

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2020/00288

In the matter between:

PARATUS TELECOMMUNICATIONS (PTY) LTD

APPLICANT

and

**THE COMMUNICATIONS REGULATORY
AUTHORITY OF NAMIBIA**

1ST RESPONDENT

**MUNICIPAL COUNCIL FOR THE CITY OF
WINDHOEK**

2ND RESPONDENT

TELECOM NAMIBIA LIMITED

3RD RESPONDENT

DOMENSION DATA (PTY) LIMITED

4TH RESPONDENT

INTERNET SOCIETY (NAMIBIA CHAPTER)

5TH RESPONDENT

ITC TRADING ENTERPRISES CC

6TH RESPONDENT

HENRY FERDINAND MUDGE

7TH RESPONDENT

ERASTUS UTONI

8TH RESPONDENT

CENTRAL PROCUREMENT BOARD OF NAMIBIA

9TH RESPONDENT

Neutral Citation: *Paratus Telecommunications (Proprietary) Limited v The Communications Regulatory Authority of Namibia* (HC-

MD-CIV-MOT-GEN-2020/00288) NAHCMD 209 (20 April 2023).

CORAM: MASUKU J
Heard: 15 September 2022
Delivered: 20 April 2023.

Flynote: Administrative Law – the audi alteram partem rule – Communications Act, No 8 of 2009 – Authority to bring application for telecommunications licence – Validity of the appointment of members of the first respondent’s Board of Directors – Completeness of application for licence.

Summary: The applicant approached the court seeking an order reviewing and setting aside the first respondent’s decision to award a telecommunications licence to the City of Windhoek (COW). The first respondent, which initially opposed the application, subsequently filed a notice to abide. The court, after considering the application, found that the application for review was merited.

Held: That the decision by the first respondent to file a notice to abide by the court’s decision, rendered its previous opposition as contained in the answering affidavit, otiose.

Held that: The decision to apply for the licence, although eventually applied for by an official not mentioned in the COW’s resolution, was nonetheless a decision of the COW as the official acted in his official capacity and the application went under the hand of the chief executive officer of the COW. For all intents and purposes, the official could not have been said to have been on a frolic of his own.

Held further that: The applicant failed to seek relief against the Minister in relation to the validity of the appointment of the Board of Directors of the first applicant. As such, the court was not at large to make a determination in that regard, with the Minister not having been called upon to show cause why the

composition of the Board should not be found to have been in violation of the Communications Act.

Held: That the first respondent was in duty bound to afford the applicant a hearing before it made a decision to award the second respondent a licence other than the one it had applied for. To that extent, the audi alteram partem principle applies and serves to imperil the decision so made.

ORDER

1. The first respondent's decision to award a Class Comprehensive Telecommunications Licence ('ECNS and ECS'), to the second respondent, announced in General Notice 155 (published in Government Gazette 7916 on 29 April 2020, and any and all decisions underpinning same, are hereby reviewed and set aside.
2. The first respondent's decision communicated by letter dated 28 July 2020, on petition, to uphold its decision of 29 April 2020 and its approval of the award of the Class Comprehensive Licence to the second respondent, is hereby reviewed and set aside.
3. The first and second respondents are liable to pay the costs of the application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and two instructing legal practitioners, where so employed.
4. The first respondent's liability for costs stated in paragraph 3 above shall be reckoned up to and including the filing of its notice to abide.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The court is, in this application, at the instance of the applicant, presently confronted with a combined application for review and the making of certain declarators.

[2] The applicant, Paratus Communications (Pty) Ltd, seeks an order setting aside a decision made by the Communications Authority of Namibia, ('CRAN'), on 29 April 2020, to grant of a Class Comprehensive Telecommunications Licence ('ECNS' and 'ECS') to the Municipal Council for the City of Windhoek, ('COW'). It also seeks the review of CRAN's decision to uphold its decision aforesaid decision and its approval of the granting of the ECNS and ECS licence to the COW.

[3] The applicant further seeks certain declarators regarding the powers of CRAN to exercise powers of a Class Network Facilities Communication Service Licence and the powers or competence of the COW's to provide telecommunication services to the public and to be a carrier, as envisaged in the Communications Act 8 of 2009, ('the Act').

[4] Needless to say, this application is vigorously opposed by the COW, which filed answering affidavits and in the end, moved the court to dismiss the application with costs. CRAN, for its part, did not oppose the relief sought, but in exercise of its rights, sat on the fence, as it were, and decided to abide by the court's decision, whichever way it went.

The parties and their representation

[5] The applicant, Paratus Telecommunications (Pty) Ltd, is a public company, duly incorporated in terms of the company laws of the Republic of Namibia. Its principal place of business is situated at 106 Nickel Street, Prosperita, Windhoek. It is the holder of an ECS and ECNS licences, in terms of the provisions of the Act.

[6] The first applicant is the Communications Authority of Namibia ('CRAN'), a body established in terms of the provisions of the Act. Its offices are situated at No. 5 Peter Muller Street, Moth Centre, Windhoek. The second applicant is the Municipal Council for the City of Windhoek, a municipality duly established in terms of the provisions of the Local Authorities Act 23 of 1992. Its main offices are situated at 80 Independence Avenue, Windhoek.

[7] The third respondent is Telecom Namibia Limited, a public company, duly and registered in terms of the provisions of the company laws of this Republic. Its main place of business is located at No. 9 Luderitz Street, Windhoek. The fourth respondent, on the other hand, is Dimension Data (Pty) Ltd, a company also duly incorporated and registered in terms of the company laws of the Republic. Its place of business is situated at 7 Newton Street, Ausspanplatz, Windhoek.

[8] The fifth respondent is Internet Society (Namibia Chapter), a duly established non-profit making association registered in terms of the company laws of Namibia. Its principal place of business is situated at 1-4 Gluck Street, Windhoek. The sixth respondent is ITC Trading Enterprise CC, a close corporation duly registered in terms of the Close Corporation laws of this Republic. Its place of business is situated at c/o Kataar and Tromp Streets, Wanaheda, Windhoek.

[9] The seventh respondent is Mr Herny Ferdinand Mudge, an adult male Namibian who is a resident of Windhoek. The eighth respondent is the Minister of Regional and Local Government and Housing and Rural Development, Mr Erastus Utoni. His address of service is at 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The eighth respondent is the Central Procurement Board of Namibia, a statutory body established in terms of the Public Procurement Act 15 of 2015.

[10] It is important to mention this early in the judgment, that the applicant seeks relief only against the CRAN and the COW. No relief sought against any of the other respondents in these proceedings. It is also necessary, to mention,

as intimated earlier, that CRAN, although it initially opposed the application and to that end, filed an answering affidavit, eventually filed a notice to abide on 1 June 2022. This accordingly renders its position one literally in the hands of the court, whichever way it rules.

[11] For all intents and purposes, the only protagonists in this matter, who spared no effort or ammunition in litigating this matter, are the applicant and the COW. I will accordingly refer to them jointly as 'the parties'. I will refer to the applicant as such and to CRAN as such. The Municipality of the City of Windhoek, intimated earlier, will be referred to as the COW.

[12] Both parties were ably represented in this matter. The applicant was represented by Mr Töttemeyer on the instructions of ENSafrica, whereas the COW was represented by Mr Phatela. The court records its indebtedness to both counsel for the assistance they duly rendered to the court in this matter.

Relief sought

[13] In the opening paragraphs of this judgment, the relief sought by the applicant is intimated. It is necessary, however, to set out the entire relief sought as recorded in the applicant's notice of motion. The applicant seeks the following:

'1. Calling upon the first and second respondents (and such other respondents as may be inclined to do so) to show cause why the –

1.1 first respondent's awarding to the second respondent of a Class Comprehensive Telecommunications Service Licence ("ECNS" and "ECS"), announced by the first respondent in General Notice 155 (published in Government Gazette 7916 on 29 April 2020), and any and all decisions underpinning same taken by the first respondent;

1.2 first respondent's decision communicated by way of a letter dated 28 July 2020, on petition, to uphold its decision of 29 April 2020 and its approval of the award of the Class Comprehensive Telecommunications Service Licence to the "Municipality of Windhoek of the Municipality of Windhoek"

should not be reviewed and set aside, alternatively, declared contrary to the provisions of Article 18 of the Namibian Constitution and be set aside on that basis.

2. Declaring that –

2.1 the second respondent does not have the powers to exercise the powers of a Class Network Facilities Telecommunication Service Licence;

2.2 Section 30 of the Local Authorities Act, 1992 (Act 23 of 1992) does not empower the second respondent to (a) provide telecommunications services to the public; (b) be a carrier as envisaged in the Communications Act, 2009, (Act 8 of 2009);

2.3 the second respondent will be acting ultra vires if it purports to perform the commercial acts for which it applied for the relevant licence in the present matter.

3. In respect of those respondents electing to oppose the application, that such respondents pay the costs of this application, including the costs of one instructing and two instructed counsel. In the event of more than one respondent electing to oppose the application, the applicant seeks costs against such respondents on the above scale, jointly and severally, the one paying the others to be absolved.

4. Further or alternative relief.'

Background

[14] It is fair to say that there have been some legal skirmishes between the applicant and the COW. One such skirmish was escalated to the Supreme Court. To say there is no love lost between the two would accordingly be no exaggeration.

[15] As intimated above, the applicant has lodged this application seeking the review and setting aside of the decisions made by CRAN captured in full above. As will be apparent later, the applicant alleges that the decision to award the licence in question was marred by a number of irregularities, including the application not being properly authorised and a licence granted not in compliance with the relevant legislative framework. The respondent takes the view that the application does not carry any prospect of success and must be dismissed with costs.

[16] In order for the reader to appreciate the disparate positions of the protagonists, I will capture the essential allegations by both parties below, beginning with the applicant's case. I will thereafter capture the essentials of the respondent's case. This will be followed by the determination of the matter, which should see the court making a decision whether it upholds the application, as prayed for by the applicant, or it will dismiss it, as prayed for by the respondent. For the present moment, the proverbial jury, is out.

[17] The grievance brought by the applicant, is deposed to by Mr Andrew Hall, the applicant's managing director. He deposes that on 29 April 2020, CRAN granted an ECNS and ECS licence to the COW. I shall refer to the said licence as 'the licence'. This awarding of the licence was announced in Government Gazette 7916 on 29 April 2020.

[18] The applicant states that on 22 February 2019, a General Notice was issued in the Government Gazette. This notice advised the members of the public that the COW had made an application for the licence. The applicant, upon obtaining the relevant documents, ascertained that the application had been made by a person who was not authorised to do on behalf of the COW. In response to the general notice, the applicant wrote a letter dated 8 March 2019 to CRAN.

[19] In its letter to CRAN, the applicant pointed out that it had not, at the time of writing the letter, had the benefit to consider the said application but reserved its right to do so. It also pointed out that the powers, functions, rights and obligations of the COW are delineated in the Local Authorities Act and that the COW, as a creature of statute, must, by law operate within the four corners of the empowering legislation. The applicant, furthermore, pointed out that the powers, duties, functions, rights and obligations of the COW, do not, whether expressly or impliedly, make provision for the COW to apply for and be granted the said licence.

[20] It is the applicant's case that it later obtained a copy of the said application. It then wrote a letter dated 11 April 2019, in response to General Notice 67. In this letter, the applicant pointed out that the COW is not competent in law to apply for such licence; that the duties, powers, functions, rights and obligations of the COW are provided for in Part 5 of the Local Authorities Act; attention was drawn to Regulation 5A (2)(c) to (j), of the Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences (General Notice 272 of 2011), as amended, which enumerate the mandatory requirements of an application of the type applied for by the COW.

[21] In this connection, it is the applicant's case that it raised a query with CRAN as to why the application was incomplete in certain respects, i.e. that other clause (h), none of the other parts of the application had been completed. The applicant further pointed out that given the incomplete nature of the application, it could not determine what the purpose of the application for the licence was and as such, it could not adequately comment on the said purported application.

[22] The applicant proceeded to point out that in the event CRAN proceeded to consider the purported application, the applicant still queried the nature of the conditions that could be imposed on the COW as a network facility licence. It is the applicant's case that it later decided to oppose the application. Its letter in which the above issues were raised, was never responded to by CRAN.

[23] Upon receipt of information subsequent to the announcement of the award of the licence, it emerged to the applicant that the COW had resolved per Council Minutes¹ to apply for the Network Facility Service Licence. It is the applicant's case that the person who was to apply for the said licence, in terms of the resolution, was the Strategic Executive: Electricity. The documents however, depicted that the person who actually applied for the licence was a Mr R Kandjiriomuini, who described himself as the SE: Information Comm

¹ Minutes of 2017-10-31 (item 9.1.3) resolution 229/10/2017.

Technology. The applicant further points out that the licence eventually applied for, was not the Network Facility Service Licence recorded in the aforesaid minutes.

[24] The applicant further points out that the COW and CRAN appear to have entered into some 'engagements' to which the applicant is not privy but which seem to have allowed the COW to file a 'revised business proposal', which differed from the pre-tender proposal submitted. It is the applicant's case that it had no sight thereof prior to the issuance of the said licence.

[25] It is further pointed out by the applicant that it was never afforded an opportunity to make any representations on that new development. In this connection, the applicant further states that it appears that CRAN made certain 'recommendations' to the COW regarding the purported application. The applicant was nonetheless not afforded an opportunity to make any representations regarding the said recommendations.

[26] With the above deficiencies, the applicant contends that there was no *intra vires* application properly before CRAN. This is so because the application filed by the COW was deficient in that some necessary information was omitted. Furthermore, the person who applied for the licence was not authorised by the COW's proper structures to do so. It is the applicant's case that in the circumstances, CRAN was not at liberty to consider the application in question, given the deficiencies.

[27] As a result, it is deposed that CRAN failed to properly apply its mind to the application – that the application was not authorised and was deficient. Furthermore, the relevant legislation did not permit the COW to engage in business related to the application for the licence. The applicant further contended that CRAN also took into account considerations that were irrelevant and employed the ruse that further information was required in order to remedy or augment the patently deficient and incomplete application.

[28] Furthermore, the applicant contends that it was denied an opportunity to make representations regarding the nature and state of the purported application. There was also some secrecy in the manner in which the application was handled resulting in the applicant, an interested party, not being afforded access to all relevant information and material to enable it to make meaningful representations before CRAN.

[29] Having regard to the complaints recorded above, the applicant argues that its rights enshrined in Art 18 of the Constitution and the applicable law, were infringed. As such, the decision to award the licence to the COW cannot be allowed to stand as it was unreasonable, unfair and conducted in an opaque manner.

[30] To compound matters, continues the applicant, the licence, which the COW applied for and which the applicant knew it had applied for, is not the licence that was eventually granted by CRAN. The licence is also not the one the COW resolved should be applied for. This is because the licence is not a Class Network Facilities Service Licence. In an opaque process, CRAN allowed the COW to amend the licence initially applied for and granted a different licence to the COW, without notice to the public and entities like the applicant, who have an interest in the application.

The first respondent's case

[31] Although I have stated that CRAN ultimately did not oppose the granting of the orders sought, it did, however file a answering affidavit, in which it submitted to the court that the decisions it made and which are sought to be impugned by the applicant are reasonable and fall within the ambit of the legislative requirements stipulated in the Communications Act.

[32] Ms Emilia Nghikembua, the Chief Executive Officer of CRAN deposed to the answering affidavit. It is CRAN's case that it followed the provisions of s 38 of the Act, read with Regulation 5(b) in granting the licence to the COW. It is her further case that the Regulation must be read in the light of s 38 and must

not, as the applicant seeks to do, be creating a new and separate class of licences.

[33] Relying on s 11(9) of the Act, CRAN contends that it has power, after considering an application for the grant of a licence, to grant or refuse the application in whole or in part and 'issue the appropriate licence in respect of the class communications service licence applications, broadcasting services licence applications and licence applications.'² In this vein, CRAN is vested with the discretion to determine what the appropriate licence is and the extent of the licence to be granted.

[34] CRAN proceeded to deny the allegations that it acted in breach of the requisites of the rule of law or the requirements of the Act in granting the licence in question. It was contended by CRAN that the awarding of the licence was in the public interest, considering the business case presented by the COW. It further considered that the COW is a public institution and intended to provide ready access telecommunication services to its residents, including those not fortunate to have ready access to such services.

[35] CRAN denied that the application was moved by an unauthorised person. This is because the application came with a covering letter under the hand of the CEO of the COW. Furthermore, the said letter was accompanied by a resolution from the COW's Council, namely, Council Resolution No. 229/10/2007, which clearly showed that the COW was the applicant for the licence. CRAN further asserted that there is no evidence that Mr Kandjiriomuini, who filed an affidavit, was on a frolic of his own when he signed the necessary documents in support of the application.

[36] It is CRAN's case that it followed the requirements of s 40 of the Act and conducted an open, non-discriminatory and transparent process in the instant matter. In this wise, it published a notice on the Government Gazette, calling on members of the public to submit in writing their comments. CRAN points out

² Section 11(9)(a) of the Act.

that in terms of Regulation 11(9), it has no responsibility to engage in correspondence with parties who make representations, such as the applicant did in this case. It is its case that in any event, it forwarded a copy of the applicant's letter dated 11 April 2020 to the COW for comment on the issues raised by the applicant and the COW obliged accordingly.

[37] CRAN denies that the application filed by the COW was incomplete as all the information required for the application was contained in the accompanying documentation submitted in support of the application. It states further that there was nothing untoward with it engaging the COW in the applicant's absence as Regulations 4(5) and 5(4), sanction such further engagements. It is its case that in any event, the said engagements are part of the wider discretion reposed in it, to request further information and if satisfied, grant or refuse the application.

[38] CRAN deposes that the engagements with the COW were intended to provide clarity on the business case of the COW for determination of the appropriate licence to be issued. It then became clear, as the engagements ensued, that the Network Facility Licence was not appropriate to grant to the COW, hence the granting of the licence that was eventually granted.

[39] CRAN denies that there is any prohibition in the Local Authorities Act that serves to deny the COW the right to provide telecommunication services. It was contended that as the COW provides services like water, electricity, road infrastructure and policing services, it is vital that it maintains communication with its residents. In this regard, the COW would provide cheap and reliable communication to its residents. Reliance was placed on s 30(1) of the Local Authorities Act, as the empowering provision for the COW to undertake the enterprise in question.

[40] CRAN agrees that pursuant to a petition filed by the applicant, it decided to hold a public hearing and in which hearing, it resolved to uphold its decision to grant the licence to the COW. This decision, it further stated, was availed to the applicant. CRAN states that in making its aforesaid decision, it took into

account representations made on the applicant and COW's behalf at the hearing. It thus maintains that the decision it made, was in the public interest and that there is no proper basis for the granting of the application.

[41] In dealing with the alleged missing documents in relation to the financials of the COW, CRAN contends that the former filed substantial financial records as appear from p 562-808 of the record. It further contends that the COW is the largest local authority in the country and has substantial financial resources at its disposal. I pause to record my discomfort regarding whether CRAN is on firm legal ground to state this, in the absence of any evidence. I am not even certain that the alleged substantial financial resources can be said to be a matter the court can properly take judicial notice of.

[42] Regarding the complaint that CRAN did not make provision for all correspondence between it and the COW to be availed, including subsequent comments by members of the public, CRAN maintains that there was a public hearing convened after the applicant lodged its petition. The applicant thus had an opportunity to make representations and indeed took advantage thereof. CRAN also makes the point that its decision-making process would be too cumbersome if it would engage with members of the public on every conceivable matter raised by the public in relation to an application for a telecommunications licence.

[43] Another issue raised by the applicant and to which CRAN responds, is the allegation that its Board of Directors was not properly constituted when the decision in question was taken. CRAN points out that the fact that there are six members of the Board does not *per se* indicate that the Board was not properly constituted. It is also contended that if the applicant challenges the composition of CRAN's Board, it should have joined the appointing authority, namely the Minister. This was not done and for that reason, this issue is not available for determination as it is not properly before court for determination in these proceedings.

The City of Windhoek's case