

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

URGENT APPLICATION: REASONS

Case Title: MTC Mobile Telecommunications Ltd Applicant and Nampower Corporation (Pty) Ltd First Respondent Telecom Namibia Ltd Second Respondent Chairperson of the Communications Regulatory Authority of Namibia Third Respondent Communications Regulatory Authority of Namibia Fourth Respondent	Case No: HC-MD-CIV-MOT-GEN-2023/00078 Division of Court: High Court, Main Division
Coram: The Honourable Justice Coleman	Heard: 28 February 2023 Order made: 28 February 2023 Reasons: 6 March 2023
Neutral citation: <i>MTC Mobile Telecommunications Ltd v Nampower Corporation (Pty) Ltd and Others</i> (HC-MD-CIV-MOT-GEN-2023/00078) [2023] NAHCMD 92 (6 March 2023)	
Order: <ol style="list-style-type: none">1. The application is struck from the roll for lack of urgency.2. The applicant shall pay the first respondent's costs to include the costs of one instructing and one instructed counsel.	
Reasons:	

COLEMAN J:

Introduction

[1] This is an urgent application to interdict first respondent from terminating the tri-partite agreement between applicant (MTC), first respondent (Nampower) and second respondent (Telecom). Nampower opposes it while the other respondents abide. I made the order herein on 28 February 2023. These are the reasons for the order.

Pertinent facts and submissions

[2] The so-called tri-partite agreement was entered into during 2012 between MTC, first Nampower and Telecom. It is essentially an agreement in terms whereof MTC and Telecom lease optical ground wire fibre capacity from Nampower. The agreement was for an initial 10-year period ending on 30 May 2022. In terms of a seventh addendum to this agreement the lease was ultimately extended to 28 February 2023.

[3] This last extension was, as I understand it, largely influenced by a dispute with fourth respondent (CRAN). This dispute is material since CRAN ruled on 24 May 2022 that clauses 2.2.2 and 3.2 of the tri-partite agreement are void and unenforceable. MTC filed a review application in the High Court on 12 December 2022 challenging this ruling.

[4] Understandably, MTC felt insecure about the status of the tri-partite agreement pending the review application and started looking for assurances from Nampower. In a letter to Nampower on 2 December 2022, MTC sought an undertaking from Nampower that it would not seek the implementation of CRAN's decision, nor in any way rely on the facts of this decision pending the outcome of the review. Telecom had similar concerns as MTC.

[5] Eventually, on 6 February 2023, Nampower responded to MTC's enquiry through its legal practitioners. In this letter two aspects stand out, firstly, Nampower makes it clear that it is committed to making sure that there is no service interruption which would negatively impact the

public, and secondly, it confirms the agreement will expire on 28 February 2023. This response raised concerns with MTC and in a letter on 9 February 2023 it articulates these concerns. It appears by now that there is a difference of opinion on the interpretation of the seventh addendum and the future of the tri-partite agreement.

[6] Nampower responds on 17 February 2023 to this letter of 9 February 2023. This response is significant. In this letter Nampower gives MTC notice that should the parties not agree to a transitional agreement, Nampower will have no option but to institute action proceedings, or such other appropriate proceedings, to confirm the termination of the agreement by effluxion of time and to essentially evict MTC from Nampower's infrastructure. The letter concludes as follows:

"It is not our client's intention, pending finalization of those negotiations, to simply take the law into its own hands and remove your client from its infrastructure. Our client, as a responsible corporate citizen, will follow the law and pursue an appropriate remedy before the courts."

[7] Not satisfied with this MTC pursued this urgent application on 20 February 2023. Telecom being essentially in the same position as MTC elected not to proceed with an urgent application. In a letter dated 20 February 2023, Telecom, through its legal practitioners, informs the legal practitioners of Nampower (MTC's legal practitioners are carbon copied therein) that because of Nampower's undertaking that it shall not terminate access to the infrastructure or remove equipment without a court order from a competent court authorising it, Telecom will not proceed with its envisaged urgent application.

[8] In its answering affidavit deposed to by its managing director, Nampower asserts that there is no threat to MTC's continued use of and access to Nampower's infrastructure until a court issues an order in favour of Nampower.

[9] It is submitted on behalf of MTC that the matter remains urgent despite Nampower's stance. The assertion of urgency is based on, amongst others, the following three core submissions: Nampower seeks to unlawfully terminate the tri-partite agreement on 28 February 2023, this conduct leaves MTC with undesirable options which may result in harm and

Nampower's undertaking in its answering affidavit is not unequivocal and does not dissipate the urgency.

[10] On behalf of Nampower, it is submitted that it already indicated in its letter of 17 February 2023 that it would not 'evict' MTC (or Telecom, for that matter) without a court order and that should be enough.

Conclusion

[11] I have read the papers in the matter and considered all the submissions on behalf of the parties. I mean no disrespect in not articulating each and every contention herein.

[12] Rule 73(4) of the rules of this court is peremptory and unequivocal. In particular, sub-rule 73(4)(b) requires that an applicant must set out explicitly in its founding affidavit the reasons why it claims it could not be afforded substantial redress at a hearing in due course. This is a fundamental requirement for urgent applications with a clear rationale. In its founding affidavit under the heading 'Urgency' applicant endeavours to address this requirement. However, it does not address the core requirement – why it cannot be afforded substantial redress at a hearing in due course.

[13] In its letter of 17 February 2023, Nampower, is in my view, unequivocal that if a transitional agreement or any other agreement in terms of which MTC may share Nampower's infrastructure beyond 28 February 2023 is not reached between the parties, it will institute action proceedings, or any other appropriate proceedings, to resolve the issue. The essence thereof is repeated in Nampower's answering affidavit. In my view this is clearly an indication that the *status quo* will be maintained and any dispute about the continuation thereof Nampower will pursue adjudication on. That is clearly a hearing in due course. MTC does not show how it will not obtain substantial redress at such hearing. It contends that Nampower's commitment to follow an adjudication process is not good enough. Telecom, on the other hand, is clearly satisfied with the prospect of this hearing in due course.

[14] In my view, MTC is not reasonable in rejecting Nampower's commitment to maintain the *status quo* until the matter had been adjudicated upon. Consequently, MTC failed to comply with

the requirement in subrule 73(4)(b) of the rules of this court and as such failed to establish urgency in this matter.

[15] Accordingly, I made the following order on 28 February 2023:

1. The application is struck from the roll for lack of urgency.
2. The applicant shall pay the first respondent's costs to include the costs of one instructing and one instructed counsel.

Judge's Signature	Note to the parties:
Justice Coleman	Not applicable.
Counsel:	
Applicant	First Respondent
Adv Bhana SC Assisted by Adv Dafel and Adv Kauta Instructed by Shikongo Law Chambers, Windhoek	Adv Bassingthwaighte Instructed by AngulaCo Inc., Windhoek