



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 151/2007

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

APPLICANT

And

TELECOM NAMIBIA LIMITED

RESPONDENT

CORAM: NDAUENDAPO J

Neutral citation: *Municipality Council Of Windhoek V Telecom Namibia Limited (A 151/2007)* [2013] NAHCMD 56 (1 March 2013)

Heard: 03/3/2008

Delivered: 1 March 2013

Flynote: Law of property—Respondent erected pay phone booths on land registered in the name of the applicant (Land reserved for public purposes)—Without an

agreement—Applicant seeking a declaration that respondent has no right to do so without an agreement—Land reserved for public purpose—Public thing—Phone booths erected for public purpose on land reserved for that purpose—No agreement required.

Constitutional—Law—Section 24 of the Post and Telecommunications Act 19 of 1992 authorizing respondent to enter land registered in the name of applicant reserved for public purpose to erect pay phone booths without an agreement with applicant and without paying compensation. In conflict with article 16 of the Constitution? Held, article 16 protects the right to acquire, own and dispose of property. Held further, no limitation on the enjoyment of property by applicant as the phone booths are erected for the use of the public on land reserved for public purposes—The very purpose for which land is reserved.

Summary: The applicant brought an application for declaratory relief to enforce Lease agreements entered into between itself and respondent and determination that respondent cannot erect phone booths on land registered in applicant's name without the latter's agreement. The respondent conceded to be obliged to honour existing lease agreements, but disputed that it is obliged to enter into an agreement to erect phone booths on land of applicant reserved for public purposes. Respondent of the view that it is authorised by section 24 of Act 19 of 1992 to enter land reserved for public purposes and to erect phone booths without an agreement with applicant and without paying compensation. Applicant of the view that, if respondent is authorised by section 24, then that section is in conflict with article 16 of the Namibian Constitution.

Held, section 24 of Act authorizes respondent to enter any land reserved for public purpose to erect phone booths without any agreement.

Held, further the land on which phone booths are erected is land reserved for public purpose and thus not necessary to expropriate it as it is already held for that purpose.

Held, further, section 24 not in conflict with article 16. Article 16 only protects the right to acquire, own and dispose of property.

Held, further section 24 does not infringe the right of applicant's to enjoy its property, because the public phone booths are erected on land designated/reserved for the public purposes and for public use.

ORDER

1. Prayers 1, 4 and 5 are allowed.
2. Prayers 2 and 3 are dismissed with costs.
3. Respondent is ordered to pay applicant's costs of the application up to 12 July 2007 (the date when the tender was made).

JUDGMENT

NDAUENDAPO, J [1] By notice of motion, the applicant seeks an order in the following terms:

1. 'Declaring that respondent has no right to keep public phone booths on applicant's property without complying with the lease agreements entered into between the parties.
2. Declaring that respondent has no right to erect and keep public phone booths on applicant's property without applicant's agreement and without payment of compensation to applicant.
3. In the alternative to paragraphs 1 and 2, declaring that section 24 of the Post and Telecommunications Act, 1992 (Act 19 of 1992), or any other legal provision, as far as it supports to confer the right on respondent to erect and keep telephone booths on

applicant's property without applicant's agreement and without paying applicant compensation for it, contravenes the Namibia Constitution.

4. Ordering respondent to comply with the lease agreements entered into between the parties annexed, marked "PR1" to "PR5" to applicant's founding affidavit, by paying the amounts agreed in terms of each of the said agreements.

5. Ordering respondent to provide applicant with a list indicating the location of each and every phone booth erected on applicant's property and when it was erected.

6. Ordering respondent to, within 30 days from the date of this order, enter into an agreement similar to the existing lease agreements with applicant in respect of each and every property on which it erected telephone booths without applicant's agreement, failing which authorizing applicant to remove the telephone booths.

7. Ordering respondent to pay the costs of his application.'

[2] **The Parties**

The applicant is the **Municipal Council of Windhoek**, a local authority duly constituted as such in accordance with the local Authorities Act, 1992 (Act 23 of 1992), with its principal place of business at Head Office Independence Avenue, Windhoek.

The respondent is **Telecom Namibia Limited**, a corporate body established in terms of section 2 (1) (b) of the Posts and Telecommunications companies establishment Act, 1992 (Act 17 of 1992) with its registered offices and/or principal place of business at Independence Avenue, Windhoek Republic of Namibia.

[3] **Introduction**

The background is aptly set out in the supporting affidavit of Mr Van Resnburg on behalf of the applicant. He states that the respondent has been established in terms of the

Posts and telecommunication companies establishment Act 1992 (17 of 1992) to provide telecommunications services including the erection and maintenance of public telephone booths.

Pursuant to that, respondent has been erecting and maintaining telephone booths all over the City of Windhoek on applicant's property. This was done with applicant's agreement in five instances and subsequently without even notifying applicant. Respondent asserts that it is entitled to erect these booths wherever it wants without the agreement of the owner of the land concerned, or without paying compensation. According to the respondent the property on which these phone booths are erected is reserved for public purposes and the phone booths are erected in the public interest.

[4] The lease agreements

According to Mr Van Resnburg, applicant and respondent entered into five lease agreements in respect of the erection of telephone booths on applicant's property. The first lease agreement was signed on or about 11 November 1997. That agreement relates to nine phone booths that respondent erected on applicant's property described as '.....Kiosks numbers 3, 4, 5 tourist information centre and substation, in the post street mall.....' of independence avenue, Windhoek. The agreed initial lease payment per year was N\$2979 commencing on 1 July 1997. The lease agreement was annexed to the finding affidavit of van Rensburg exhibit "PR1".

The second lease agreement was signed on or about 19 January 2000. That agreement related to a portion of Erf 818, Wanahenda the initial lease payment per year was N\$420.20 commencing on 1 November 1999. Copy of the lease agreement was annexed. The third lease agreement was signed on or about 19 January 2000 that agreement related to Erf 3309 and 3261, Okuryangava, extension b, as well as a portion of portion and two portions of portion 87 of the remainder of portion B of the farm Nubaumis in the municipal area of Windhoek. The initial lease per year was N\$2496 commencing on 19 January 2000. A copy of that lease agreement was annexed to the affidavit of Van Rensburg as exhibit "PK3".

The fourth lease agreement was signed on or about 14 December 1999. That agreement related to Erf 3231, Okuryangava, and extension 6, in the municipal area of Windhoek the initial lease payment per year was N\$364 commencing on 1 July 1998. A copy of that lease agreement was annexed as "PR4".

The fifth lease agreement was signed on or about 20 June 2000 that agreement related to '...portions of ground next to Price Waterhouse Coopers Building in Moltke street, next to First National Bank, John Meinert Branch, Stubel street, next to Roman Catholic Mission Bulow street, next to Mutual Plat 2 Bulow street, southern corner of Zoo park, independence Avenue, at corner of Gerten street and independence Avenue, at corner of independence avenue and Sam Nujoma Drive at corner of bus terminal and taxi rank Bulow street, of taxi rank Mandume Ndemufayo Avenue and next to general post office independence avenue -+ 16 m² in extent per portion 'situated in the municipal area of Windhoek. The initial lease payment per year was N\$4160 commencing on 20 June 2000.

All the lease amounts are subject to yearly escalation. The agreements are of indefinite duration and may be cancelled by applicant with three month's notice.

Mr Van Rensburg further states in his affidavit that the respondent initially paid all the lease amounts and then stopped. At the launch of the application the following amounts were outstanding:

- (a) First lease agreement: N\$25 501.91
- (b) Second lease agreement: N\$3 173.62
- (c) Third lease agreement: N\$18 822.07
- (d) Fourth lease agreement: N\$3 021 .40, and
- (e) Fifth lease agreement: N\$41 597.40

[5] Subsequent developments

On 13 March 2003 respondent wrote to the applicant and informed that it has a statutory servitude over public areas in terms of Section 24 of the Post and

Telecommunication Act 1992. A copy of that letter is annexed marked 'PR7'. Applicant's response was that section 24 is unconstitutional and that applicant's property is not public land.

On 8 September 2003 respondent informed applicant that it has no intention to make further payments in respect of the lease agreements. The applicant then launched the application before me.

In its answering affidavit, the respondent conceded that it was obliged to honour existing lease agreements during their currency and to pay unprescribed portions of rental covered by those agreements, the respondent tendered to pay all arrears rental due in terms of the agreements attached to the founding papers in respect of periods up to three years prior to the service of the application. The applicant accepted that tender.

[6] **The issues**

The first issue is whether section 24 of the Post and Telecommunication Act 1992 authorises the respondent to erect phone booths on applicant's land without its consent and to ignore the lease agreements entered into.

The second issue is, in the event of the court finding that section 24 of the Act authorises respondent to erect phone booths on applicant's land without an agreement with applicant, whether that is not in contravention of article 16 of the Namibia constitution?

Submissions

Mr Coleman appeared on behalf of the applicant and Mr Smuts SC on behalf of the respondent

[7] **Applicant's submissions**

Counsel submitted that the main issue in this case is the interpretation of section 24 of the Posts and Telecommunication Act 19 of 1992. Counsel submitted that the legislator intended, without saying so, that respondent will provide telecommunication services by agreement with whoever wants the service. Counsel argued that the word 'agreement' must be read into section 24. Consequently, section 24 assumes the existence of an agreement with the person or entity who owns the property on which the service (phone booths) is erected. Accordingly, counsel contended that the respondent has no right to erect and keep public phone booths on applicant's property without applicant's agreement and without payment of compensation to applicant. In the alternative, counsel argued that the respondent's rights in terms of section 24 to erect telephone booths on applicant's Property without an agreement and without paying compensation would be unconstitutional as it would constitute an infringement of the property rights of the applicant and therefore in conflict with article 16 of the Namibian constitution.

[8] Respondent's submissions

Counsel submitted that section 24 of the Post and Telecommunications Acts 1992 (act 19 of 1992) authorises the respondent, in fulfilling its statutory mandate of providing the widest possible access to telecommunication services in the public interest, to enter upon (applicant's) land which is reserved for public purposes and construct and maintain a telecommunication lines or any work including telephone booths without an agreement with the land owner and without paying compensation. Counsel contended that land reserved for public purposes are, inter alia, streets and public places as defined in the local authorities Act of 1992 and 'these are spaces intended for the use, enjoyment or benefit of residents in a local authority area. Counsel further argued that section 24 does not infringe upon the property rights of the applicant. Counsel submitted that 'the provisions of section 24 furthermore do not infringe upon the applicant's property rights in the land in question under article 16 by virtue of the nature of the ownership of the applicant of the land in question and the limitation upon that specific form of ownership brought about by section 24. Counsel contended that the nature of that ownership is for a public purpose and for the enjoyment of the public in

the local authority area of the applicant. The applicant has established no infringement of its rights in respect of the public nature of the property so held by it.

[9] **The legal framework**

Section 24 of the Posts and Telecommunications Act 1992 is entitled 'Rights of entry and to construct lines across any land and provides "The telecommunications company may for the purposes of this Act and the conducting of its telecommunications service enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, and construct and maintain a telecommunications line or any work (including any pay phone cabinet) upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter or remove the same, and may for that purpose attach wires, stays or any other kind of support to any building or other structure".

[10] Nowhere in section 24 does it appear that the 'pay phone cabinet' may be erected upon land of the applicant by agreement. Counsel for applicant submitted that the word 'agreement' must be read into the section 24. The law is clear as to when word/s must be implied into a statute. In *Rennie N.O v Gordon N.O 1988 (1) SA 1 (A) at 22 E-S Gorbett CJ* (as he then was) held that: 'over the years our courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands' (my underlining).

In *firs Investments (Pty) Ltd v Johannesburg City council 1967 (3) SA 549 w at 557 E-G Trollin J* held that: 'Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious...I think that the same must apply to implying a term in a statute, for the process is the same'. Can it be said that without the word 'agreement' effect cannot be

given to section 24? The answer is clearly 'no', the word agreement is not necessary to give effect to section 24.

[11] In terms of section 24 the land upon which pay phone cabinet is to be erected is land reserved for public purposes (my underlining). The Local Authority Act sets out which things are for the public benefit. In terms of the definition 'street means any road, thorough fare, pavement, sidewalk, lane or other right of way set apart for the use and benefit of residents in local authority'

The learned authors SILBENBERG and SCHOEMAN ¹ say that public things (*res publicae*) are things which belong (though not in private ownership) to an entire civil community and are often also referred to as state property. When using the latter expression, a distinction should however be made between things intended for public use, that is things which directly benefit the members of the community concerned, for example public roads, and things indirectly benefit the individual members of the community, such as buildings used merely for administrative purpose.

Only the former, that is, things intended for public use, can be classified as public and therefore, as out of commerce. Things not intended for public use are in commerce, falling within the sphere of private law. As regards South African Law (Namibia Law) public roads, national parks, the sea and sea-shore may be mentioned as examples of things intended for public use. As I mentioned, the Local Authorities Act sets out which things are intended for public use. In terms of that act 'street means any road, thoroughfare, pavement, sidewalk, alone or other right of way set apart for the use and benefit of residents in local authority' (Emphasise supplied).

The learned authors further say that "as already pointed out, it is in principle possible to acquire a specific portion of a common thing in a private ownership by appropriation, whereas, a specific portion of a public thing cannot, as a general rule, be so appropriated as it already belongs to the state (though not in private ownership).

¹ The Law of Property 4ed at 34

The land on which the phone booths are erected are reserved for public use- these spaces on which they are erected are intended for the use, enjoyment or benefit of the residents in a local authority area. 'That is the public nature of the applicant's ownership of these areas where the public phone booths are located. Although the land on which these phone booths are erected is registered in the name of the applicant in its capacity as a local authority, it is land reserved for public purposes in terms of the Local Authorities Act.

It is therefore not necessary for an agreement to be entered into between the applicant and respondent for the erection of pay phone booths on that land. The respondent cannot expropriate the land for purposes of erecting phone booths as suggested by counsel for the applicant, if no agreement is reached with applicant, as it is already reserved for that purpose.

Expropriation involves acquisition of rights in property for public purpose 'this would not arise as the property is already designated by the Public Authorities Act to be set apart for public purposes.

[12] Is section 24 in conflict with the Namibia Constitution (article 16).

Article 16 provides "All persons shall have the right in any part of Namibia to acquire, own and dispose all forms of immovable property individually or in association with other and to bequeath their property to their heir or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens". "In Minister of Defence v Mwandingi 1993 NR 63 SC the Supreme Court held that the right protected by article 16 (1) is to acquire, own and dispose of property. The article does not refer to any limitation in the enjoyment of property rights.

Does section 24 infringe the applicant's right to acquire, own or dispose of property? The answer is clearly 'no'. Furthermore the nature of applicant's ownership is for public purpose and for the enjoyment and benefit of the public in the local authority area of the

applicant. What is the limitation on that nature of ownership, if any? The pay phone booths are erected for the use, and benefit of the public on land reserved for the public purposes-it is erected for the very purpose for which the land has been reserved for and it is for the public purposes, therefore there can be no limitation on the nature of ownership for which the land is reserved. As counsel for respondent further submitted "the applicant's enjoyment of its property in question is furthermore prescribed and circumscribed by its own empowering legislation. The local authority Act defines a street as 'any road, throughfare, pavement, sidewalk or lane or right of way set a part for the benefit of residents in a local authority area. Although the land is formally owned by and registered in the name of the applicant, it is by definition set apart for the benefit of the residents and thus statutorily reserved in its ownership for the public purposes in question and therefore the erection of phone booths on land reserved for public purposes can therefore not constitute an infringement on the property rights or on the enjoyment on the ownership of the land by the respondent.

I agree with the submission by counsel for the respondent that the applicant has established no infringement of its rights in respect of the public nature of the property so held by it. Given the public nature of the ownership, no infringement of any constitutionally protected interest has been established by the applicant by section 24 by the erection of public phone booths on land in question. The alternative relief can therefore also not succeed.

As I pointed out, prayer 1 of the notice of motion was conceded by the respondent and it tendered to pay costs. Respondent also conceded prayers 4 and 5.

In the result the following order is made:

1. Prayers 1, 4 and 5 are allowed.
2. Prayers 2 and 3 are dismissed with costs.
3. Respondent is ordered to pay applicant's costs of the application up to 12 July 2007 (the date when the tender was made).

**NG NDAUENDAPO
JUDGE**

APPEARANCE

ON BEHALF OF THE APPLICANT:

ADV COLEMAN

INSTRUCTED BY KIRSTEN & CO LEGAL PRACTITIONER

ON BEHALF OF THE RESPONDENT:

ADV SMUTS SC

INSTRUCTED BY LORENTZ ANGULA INC.