The second respondent retaliates that its application was complete in compliance with the requirement by the Authority. The petitioner insists that its rights have been infringed but fails to clearly set out those rights.

There is absolutely no reason provided for the Authority to reconsider the second respondent's application and the decision to award the licence to the second respondent.

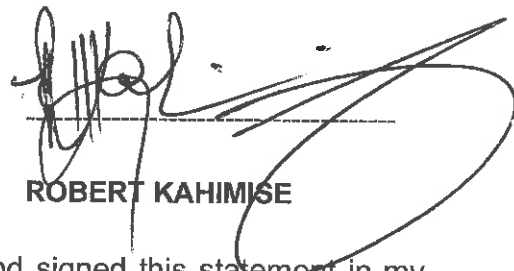
44.

Ad paragraph 22 thereof

T.O.B. 

The contents thereof are noted.

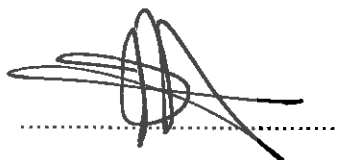
In conclusion, the petition has no merit; there is no reason for the Authority to reconsider its decision to award the licence to the second respondent. The petition by Paratus and the public comments must be dismissed. The Authority to uphold the decision to award the licence to the second respondent.



ROBERT KAHIMISE

I hereby declare that the deponent has sworn to and signed this statement in my presence at WINDHOEK on the 8TH day of JULY 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: **Trevor Phillip Brockerhoff**
Commissioner of Oaths
Legal Practitioner
CAPACITY: **13 Strauss Strasse**
Windhoek West
Tel: +264 61 250 438