

Practice Directive 61

"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title: COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA v TELECOM NAMIBIA LTD	Case No: HC-MD-CIV-ACT-OTH-2017/01370
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 26 May 2020
	Date of order: 16 June 2020
	Reasons delivered on: 19 June 2020
Neutral citation: <i>Communications Regulatory Authority of Namibia v Telecom Namibia Ltd</i> (HC-MD-CIV-ACT-OTH-2019/01370) [2020] NAHCMD 238 (16 June 2020)	
Results on merits: Merits not considered.	
The order: Having heard TAIMI ILEKA-AMUPANDA , for the Plaintiff and ANNETHE JASON , for the Defendant, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The application to stay the proceedings in HC-MD-CIV-ACT-OTH-2017/01370 is hereby refused with costs. Such costs occasioned by the employment of one instructed and one instructing counsel. Such cost is limited to Rule 32(11).2. The matter is postponed to 9 July 2020 at 15h00 for further Case Planning Conference.3. Further joint case plan must be filed on or before 6 July 2020.	
Reasons for orders:	

The Parties

[1] The applicant/plaintiff¹ in this matter is the Communications Regulatory Authority of Namibia, established in terms of s 4(1) read with s 4(2) of the Communication Act 8 of 2008. The respondent/defendant is Telecom Namibia Ltd, a state-owned enterprise established in terms of s 2(1)(b) of the Post and Telecommunications Companies Establishment Act 17 of 1992.

Background

[2] It is important for purposes of this ruling to briefly sketch the background of the matter as it goes as far back as 2013. The evolution of the matter between the parties since 2013 appears to be common cause.

[3] During 2013 the defendant instituted an application in the High Court against the plaintiff², Minister of Information, Communication and Technology, the Government of Namibia and the Attorney General seeking an order declaring s 23(2)(a) of the Communications Act 8 of 2009 (the Act) as unconstitutional as it constituted the imposition of tax by the plaintiff as opposed to regulatory levies for defraying its expenses.

[4] On 29 September 2016 the High Court made an order to the effect that s 23(2)(a) of the Act and the regulations made thereunder was unconstitutional and invalid³. The plaintiff appealed to the Supreme Court against the judgment and order of the High Court. Subsequent to this judgment Mobile Telecommunications Limited (herein referred to as MTC), who was not a party to the defendant's constitutional challenge in the High Court joined the proceedings in the Supreme Court.

[5] The appeal was heard and the Supreme Court delivered its judgment on 11 June 2018⁴ wherein it found that the levy imposed by the plaintiff did not constitute imposition of taxation. The Court further proceeded to consider whether or not s 23(2)(a) of the Act and Regulations was unconstitutional and found that it was unconstitutional on the basis that it delegates uncircumscribed discretion and powers to the plaintiff. Section 23(2)(a) was accordingly

¹ The parties will be referred as they are in the main action.

² Case 48/2013.

³ Telecom Namibia Limited v Communications Regulatory Authority of Namibia (A 448-2013) [2016] NAHCMD 292 (29 September 2016).

⁴ Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Another 2018 (3) NR 663 (SC).

struck down. The Supreme Court also dealt with the consequences arising from the order it made in respect of the unconstitutional nature of the related provisions of the Act and Regulations under paras 94 to 112 of the judgment.

[6] The order of the Supreme Court read as follows⁵:

'The appeal succeeds and the order of the High Court is set aside and substituted for the following:

- (a) Section 23(2)(a) of the Communications Act 8 of 2009 is declared unconstitutional and is hereby struck down.
- (b) Subject to para (c) below, the order of invalidity in para (a) will take effect from the date of this judgment and shall have no retrospective effect in respect of anything done pursuant thereto prior to the said date.
- (c) Telecom shall not be liable to pay any levy imposed covering a period before the coming into force of Item 6 of the Regulations Regarding Administrative and Licence Fees for Service Licences, published as GN 311 in GG 5037 on 13 September 2012.
- (d) There is no order in respect of costs.'

[7] Based on its understanding of the Supreme Court order, the plaintiff then proceeded to institute action against the defendant during March 2019 for payment of levies and related charges for payment of an amount of N\$ 66 559 010. The payment claimed is in respect of regulatory levies due for March 2016, March 2017 and March 2018. However, following the Supreme Court's order a dispute arose between the parties with regard to the meaning and the import of the order read with paras 94 to 112 of the judgment.

[8] According to the plaintiff's interpretation, the order of the Supreme Court replaced the order made by the High Court on 29 September 2016 with the clear intention to ensure that s 23(2)(a) of the Act was declared unconstitutional with effect from 11 June 2018, being the date of the Supreme Court confirmed unconstitutionality of the concerned section. The conflicting interpretation by the defendant (and apparently MTC) is that the judgment date of the substituted order of the Supreme Court is 29 September 2016, which is the date of the High Court order for which it was substituted. According to the defendant the order of invalidity of s 23(2)(a) of the Act is thus 29 September 2016, which in turn causes s 23(2)(a) and the regulation, which was made thereunder, to be null and void since the substituted order dated 29 September 2016 and therefore any charge of regulatory levies for the period from 29 September 2016 premised on the s 23(2)(a) of the Act and Regulations is unenforceable.

⁵ *Supra* para 113.

[9] The plaintiff filed an application in the Supreme Court requesting the Court to interpret and make the order clear for the parties if found ambiguous, however the Supreme Court declined to entertain the application. As the same issue regarding the interpretation of the Supreme Court's order arose between the plaintiff and MTC under case number HC-MD-CIV-ACT-OTH-2019/01367 it was agreed between those parties to have the question of the meaning of the Supreme Court order adjudicated on the basis of a stated case in terms of Rule 63(1) and (2) of the Rules of Court.

The application in casu

[10] An application for stay of proceedings was therefore brought pending the outcome of the stated case between the plaintiff and MTC under case number HC-MD-CIV-ACT-OTH-2019/01367.

[11] The stated case served before my Brother Usiku J on 15 November 2019 however Usiku J struck the stated case from the roll on the said date on the basis that the matter does not meet the requirements of a 'special case' contemplated under rule 63⁶. Following on the ruling by Usiku the plaintiff filed an application for leave to appeal the court's ruling and that application is scheduled for hearing on 1 July 2020.

The plaintiff's argument

[12] Mr Namandje conceded that applications for stay of proceedings are not lightly granted by courts and is not merely for the asking but implored the court to use its discretion in this particular matter and that the court should consider the fact that if the matter between the plaintiff and MTC proceed to the Supreme Court and the Supreme Court conclusively decides the matter one way or the other there will no longer be a dispute on the critical and central issue between the parties with regard to the date from which the plaintiff is entitled to claim levies and therefore a stay of proceedings is warranted under the circumstances.

[13] Mr Namandje submits that once the judgment of the Supreme Court is interpreted such certainty will apply to all members of the public, including the defendant.

⁶*Communication Regulatory Authority of Namibia v Mobile Telecommunication Company Namibia* (HC-MD-CIV-ACT-OTH-2019/01367) [2019] NACHMD 490 (15 November 2019).

[14] Mr Namandje submitted that it would be convenient, fair and reasonable for this court to stay the action pending the finalization of the stated case as the issues raised therein are largely and substantially the same issues which would arise in the current matter. Counsel further submitted that there are good prospects of success that the court in the stated case between the plaintiff and MTC would find in favor of the plaintiff and lastly that the granting of the stay of proceedings is also a matter of public policy as it will avert a situation where there may be two conflicting judgments of the Supreme Court order arising from the same court.

The defendant's argument

[15] The defendant opposed the plaintiff's application on the following basis:

- a) The plaintiff is *dominis litis* and is thus required to prosecute its case.
- b) What the plaintiff seeks is contra the spirit and intention of the Rules and violation of the defendant's constitutional rights to a prompt and speedy trial.
- c) That the plaintiff is unable to show that there are merits that would warrant a stay in this matter.
- d) That what the plaintiff seeks to do is impermissible in law.
- e) That the Supreme Court has declined to interpret its order because in the defendant's opinion the order is clear, and the plaintiff now attempts to secure from the High Court the interpretation that the Supreme Court declined to provide. The plaintiff however seeks this interpretation in a matter to which the defendant is not a party.
- f) That the outcome in the pending civil matter between the plaintiff and MTC is is not binding on the parties in the current suit in relation to the disputes in this suit.
- g) That the issues in the matter in casu, if compared with the other matter differs materially and that the interpretation of the Supreme Court's judgment will not dispense of the current matter in its entirety. As such the outcome of the suit between the latter will not be determinative of the current suit between plaintiff and defendant.

[16] In order to illustrate his point Mr Heathcote referred this court to its exception to the plaintiff's particulars of claim wherein the defendant maintains that no rule making procedure as defined was published in the Government Gazette or followed for purposes of making regulations to impose the regulatory levy claimed by the plaintiff, nor does the plaintiff allege such a rule making procedure was published in the Government Gazette or followed (bearing in

mind that the plaintiff, for its claim against the defendant relies on s 23(1) of the Act, which authorises the plaintiff to impose a levy regulation after having followed a rule making procedure, the latter being prescribed for purposes of making regulation to impose a regulatory levy).

[17] Mr Heathcote however conceded that in addition to the aforementioned the defendant joins issue with the plaintiff regarding the interpretation of the Supreme Court order.

[18] Mr Heathcote pointed out that the defendant is entitled to have its day in court as guaranteed by the Constitution and at this stage there is no certainty in respect of the outcome in the MTC matter as the stated case never took place and that even if the plaintiff succeeds to get this matter before the Supreme Court the Court will not hear the matter but refer it back to be heard by the High Court. There is therefore no certainty if and when there will be an outcome on the merits of the stated case.

[19] Mr Heathcote argued that if the defendant succeeds in their exception against the plaintiff's particulars of claim, the outcome of the matter wherein the defendant is currently not a party to, will become academic because if the defendant becomes successful in its exception it will bring finality to the matter.

[20] Mr Heathcote argued in essence that none of the issues raised on behalf of the plaintiff are sufficient reasons to prevent a party with material interest in the matter from having access to justice and submitted that there are no exceptional grounds in the matter before court that would warrant the stay of proceedings.

The applicable law and its application to the facts

[21] The High Court possesses the inherent jurisdiction to stay proceedings but the power to do so will be exercised judicially, sparingly and only in exceptional circumstances.

[22] This was made very clear in the matter of *Mouton v Gaoseb*⁷ wherein Masuku AJ (as he then was) considered an application for stay of civil proceedings pending a hearing of an appeal to the Supreme Court. The court in the *Mouton* matter set out the factors to be considered during an application for stay of proceedings. The court held as follows:

⁷ (I 4215-2011) [2015] NAHCMD 257 (28 October 2015).

[13] It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.'

[23] In deciding whether to grant the stay of proceedings as sought it is important to consider the conflicting rights and interests of the parties concerned but also the issue of convenience and prejudice in the peculiar circumstances of this case.

[24] The plaintiff relies heavily on the outcome of the stated case that was before Usiku J. As we now know the court did not consider the merits of the matter and the purported stated case was struck from the roll. Therefore the stay application is based on the hearing of a stated case that never took place.

[25] The matter between the plaintiff and MTC would only have progressed to a point of a leave to appeal hearing by 1 July 2020. This is a good 7 months after the matter was struck from the roll. Because the parties awaited for the outcome of the stated case they approached this court and requested that the further judicial case management in the current matter be kept in abeyance pending the outcome of the stated case. This result in the position that the case before me did not progress past the point of a case planning conference and the matter has been 'dormant' in this position for a year now. If this court should grant the application to stay the proceedings the matter before this court will be reliant on the outcome of a matter that is nowhere in sight. In the event that the application for leave to appeal does not succeed then the Supreme Court must be approached with a petition for leave to appeal. Even if leave to appeal is granted on 1 July 2020 there is no guarantee that the Supreme Court will decide the matter. There is a possibility that it might just be referred back to the High Court to be heard. The fact is that a ruling on the merits of the stated case is clearly still a long way off and it would appear that the stay sought by the plaintiff is for an indefinite

period of time.

[26] The delays in the matter before me is not in the spirit of the Rules of Court which requires matters to be dealt with expeditiously and one should not lose sight of the fact that the defendant was brought to court by the plaintiff and the defendant literally finds itself in a position where it is a mere spectator in respect of the MTC matter yet it has a material interest in the finalization of its own matter without inordinate delay. This is even more so relevant in light of the defendant's argument that its exception might bring an end to the matter sooner than later.

[27] The plaintiff's argument that there is a risk of conflicting decisions emanating from two courts of equal status should the stay be refused, is neither here nor there. The plaintiff chose to prosecute the matters against MTC and Telecom separately, however consolidation of the matters remains an option open to the plaintiff.

[28] Having considered the arguments and the facts set out above I cannot find that it would be equitable to grant the stay of proceedings. The potential prejudice to the defendant far outweighs any measure of convenience that the granting of an order for stay might have.

[29] I am further of the considered view that there are no exceptional circumstances in this case to justify an order to stay the proceedings and the application must be refused.

[30] My order is therefore as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff/Applicant	Respondent
Mr S Namandje from	Mr R Heathcote, SC Instructed by

Sisa Namandje & Co Inc.	Shikongo Law Chambers.
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