

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-ACT-OTH-2019-01367

In the matter between:

**COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**                      **PLAINTIFF**

and

**MOBILE TELECOMMUNICATIONS COMPANY NAMIBIA**                      **DEFENDANT**

**Neutral citation:** *Communications Regulatory Authority of Namibia v Mobile Telecommunications Company Namibia* (HC-MD-CIV-ACT-OTH-2019/01367) [2021] 81 NAHCMD (26 February 2021)

**Coram:**            USIKU, J

**Heard:**            **09 February 2021**

**Delivered:**      **26 February 2021**

**Flynote:**        Interpretation of court's judgment or order – Principles to apply in interpreting a judgment or order not different to that applicable when interpreting a document or legislation – Effect of '*substituting*' an order of a court for another order.

**Summary:** The plaintiff initiated action against the defendant claiming payment in the amount of N\$ 97 269 143.84, being regulatory levies calculated from 29 September 2016 to 11 June 2018. The defendant filed an exception to the plaintiff's particulars of claim to the effect that same does not disclose a cause of action, because s 23 (2)(a) of the *Communications Act 8 of 2009* in terms of which the plaintiff claims the amount in question, was declared unconstitutional by the Supreme Court with effect from 29 September 2016. The plaintiff argued that the declaration of invalidity of s 23 (2)(a) is with effect from 11 June 2018.

*Held* that, where a court order is clear and unambiguous, the words used in the order, including the punctuation marks, are to be given their ordinary grammatical meaning, unless doing so would lead to an absurdity so glaring that the court could not have contemplated it.

*Held further* that, the order made by the Supreme Court is *substituted* for the order of the High Court and replaces the order of the High Court. Therefore, the words '*from the date of this judgment*' in para 1 (b) of the Supreme Court order, refer to the judgment of the High Court.

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### ORDER

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1. The defendant's exception is upheld.
2. The plaintiff's particulars of claim are set aside and the plaintiff is granted leave to file amended particulars of claim, if so advised, within 15 days of this order.
3. The plaintiff is ordered to pay the defendant's costs, including costs of one instructing and two instructed counsel.
4. The matter is postponed to 07 April 2021 at 15h15 for a further case planning conference.
5. The parties shall file a joint case plan on or before 31 March 2021.

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### RULING

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USIKU, J

### Introduction

[1] In his article on 'Ambiguity and Misunderstanding in the Law' *Sanford Schane*<sup>1</sup> states:

' . . . in spite of all good intentions, the meaning of words found in documents are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the court to come up with its interpretation . . . .'.

[2] The foregoing quotation crisply sums up the nature of the dispute between the parties presently before court.

[3] The matter before court is an exception raised by the defendant that paras 11 to 20 do not disclose a cause of action against the defendant and that the plaintiff's claim should, as a result, be dismissed.

[4] In the particulars of claim, the plaintiff seeks payment from the defendant, in the amount of N\$ 97 269 143.84, being regulatory levies, calculated from 29 September 2016 to 11 June 2018. The aforesaid amount is levied by the plaintiff in terms of s 23(2)(a) of the *Communications Act*<sup>2</sup> ('the Act') and item 6 of the *Regulations Regarding Administrative and Licence Fees for Service Licences*<sup>3</sup>, ('the Regulations') published by *Government Gazette* No. 5037 in 13 September 2012.

[5] The defendant contends that s 23(2)(a) of the Act and item 6 of the Regulations have been declared by the Supreme Court as unconstitutional and null and void with effect from 29 September 2016.

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<sup>1</sup> Research Professor of Linguistics, University of California, San Diego.

<sup>2</sup> No. 8 of 2009.

<sup>3</sup> No. 311 of 2011.

[6] On the other hand, the plaintiff contends that in terms of the order and judgment of the Supreme Court, the invalidity of the aforesaid provisions took effect from 11 June 2018, being the date on which the Supreme Court made its order.

[7] Thus, the exception turns on the interpretation of the order of the Supreme Court in the matter of *Communications Regulation Authority of Namibia v Telecom Namibia Ltd*<sup>4</sup>, delivered on 11 June 2018, on when the order of invalidity of s 23 (2) (a) takes effect.

### Background

[8] On 29 September 2019, the High Court made an order declaring s 23(2) (a) of the Act as unconstitutional and invalid on the ground that the levy imposed under that section amounted to imposition of tax<sup>5</sup>. The Communications Regulatory Authority of Namibia (CRAN), the plaintiff in the present matter, successfully appealed to the Supreme Court. The Supreme Court found that s 23(2) (a) is not a tax measure. However, it found 23(2) (a) unconstitutional on a different ground. The Supreme Court delivered its judgment on 11 June 2018.

[9] The parties could not agree on the interpretation of the Supreme Court order as to when the order of invalidity takes effect, and on or about 07 February 2019, the plaintiff applied to the Supreme Court requesting the Court to interpret its order.

[10] On or about 28 March 2019, the plaintiff initiated the present action against the defendant seeking payment of the aforesaid amount, being regulatory levies for the period between 29 September 2016 and 11 June 2018.

[11] On or about 12 June 2019, the Supreme Court declined to entertain the application to interpret its order.

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<sup>4</sup> *Communications Regulation Authority of Namibia v Telecom Namibia Ltd* (SA 62 - 2016) [2018] NASC (11 June 2018)

<sup>5</sup> *Telecom Namibia Ltd v Communications Regulatory Authority of Namibia* A448/2013 [2016] NAHCMD 292 (29 September 2016) para 16.

[12] On or about 01 October 2020, in a matter similar to the present case, between CRAN and Telecom<sup>6</sup>, Prinsloo, J dismissed Telecom's exception and held that the order of invalidity, according to the judgment of the Supreme Court, takes effect from 11 June 2018.

### The exception

#### *Defendant's argument*

[13] In its exception, the defendant contends that the order for the invalidity of s 23(2) (a) takes effect from 29 September 2016, (ie the date of the judgment of the High Court) and accordingly paras 11 to 20 (claiming levies for the period between 29 September 2016 to 11 June 2018) do not disclose a cause of action against the defendant.

[14] The defendant submits that the order of the Supreme Court means what it says. It substituted its order for that of the High Court. Therefore, the reference in the substituted order (which becomes the order of the High Court) to 'the date of this judgment' means the date of the High Court judgment.

[15] The defendant further contends that, if the Supreme Court had intended to refer to the order made by itself and not the one it substituted, then it would have referred, in unequivocal terms, to its own order. It would specifically have referred to 'the judgment of the Supreme Court'.

[16] It is also the contention of the defendant that, it is impermissible to interpret an unambiguous order with reference to the judgment. The order that a court delivers is the executive part of the court's judgment. Consequently, in circumstances where the order is clear and unambiguous, resort may not be had to anything stated in the judgment (i.e. the reasons for the order) to restrict, extend, qualify or vary the order. According to the defendant, the foregoing proposition is the *ratio* in the case of *Administrator, Cape and Another v Ntshwaquela and Others*.<sup>7</sup>

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<sup>6</sup> *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd* HC-MD-CIV-ACT-OTH-2019/01370 [2020] NAHCMD 452 (2 October 2020).

<sup>7</sup> *Administrator, Cape and Another v Ntshwaquela and Others* 1990 (1) SA 705 at 715F to 716C.

[17] The defendant submits that the order of the Supreme Court is clear and unambiguous. Therefore, the reasons provided in the judgment cannot be resorted to for the purposes of recasting or altering it, under the guise of interpretation.

[18] The defendant argues that the ruling in the *CRAN v Telecom* matter was wrongly decided because, even though Prinsloo, J cited the *Ntshwaquela*'s judgment, she did not consider its ratio. The defendant contends that this court is not bound by the outcome in the *CRAN v Telecom* matter, but is bound by *Ntshwaquela*, being a judgment delivered when the *Appellate Division* was still the highest court in Namibia. The defendant therefore urges this court to find that Prinsloo, J's interpretation was wrong.

#### *Plaintiff's argument*

[19] The plaintiff argues that the exception filed by the defendant is the same as the exception raised in the matter of *CRAN v Telecom*, in which this court has already, per Prinsloo, J, dismissed Telecom's exception based on same facts and issue.

[20] The plaintiff submits that this court is bound by the decision in the *CRAN v Telecom* matter and that as a matter of rule of law, has a duty to respect the judgment in the *CRAN v Telecom* matter, unless if the court makes a finding that that judgment is clearly wrong.

[21] The plaintiff further contends that it would be inappropriate for this court again to rule on the disputed interpretation when the same court has already pronounced itself on the same issue. Any ruling by this court leading to a contradictory judgment would not augur well for the rule of law and legal certainty.

[22] The plaintiff asserts that, in the event of the court nevertheless proceeding to consider the merits of the exception, the plaintiff repeats its submissions as made before Prinsloo, J and accepted by her.

[23] The plaintiff contends that there is no ambiguity in the Supreme Court's judgment and order. The judgment and order are clear that the invalidity operated from the date that the Supreme Court confirmed the invalidity.

[24] The plaintiff argues that the Supreme Court's reasoning under paras 94 to 112 must be considered to determine whether or not the invalidity operates from 29 September 2016 or from 11 June 2018. After referring to paras 94 to 112 of the Supreme Court judgment, the plaintiff contends that the defendant's exception is bad and must be dismissed.

### Legal principles

[25] Where an exception is taken on the ground that no cause of action is disclosed, two aspects are considered for the purpose of determining the exception, namely:

- (a) the facts alleged in the plaintiff's pleadings are taken as correct, and,
- (b) the excipient bears the onus to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.<sup>8</sup>

[26] When interpreting an order of court or a judgment, the approach to adopt is the same as that applicable when interpreting a document or legislation. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. The judgment or order and the court's reasons for giving it are read as a whole to ascertain its intention. If the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.<sup>9</sup>

[27] In the matter of *Administrator, Cape and Another v Ntshwaquela and Others*, the court observed that the order with which a judgment concludes is the executive part of the judgment which defines what the court requires to be done or not to be done, so that the defendant, or the world, may know it. If the meaning of the order is

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<sup>8</sup> *Van Straten NO and Another v Namibia Financial Institutions and another* 2016 NR 747 SC para 18.

<sup>9</sup> *Firestone South Africa Pty Ltd v Gentiruco AG* 1977 (4) SA 298 at 304 D-G.

clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment.<sup>10</sup>

[28] In *Commissioner, SARS v Executor, Frith's Estate*<sup>11</sup>, the court expressed the traditional rule of interpretation of statutes, as follows:

'The primary rule in construction of a statutory provision is ... to ascertain the intention of the legislator and ... one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature would not have contemplated it'.

[29] It follows from the foregoing authority that, if the meaning of a text is clear and unambiguous, it should be applied. If the meaning of the words used is ambiguous or vague or if the literal meaning would lead to absurd results, then the court may refrain from applying the literal meaning to avoid the absurdity. In such circumstances the court would then turn to 'secondary aids' to interpretation, to find the intention of the legislator.

### Analysis

[30] The order made by the Supreme Court on 11 June 2018 reads as follows:<sup>12</sup>

'1. 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 paragraph (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."

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<sup>10</sup> 1990 (1) SA at 715F to 716C.

<sup>11</sup> *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) at 273.

<sup>12</sup> *CRAN v Telecom Namibia Ltd* (SA 62/2016) [2018] NASC 18 (11 June 2018) para 113.



2. There shall be no order as to costs in the appeal and each party shall bear its own costs.'

[31] In terms of s 19 of the *Supreme Court Act*,<sup>13</sup> the powers of the Supreme Court on hearing appeals, include the power to confirm, amend or set aside the judgment or order which is the subject of the appeal and 'to give any judgment or make any order which the circumstances may require.'

[32] In its judgment, the Supreme Court found that the order of the High Court could not be sustained. It set the order of the High Court aside, and made an order which the High Court ought to have made, and which the High Court had power to make, as appears under sub-paragraphs (a) to (d) of the above quoted order.

[33] The order made by Supreme Court is 'substituted' for the order of the High Court. The verb 'substitute' is defined as 'to serve or cause to serve in the place of another person or thing.'<sup>14</sup> The 9<sup>th</sup> Edition of the Oxford Dictionary defines 'substitute' as something in the place of another, alternatively, where it serves in exchange and it replaces with another.

[34] It is significant to note that the 'substituted order' is put by the Supreme Court in quotation marks. A question may, rhetorically, be asked: why do we quote (or use quotation marks)? I believe we do so, so that we recognize others' words and voices. As a rule of grammar, quotation marks are used to indicate direct speech. In other words, quotation marks, generally, serve as a device for recognizing others' words and voices.

[35] In my opinion, the purpose and effect of putting the words appearing in sub-paras (a) to (d) above, in quotation marks, is to separate them from the surrounding words in paras 1 and 2, thereby signaling the words and the voice of the High Court, in respect of the 'substituted order'. In other words, the Supreme Court put the substituted order in quotation marks so that a reader can recognize the words and the voice of the High Court.

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<sup>13</sup> No 15 of 1990.

<sup>14</sup> Collins Dictionary of the English Language, Second 2<sup>nd</sup> Edition 1986.

[36] It is common cause that the Supreme Court set aside the order of the High Court and substituted it for the order appearing in quotation marks. In my opinion, the effect of the 'substitution' is to replace the former order with the new order, that is, the new order takes its place and operates in its place.

[37] It is trite law that a court order must be read as part of the entire judgment. However, if the meaning of the order is clear and unambiguous, like it is in the present case, the court order is decisive and cannot be restricted or extended by anything stated in the judgment.

[38] I am of the opinion that the words and the punctuation marks used in the Supreme Court order are clear and unambiguous. The literal meaning of the words does not lead to an absurdity so glaring that the Supreme Court could not have contemplated it. In the circumstances, the court order is decisive and should be applied.

[39] I am therefore, of the opinion that the words 'from the date of this judgment' in para 1(b) of the order of the Supreme Court refer to the judgment of the High Court.

[40] In my view, if it was the intention of the Supreme Court to make the order of invalidity take effect from the date of the judgment of the Supreme Court, then the order, as an example, would have read as follows:

'1. 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) 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 12 September 2012;

(c) There is no order in respect of costs. "

2. Subject to para 1(b) above, the order of invalidity in paragraph 1(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.

3. There shall be no order as to costs in the appeal and each party shall bear its own costs.'

[41] The above example limits the 'substituted order' to sub-paras (a), (b) and (c), and the order of invalidity would have clearly taken effect from the date of the judgment of the Supreme Court.

[42] The plaintiff submits that the order of the Supreme Court and the reasons for giving it, must be read as a whole. I am not persuaded that there is something in the judgment of the Supreme Court that says that the invalidity of s 23(2)(a) takes effect from the date of the Supreme Court's judgment. Having read the judgment as a whole, specifically paras 104-112, it appears to me that the Supreme Court states that s 23(2)(a) is validated up to the point specified in its judgment. The Supreme Court then proceeds to specify that date in para 1(b) of the order itself.

[43] The relevant paras of the Supreme Court judgment reads as follows:

'[104] I am satisfied that the High Court had jurisdiction to delay the order of invalidity if it found (as it should have) s 23(2) (a) and item 6 unconstitutional on the basis that I have described. The question arises whether the order of invalidity should be delayed.

[105] The levy of 1.5% on annual turnover is not *per se* an unconstitutional exercise of discretionary power as it is well within the international norm as demonstrated in CRAN's answering papers and *Canadian Broadcasting Assn v Canada*. In fact, as demonstrated by CRAN in the opposing affidavit, Telecom considered that to be the case. That is a compelling reason for not making the order of invalidity operate *ex tunc*. However, the rule of law dictates that care should be exercised so that the effect of the order of invalidity is not rendered meaningless and that those who have suffered its existence are not made to endure it any longer than the circumstances justify.

[106] I would therefore validate s 23(2) (a) of the Act and Item 6 only up to the point that its invalidity has been confirmed by this court: In other words, the order of invalidity will operate *ex nunc*.

#### The resultant legal vacuum

[107] No doubt the order of invalidity taking immediate effect after this judgment creates a legal vacuum in the levy regime. At the prompting of the Executive, the Parliament has in the past acted with deliberate haste to deal with the court's declaration of invalidity of legislation

and administrative decision-making. I have no reason to believe that the same cannot be done in respect of s 23(2) (a) of the Act.

Was the challenge to the regulation time-barred?

[108] CRAN's allegation that the challenge to the regulation should have been brought within six months of it being gazetted, as required by s 32 of the Act, cannot be the basis for barring a challenge to the constitutionality of s 23(2)(a). As I have demonstrated, in view of the amended notice of motion, the focus of the attack is now s 23(2) (a) of the Act. Since s 23(2) (a) is invalid from the date of this court's order, Item 6 suffers the same fate and cannot validly be kept alive.'

[44] Paragraph 106 states that the Supreme Court would validate s 23(2) (a) and Item 6 only up to the point that its invalidity has been confirmed by the court. Paragraph 106 is to be read together with para 105 in which the court cautions that the effect of 'the order of invalidity should not be rendered meaningless and that those who have suffered its existence are not made to endure it any longer than the circumstances justify'. Paragraph 106 does not confirm the point up to which the invalidity operates. That point is set out in para 1 (b) of the Supreme Court order.

[45] Furthermore, paras 107 and 108 do not detract from the provisions of para 1 (b) of the order. If one is to ascertain the date from which the invalidity runs, one would have to go to para 1(b) of the court order and not to paras 107 and 108.

[46] I am, therefore, unable to accept the contention that in terms of the Supreme Court order and judgment, the order of invalidity takes effect from the date of the judgment of the Supreme Court.

[47] I have carefully read the judgment in the *CRAN v Telecom* matter. I respect the findings and conclusions reached therein. However, for reasons set out in this judgment, I am unable to reach the same conclusion herein. I take note that the meaning of 'substitution' and the effect of putting the substituted order in quotation marks were not addressed in that matter.

[48] I am aware that the implications of my order in this matter is that there would be two conflicting judgments of this court on the interpretation of the order of the

Supreme Court. Because this court has not followed its earlier decision in *CRAN v Telecom*, I am inclined to grant leave to appeal, if sought, on the basis of the conflicting decisions.

[49] The defendant argued that once the exception is upheld, there is nothing that the plaintiff can contribute to the issues during any trial, in the form of evidence, to salvage the cause of action. The defendant prays, in such circumstances, that the plaintiff's claim must be '*culled*'. As authority for that proposition the defendant cites the case of *Hangula v Motor Vehicle Accident Fund*<sup>15</sup>. I have read the *Hangula* judgment and I saw no proposition to that effect.

[50] In cases where an exception has successfully been taken to a plaintiff's pleading, on the ground that it discloses no cause of action, the practice of the courts is to order that the pleading be set aside and the plaintiff be given leave to file an amended pleading, if so advised, within a certain period of time.<sup>16</sup>

[51] I am of the opinion that the foregoing practice is the correct course to take in this matter and I shall make an order to that effect.

[52] Insofar as the issue of costs is concerned, the defendant asks the court to dispense with the limit imposed under rule 32(11). I see no convincing reason, and none was brought to my attention, why the limit on costs imposed by rule 32(11) should not find application in this matter. I am therefore, not going to order that rule 32(11) is inapplicable.

[53] In the result, I make the following order:

1. The defendant's exception is upheld.
2. The plaintiff's particulars of claim are set aside and the plaintiff is granted leave to file amended particulars of claim, if so advised, within 15 days of this order.
3. The plaintiff is ordered to pay the defendant's costs, including costs of one instructing and two instructed counsel.

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<sup>15</sup> *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 (HC) para 17.

<sup>16</sup> *Group Five Building Ltd v Government of RSA* 1993 (2) 593 at 602C-E.

4. The matter is postponed to 07 April 2021 at 15h15 for a further case planning conference.
5. The parties shall file a joint case plan on or before 31 March 2021.

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B USIKU  
Judge

## APPEARANCES:

PLAINTIFF: Mr S Namandje assisted by Ms lileka-Amupanda  
Of Sisa Namandje & Co Inc  
Windhoek

DEFENDANT: Mr N Tjombe assisted by Ms Auwanga  
Of Tjombe – Elago Inc  
Windhoek