

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING I.T.O. P. D. 61

HC-MD-CIV-MOT-GEN-2019/00169

In the matter between:

TELECOM NAMIBIA LIMITED

APPLICANT

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST RESPONDENT

THE CABINET OF THE REPUBLIC OF NAMIBIA

2ND RESPONDENT

**THE MINISTER OF INFORMATION AND
COMMUNICATION**

3RD RESPONDENT

THE MINISTER OF PUBLIC ENTERPRISES

4TH RESPONDENT

NAMIBIA POST AND TELECOM HOLDINGS LIMITED

5TH RESPONDENT

FERNANDO SOMAEB

6TH RESPONDENT

WILLEM TITUS

7TH RESPONDENT

Neutral Citation: *Telecom Namibia Limited v The Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2019-00169) [2019] NAHCMD 169 (27 May 2019)

Coram: **Masuku J**

Heard on: 24 May 2019

Delivered on: 27 May 2019

ORDER

1. The application for enrolment of the matter as one of urgency is refused.
 2. The Fifth Respondents' points of law in limine are upheld.
 3. The Applicant is ordered to pay the costs of the application.
 4. The matter is removed from the roll and regarded as finalised.
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REASONS FOR THE ORDER

MASUKU J:

Introduction

[1] After reading the papers filed of record, and upon consideration of the argument advanced, on behalf of the parties, I refused the application that the matter be heard as one of urgency. I accordingly struck the matter from the roll and granted consequential relief. The reasons for the order follow below:

Urgency

[2] The applicant, as argued by both Ms. Tjahikika and Mr. Namandje, for the respondents, on a proper and close reading of its papers, has failed to comply with the mandatory provisions of rule 73(4)(a) and (b), namely, it failed to set out explicitly and with fullness, the circumstances which it avers render the matter urgent and why it claims it cannot be afforded substantial relief at a hearing in due course, in line with *Nghiimbwasha v The Minister of Justice*.¹

[3] From the applicant's papers, it is clear that the applicant became aware of the so-called impugned decision on 11 February 2019 but the applicant did not take steps at the appropriate time to have the said decision set aside but

¹ (A 38/2015) [2015] NAHCMD 67 (20 March 2015).

waited until it was late, thus serving the respondents with the application on less than 48 hours' notice. To this extent, the urgency, if any, is of the applicant's own creation.

[4] The applicant's counsel, in argument, submitted that the reason for the urgency is that there is scheduled an annual general meeting of the 5th respondent and the applicant's Boards on 27 May 2019. Curiously, there is no order sought in the notice of motion seeking the interdiction of that meeting. It would, in the circumstances, be improper for the court to resort to its plenary powers under 'further and/alternative relief' to grant the applicant such an order. No basis for urgency in this regard can properly be resorted to.

Appointment allegedly made by the Cabinet of the GRN

[5] The 5th respondent, in its answering affidavit, filed under very oppressive and stringent time limits, states that the appointment of the 6th respondent, was made by the 5th Respondent's Board, as per annexure 'LK2' of the 5th respondent's answering affidavit. This appears to negate the allegation that it was the 2nd respondent, which appointed the 5th respondent as the chairperson of the applicant's board. This position, stated on affidavit deposed to on the 5th respondent's behalf, has not been gainsaid by the applicant on affidavit and this fundamentally shakes the very foundations of the applicant's case. In any event, the Plascon Evans rule favours the respondents in this case.

[6] The argument by Mr. Namandje, to the effect that the role of the 2nd respondent was merely preparatory to the appointment and therefore not amenable to review, appears, *prima facie* to hold water, in the light of the case of *PG Group (Pty) Ltd and Others v National Energy Regulator of South Africa and Others*.² No compelling argument or otherwise, to the contrary, was advanced on behalf of the applicant in this regard.

² Case No. 150/2017 delivered on 10 May 2018, para 31.

Withdrawal of the appointment of the 6th Respondent

[7] Mr. Namandje argued that the issue of the appointment of the 6th respondent is not a live issue as it was countermanded by the 5th respondent's board of Directors via a letter dated 2nd instant, directed to the 5th respondent's Board, marked 'LK4' to the 5th respondent's answering affidavit. The said letter reads as follows in part:

'a. Appointment of TN Board Chairperson: With reference to our letter dated 12 April 2019, the NPTH Board is hereby directing the TN Board not to execute the instructions contained in ***paragraph 1*** therein. Accordingly, the matter should not be discussed at any TN Board meeting as it is envisaged to bring more disunity amongst the TN Board members.

The NPTH and the TN Boards are expected to resolve this item at the upcoming Annual General Meeting as scheduled for 16 May 2019.'

[8] Again, the applicant has not dealt with this aspect of the matter, which suggests that the appointment in question is a matter yet for discussion. The applicant could have applied for time to file an affidavit dealing with these issues but it did not, thus leaving the matters to be dealt with on the respondents' version, uncontested as it stands.

[9] It was on the basis of the foregoing considerations that the order has been issued.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT:

Mr. S. Makando
Instructed by Kwala & Co, Windhoek.

1ST -4TH RESPONDENTS:

Ms. N. Tjahikika (With her S. Kahengombe)
Of the Government Attorney, Windhoek

5th RESPONDENT:

Mr. S. Namandje (with him T. Iлека)
Of Sisa Namandje Inc, Windhoek.