

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-GEN-2020/00064

PARATUS TELECOMMUNICATIONS (PTY) LTD

APPLICANT

and

MUNICIPAL COUNCIL FOR

THE MUNICIPALITY OF WINDHOEK

1ST RESPONDENT

CEO OF THE MUNICIPAL COUNCIL OF

THE MUNICIPALITY OF WINDHOEK

2ND RESPONDENT

COMMUNICATIONS REGULATORY

AUTHORITY OF NAMIBIA

3RD RESPONDENT

Neutral citation: *Paratus Telecommunications (Pty) Ltd vs Municipal Council for the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2020/00064) [2020] NAHCMD 116 (26 March 2020)

Coram: UNENGU AJ

Heard: 18 March 2020

Delivered: 26 March 2020

Flynotes: Applications and Motions – Urgent applications – Applicant must satisfy both requirements of rule 73(4) of the rules of court for the matter to be heard on basis of urgency – The applicant’s non-compliance with the forms and service

provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

Summary: The applicant approached this court on an urgent basis seeking to interdict and restrain the respondents from interfering with, or obstructing, the applicant's business in terms of s 59 (5) of the Communications Act. The respondents, however, opposed same, indicating that the applicant has not complied with the requirements as determined in s 59 (5) of the Communications Act by not giving the requisite notice to the relevant parties.

Held – that nowhere is it indicated in the provision that the applicant requires consent from the respondents to carry out works as per the license awarded.

Held – as long as the applicant gives the necessary notice, the applicant may exercise its rights in accordance with the requirements guiding such works.

Held further – the arguments advanced by the respondents that the Director – General ought to have received notice regarding the works carried out by the applicant does not hold water.

ORDER

- a) That the applicant's non-compliance with the Rules of this Court (the Rules) and the time periods and forms of service prescribed therein is condoned and that this matter is heard as one of urgency as envisaged in Rule 73 of the Rules.
- b) That the first and second respondent are hereby interdicted and restrained from unlawfully interfering with or obstructing the applicant's current or future exercise of its rights, powers, duties and functions as per the Communications Act 8 of 2008, including (but not limited to) the rights, powers, duties and functions contained in Part 5 of the Communications Act, and including (but not limited to)

the installation of fiber optic cable installations within Windhoek by the applicant (itself or through its duly appointed contractors);

c) The first and second respondents are hereby interdicted and restrained from unlawfully interfering with, or obstructing, the applicant's installation or infrastructure (in the exercise of the applicant's rights, powers, duties and functions as per the Communications Act) currently being carried out at –

- i. Erongo Street, Eros – notification of 25 June 2019;
- ii. Olympia Phase 1 – notification of 25 September 2019;
- iii. Dante Street, Prosperita – notification of 09 December 2019;
- iv. Florence Nightingale Street, Windhoek – West – notification of 09 December 2019;
- v. Laurent Desire Kabila Street, Olympia – notification of 09 December 2019;
- vi. General Murtala Muhamed Street into Nelson Mandela Avenue – notification of 09 December 2019.
- vii. Independence Avenue, Katutura – notification of 09 December 2019

d) The first and second respondents are hereby interdicted and restrained from (or causing the) unlawfully confiscating, seizing, taking or removing the applicant's equipment (of whatever nature) being utilized by the applicant for the purposes of –

- i. the applicant's exercise and enjoyment of its rights, powers, duties and functions as per the Communications Act;
- ii. the applicant's installation of infrastructure currently being carried out at –
 - i. Erongo Street, Eros – notification of 25 June 2019;
 - ii. Olympia Phase 1 – notification of 25 September 2019;
 - iii. Dante Street, Prosperita – notification of 09 December 2019;
 - iv. Florence Nightingale Street, Windhoek – West – notification of 09 December 2019;
 - v. Laurent Desire Kabila Street, Olympia – notification of 09 December 2019;
 - vi. General Murtala Muhamed Street into Nelson Mandela Avenue – notification of 09 December 2019.

vii. Independence Avenue, Katutura – notification of 09 December 2019

e) The first and second respondents (jointly and severally, the one paying the other to be absolved) are ordered to pay the costs of this application, including the costs of one instructing and two instructed counsel.

JUDGMENT

Unengu, AJ:

[1] The applicant approached this court on an urgent basis seeking the following relief:

“1. Condoning the applicant’s non-compliance with the Rules of this Court (“the Rules”) and the time periods and forms of service prescribed therein and directing that this matter be heard as one of urgency as envisaged in Rule 73 of the Rules.

2. That a rule nisi do hereby issue calling upon the first and second respondent to show cause on a date to be determined by this Honourable Court, why the following order should not be granted:

2.1 Interdicting and restraining the first and second respondents from unlawfully interfering with or obstructing the applicant’s current or future exercise of its rights, powers, duties and functions as per the Communications Act 8 of 2008, including (but not limited to) the rights, powers, duties and functions contained in Part 5 of the Communications Act, and including (but not limited to) the installation of fiber optic cable installations within Windhoek by the applicant (itself or through its duly appointed contractors);

2.2 Interdicting and restraining the first and second respondent from unlawfully interfering with, or obstructing, the applicant’s installation or infrastructure (in the exercise of the applicant’s rights, powers, duties and functions as per the Communications Act) currently being carried out at.....

2.3 Interdicting and restraining the first and second respondent from (or causing the) unlawfully confiscating, seizing, taking or removing the applicant's equipment (of whatever nature) being utilized by the applicant for the purposes of –

2.3.1 the applicant's exercise and enjoyment of its rights, powers, duties and functions as per the Communications Act;.....

2.4 “

[2] The above is not quoted verbatim for purposes of time. Same was opposed by the respondents and counsel prepared arguments for this court's consideration, in times where the country and the whole world are going through the pandemic which came to be known as the COVID – 19 virus. In this respect, the court is highly indebted to counsel of record. For purposes of this judgment, I will first commence with the issue of urgency before dealing with the prospects.

Urgency

[3] Rule 73(4) stipulates that:

‘(4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

- a) the circumstances which he or she avers render the matter urgent; and
- b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.’

[4] Having read the applicant's founding affidavit, the applicant clearly and concisely outlines the picture of what it considers as illegal and detrimental actions of the first respondent and how the applicant stands to be affected by losing big contracts and its reputation being harmed as a result of it being unable to cater for contractual clients seeking the provisions of fiber optic connectivity necessary for business operations. This not to mention also the ultimate contractual harm the applicants may have to face for breach of its obligations, resulting from the

respondents' improper and detrimental conduct. It must be mentioned that in urgent applications such as the present one, the court decides the issues on the basis of the allegations made by the applicants, and they are, in this case compelling. I am of the view that a case of commercial urgency has been clearly made out by the applicants in this matter.¹

[5] Having determined that the matter is of an urgent nature, I will now proceed to consider the merits as argued by the counsel of record.

[6] From the arguments advanced by counsel, what seems to be the main bone of contention evolves around the interpretation of s 59 (5) which provides as follows:

(5) Rights granted by this Part must be exercised subject to the following principles-

(a) rights must be exercised in such a manner that the burden on the land owner is as small as possible;

(b) when the rights referred to in this section relate to land owned by a public body or the State, the rights may not be exercised in such a manner that the exercise of those rights is prejudicial to any public purpose or legal duty of the body or the State;

(c) when there are different technically feasible and economically reasonable ways of exercising the rights concerned, the rights must be exercised in such a manner that the rights of the land owner and the carrier are balanced in a fair manner.'

[7] Counsel for the applicant submitted that the crux of the matter evolves around the aspect on whether or not the applicant is obliged to follow a 'due permitting process (and thereby, in effect, invite the consent of the respondent)' or, whether the respondent could simply take the law in its own hands where such consent was not granted. This is in reference to the applicant's business where it excavates, digs trenches and installs fiber optic cabling for purposes of internet services contractually

¹ *Van Zyl and Others v Namibian Affirmative Management and Business (Pty) Ltd and others* 2019 (1) NR 27 (HC).

undertaken in respect of widespread customers. These activities take place around Windhoek along sidewalks and any other areas where such activities are required.

[8] However, counsel for the respondents' view is premised on the basis that the applicant does not require the right as envisaged in s 59 (5) in accordance with its limitations, namely that 'giving notice together with the dates to the first and second respondents of the streets it intends to dig trenches for the laying the fiber optic cables is sufficient for the purposes of s 59 (5) of the Communications Act.

[9] This issue is further premised on the point that the applicant exercises this right without strict compliance with s 59 (5) especially on the manner it is exercised, causing the respondents harm in having to repair the damages as a result of poor workmanship and failure to give notice to the relevant authorities, in this instance being the Director – General when and if such works by the applicant may affect national security or the safety of the President or a member of Cabinet, to which the Director – General may forward a directive to the authority² indicating any requirements with which the telecommunications facilities in question must comply.³

[10] In this instance, it is clear and undisputed that the applicant is a holder of a license awarded on 13 September 2012 as envisaged in terms of s 38 (2) of the Communications Act and as per Government Gazette 5037 Notice no.308 dated 13 September 2012, under the auspices and guidelines of s 59 of the Communications Act.

[11] It is further so that ss 60 to 68 of the Communications Act clearly detail the obligations imposed upon licensees in providing infrastructure and services as part of their license obligations.

[12] Looking at the above provisions, nowhere is it indicated that the applicant requires consent from the respondent to carry out works as per the license awarded to it. As long as the applicant gives the necessary notice, the applicant may exercise its rights in accordance with the requirements guiding such works. However, it must

² Being the Communications Regulatory Authority of Namibia as defined in s 1 of the Communications Act.

³ Section 59 (6) of the Communications Act.

be noted that when considering the manner in which it is carried out and if grievances are raised in that regard, such may only be adjudicated upon by the Authority, being CRAN as per s 1 of the Communications Act, which is a different discussion altogether and this court cannot make a determination thereon.

[13] This is premised on the provisions of s 69 of the Communications Act which provides that:

'(1) Unless the provisions of this Chapter expressly provide otherwise, any party to a dispute regarding the exercise of the rights conferred upon a carrier in this Part, may only be adjudicated upon by the Authority.

(2) Any party to a dispute referred to in subsection (1) may refer the dispute in the prescribed manner to the Authority.

(3) The Authority must make regulations prescribing the procedure to be followed when a dispute is adjudicated upon in terms of this section.

(4) Any party aggrieved by a decision of the Authority under this section may appeal to the High Court within the prescribed period and subject to the prescribed procedural requirements.'

[14] Further on the arguments advanced by the respondents that the Director – General ought to have received notice regarding the works carried out by the applicants does not hold water in that the wording of s 59 (6) and (7) provides that:

'(6) When the exercise of rights referred to in this Part may affect national security or the safety of the President or a member of Cabinet the Director-General may forward a directive to the Authority indicating any requirements with which the telecommunications facilities in question must comply.

(7) The Authority must on receipt of the directive referred to in subsection (6) impose such licence conditions on licensees as may be necessary to comply with the directive in question: Provided that licensees may make alternative proposals that may with the approval of the Director-General be imposed as licence conditions.'

[15] It is the understanding that if the Legislature envisaged for the Director – General to have notice for the exercise of rights by licensees that may affect national security or the safety of the President or a member of Cabinet, the Communications Act would have explicitly made provisions to that effect that licensees must make such notice directly to the Director – General.

[16] Therefore, this court is satisfied that the applicant has established its rights in terms of s 59 of the Communications Act. It follows therefore that the respondents have no right to interfere with the exercise of such right.

[17] It is common cause between the parties that the dispute regarding the manner how to exercise such right is presently before the Authority and this court will not pronounce itself on the matter. There is also no reason why the applicant should not be awarded costs prayed for.

[18] In the result, the following order is made:

- a) That the applicant's non-compliance with the Rules of this Court (the Rules) and the time periods and forms of service prescribed therein is condoned and that this matter is heard as one of urgency as envisaged in Rule 73 of the Rules.
- b) That the first and second respondent are hereby interdicted and restrained from unlawfully interfering with or obstructing the applicant's current or future exercise of its rights, powers, duties and functions as per the Communications Act 8 of 2008, including (but not limited to) the rights, powers, duties and functions contained in Part 5 of the Communications Act, and including (but not limited to) the installation of fiber optic cable installations within Windhoek by the applicant (itself or through its duly appointed contractors);
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e) The first and second respondents (jointly and severally, the one paying the other to be absolved) are ordered to pay the costs of this application, including the costs of one instructing and two instructed counsel.

E P Unengu
Acting Judge

APPEARANCES:

APPLICANT: J MARAIS SC (assisted by D OBBES)

Instructed by ENSafrica (Incorporated as LorentzAngula)

FIRST and SECOND RESPONDENTS: T PHATELA (assisted by E SHIFOTOKA)

Instructed by Uanivi Gaes Incorporated