

REPORTABLE

CASE NO: SA 37/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**COMMUNICATIONS REGULATORY AUTHORITY
OF NAMIBIA**

Appellant

and

**MOBILE TELECOMMUNICATIONS COMPANY
OF NAMIBIA**

Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: 25 October 2021

Delivered: 4 November 2021

Summary: This appeal concerns the interpretation of an order of this court made in *Communications Regulatory Authority of Namibia (CRAN) v Telecom Namibia & others* 2018 (3) NR 663 (SC). The parties differed on their interpretation as to when the order of invalidity took effect under subparagraph (b) of that order. CRAN had instituted an action against the Mobile Telecommunications Company of Namibia (MTC), claiming payment of levies up to the date of judgment of this court (ie 11 June 2018) under the provision which was declared unconstitutional. MTC excepted to the claim for levies for the period between 29 September 2016 to 11 June 2018 as failing to disclose a cause of action.

In essence, it was CRAN's case that the date when the order of invalidity was to kick in and lead to its consequences is that expressly directed by this court on 11 June 2018. It was argued that the order of invalidity took effect 'from the date of this judgment', as directed by this court. MTC on the other hand contended that the reference in subparagraph (b) of the order to 'the date of this judgment' meant the date of the High Court judgment, thus rendering a claim for levies after the High Court order of 29 September 2016 as incompetent as the invalidity of the provision operated from 29 September 2016 and not the date of the Supreme Court judgment of 11 June 2018; that the order is unambiguous and it would be impermissible to interpret it with reference to this court's judgment in accordance with *Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A).

The court *a quo* upheld MTC's exception. It found that there was no ambiguity in the order. Relying upon a statement contained in *Administrator, Cape*, the High Court held that in the absence of ambiguity, the meaning of the order cannot be restricted or extended by anything stated in the judgment of this court. It found that by setting aside the order of the court below, this court proceeded to make and made the order which that court ought to have made. It concluded that 'this judgment' referred to in the substituted order is that of the High Court as it formed part of the substituted order of the High Court.

This court must interpret the order of 11 June 2018 as to when the order of invalidity was to operate from.

Held that, the well-established approach to the interpretation of court judgments and orders is to follow the basic principles applicable to construing documents in order to ascertain the intention of the court. The well-known rules relating to the construction of text or documents stress the importance of the context in which a document is drafted which is 'relevant to its construction in all circumstances, not only when the language appears to be ambiguous'.

Held that, this court's intention, as ascertained from the entire judgment and order on 11 June 2018 is abundantly clear, as demonstrated emphatically from the passages therein.

Held that, this court intended that the order of invalidity operate *ex nunc* (from now on) from the confirmation of invalidity by this court. The reference to the ‘judgment of this court’ in subparagraph (b) of the order clearly intended to mean from the date of the judgment of the Supreme Court.

Held that, the statement relied upon by MTC in *Administrator, Cape*, is taken out of the context of that court’s judgment and is not authority for the proposition that if an order is clear, the ratio and reasoning of the court are to be ignored.

This court thus finds that the date referenced to ‘the judgment of this court’ in the order given by this court on 11 June 2018 replaces the High Court’s judgment and order and once the intention of this court is ascertained, it is clear that the date of the judgment of this court in that order means precisely that – the date of the judgment of the Supreme Court.

Appeal succeeds.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and MAINGA JA concurring):

[1] This appeal concerns the interpretation of an order of this court made in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & others*.¹

[2] At issue is the liability of telecommunications licencees such as the respondent Mobile Telecommunications Company of Namibia (MTC) to pay regulatory levies under a provision – s 23(2)(a) – of the Communications Act 8 of 2009. The High Court had struck down that provision as unconstitutional on 29

¹ 2018 (3) NR 664 (SC) (CRAN).

September 2016. CRAN appealed to this court which upheld its appeal but struck down the provision as unconstitutional on a basis different to that of the High Court. This court, on 11 June 2018, substituted the order of the High Court with the following order:

'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.”

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

[3] The parties differed on their interpretation as to when the order of invalidity took effect under subparagraph (b). In February 2019, CRAN applied to this court to clarify or interpret the order. This court declined to entertain that application.

[4] CRAN had also instituted an action against MTC, claiming payment of levies up to the date of judgment of this court, 11 June 2018 under the provision declared unconstitutional. MTC excepted to the claim for levies for the period

between 29 September 2016 to 11 June 2018 as failing to disclose a cause of action. MTC contended in the exception that the reference in subparagraph (b) of the order to 'the date of this judgment' means the date of the High Court judgment, thus rendering a claim for levies after the High Court order (29 September 2016) as incompetent as the invalidity of the provision operated from 29 September 2016 and not the date of the Supreme Court judgment of 11 June 2018.

[5] MTC contended that, if this court had intended to refer to the order made by it, it would have made reference in the substituted order to the judgment of the Supreme Court. MTC also contended that the order is unambiguous and that it would be impermissible to interpret it with reference to this court's judgment in accordance with *Administrator, Cape, & another v Ntshwaqela & others*.²

[6] CRAN on the other hand contended that the date of invalidity operated from the date the Supreme Court confirmed the invalidity and that the phrase 'date of this judgment' in the substituted order was to be interpreted in the context of this court's judgment in the matter and meant the judgment of the Supreme Court.

The approach of the High Court

[7] The High Court upheld MTC's exception. It found that there was no ambiguity in the order. Relying upon a statement contained in *Administrator, Cape*, the High Court held that in the absence of ambiguity, the meaning of the order cannot be restricted or extended by anything stated in the judgment of this court.

[8] The High Court reasoned that, by setting aside the order of the court below, this court proceeded to make and made the order which that court ought to have

² 1990 (1) SA 705 (A) at 715D-716D.

made. By directing that, this court substituted its own order for that of the court below. The High Court found that the order of the court below (of Parker, AJ) was replaced by the text of this court's order in quotation marks. The High Court concluded its analysis by finding that 'this judgment' referred to in the substituted order is that of the High Court as it formed part of the substituted order of the High Court.

[9] In upholding MTC's exception, the High Court afforded CRAN an opportunity to amend its particulars of claim. Given that the High Court's approach differed from the conclusion reached in an exception to a similar claim which CRAN had instituted against Telecom Namibia,³ the court granted leave to appeal. The High Court granted costs but declined to order that the capping of costs provided for in rule 32(11) of the rules of the High Court be dispensed with.

[10] CRAN appeals against the court's judgment and orders whilst MTC filed a cross appeal against the order granting CRAN leave to amend its particulars instead of dismissing the claims in question. That cross appeal was filed out of time and counsel for MTC informed us that it is no longer proceeding with the cross appeal. Both sides take issue with the costs order and argue that it should have dispensed with the limitation imposed by rule 32(11).

Condonation

[11] Before turning to the parties' submissions on appeal, there is an application for condonation and reinstatement of the appeal. The rules require that a record in respect of an appeal against an order given on an exception is to be filed within six

³ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd* 2020 (4) NR 1182 (HC) in which Prinsloo, J reached a contrary conclusion and dismissed a similar exception.

weeks of leave having been granted instead of the three month period which applies in all other cases. The appellant's practitioners were not alive to this exceptional position when lodging the record and did so within the time period usually required. When this misstep was realised, an application for condonation was made. It was not opposed and was granted at the outset of the hearing.

Submissions on appeal

[12] It was argued on behalf of CRAN that the approach of the High Court does violence to the literal context and purpose of the order of substitution made by this court. Counsel for CRAN contended that the order of substitution followed upon the preceding order which upheld CRAN's appeal and set aside the High Court's order. Counsel pointed out that a premise of MTC's argument – that CRAN's appeal was unsuccessful and that this court upheld the High Court's declaration of unconstitutionality was thus incorrect. On the contrary, this court had upheld the appeal and repudiated the basis of the High Court's declaration of unconstitutionality and thus its judgment found that the provision was unconstitutional on an entirely different basis.

[13] Counsel further submitted that the verb 'substituted' in para 113.1 of the order is not to be read in isolation but is connected to and follows upon the order made that 'the order of the High Court is set aside'. By setting aside the High Court's order, this meant that it no longer existed and that the only valid order was that given by this court to substitute it in its judgment. This court's order thus replaced that of the High Court and should have been the order given by that court.

[14] Counsel for CRAN further argued that the date when the order of invalidity was to kick in and lead to its consequences are those expressly directed by this court. It was argued that the order of invalidity took effect 'from the date of this judgment', as directed by this court.

[15] It was also argued on behalf of CRAN that this court expressly limited the retrospective effect of its order of invalidity and directed that it should have 'no retrospective effect in respect of anything done pursuant thereto prior to the said date'. Counsel contended that the date so referenced is the date of the judgment of this court. Counsel pointed out that the only retrospective effect of the order of invalidity is contained in para 113.1(c) concerning Telecom not being liable to pay levies prior to 13 September 2012 as those levies predated the coming into operation of the provision.

[16] Counsel for CRAN also contended that the court *a quo* erred in its interpretation of 'substitution of a trial court order' without taking into account the relevant context and clear language in the reasoning used in this court's judgment where this court had stated in para 106 that the order is to operate *ex nunc*. Reference was also made to para 107 where this court stated that the order of invalidity would take immediate effect 'after this judgment'. Counsel also referred to para 108 where this court expressly stated that the provision is invalid from the date of this court's order. We were also referred to para 111 where this court said:

' . . . the order of invalidity will not have retroactive effect and will have legal consequences only from now and into the future.'

[17] As for *Administrator, Cape*, it was argued that the court below erred by taking it to mean that if an order is clear and unambiguous, then its meaning is decisive and that the ratio and reasoning of the court are to be ignored. Counsel contended that the meaning of a clear order would refer to its meaning in the eyes of those who have read the reasons. Reliance was placed upon a recent (South African) Constitutional Court judgment (in *Member of the Executive Council for Health, Gauteng Provincial Government v PN*⁴) where it was stated that the starting point in interpreting court orders was to determine the purpose of the order – to be ascertained from the language of the judgment in context.

[18] Counsel concluded that the High Court erred in misreading and misconstruing the language of this court in para 106 of the judgment where reference is made to this court validating the provision ‘up to’ the date that this court confirmed its unconstitutionality and para 107 where reference is made to the order of invalidity taking immediate effect after this judgment.

[19] MTC’s counsel countered that the approach of CRAN would require this court to distance itself from *Administrator, Cape*, which this court has followed and that it was decided by the Appellate Division at a time when it was the highest court for Namibia and has since been followed by this court.⁵ Counsel for MTC contended that the High Court had correctly applied the principle articulated in *Administrator, Cape*, and was correct in declining CRAN’s invitation to adopt what was termed a word-changing interpretation of this court’s order.

⁴ 2021 (6) BCLR 584 (CC).

⁵ *Fischer v Seelenbinder* 2021 (1) NR 35 (SC); *Aussenkehr Farms (Pty) Ltd & another v Minister of Mines and Energy & another* 2005 NR 21 (SC) p 32; *Handl v Handl* 2008 (2) NR 489 (SC); *Ngede v Davey’s Micro Construction CC* (SA 51/2014) [2016] NASC 4 (27 October 2016) (Ngede).

[20] It was further argued that this court's order struck a careful compromise between the doctrine of objective unconstitutionality, rendering a provision invalid *ex tunc* (since inception) and a declaration of unconstitutionality without practical effect which fails to take into account the protection of successful litigants against a violation of the rule of law. It was contended that the compromise struck by this court in its order was in clear and unambiguous terms, following the conventional formulation adopted by courts of appeal by substituting its order for that of the High Court. It would follow, so it was argued, that the 'date of this judgment' would designate the date of the High Court's judgment. It further followed, so it was contended, that the High Court was correct in upholding MTC's exception to CRAN's claim.

[21] MTC argued that a court's order, being the announcement of the result of contested litigation is enforceable and executable with immediate effect and must be capable of being acted upon by the sheriff without sifting through a judgment. In accordance with *Administrator, Cape*, if the meaning of the order is clear and unambiguous, that is decisive and cannot be restricted or extended by anything else in the judgment.

[22] It was further submitted on behalf of MTC that the interpretive analysis by the High Court was correct in finding that, by substituting its own order for that of the High Court, this court's order was 'clear and unambiguous' and is decisive.

[23] MTC's counsel also argued that CRAN's construct of the order sought that it be subjected to an exercise of reading-in (and thus imply words into the order not contained there) and that a word-changing interpretation would need to be

adopted. It was further argued that CRAN's construct is also not supported by the quoted portions of the judgment which it relied upon. In deciding that the order of invalidity is to be delayed, the order in question was, so it was contended, that of the High Court, and not the Supreme Court, as the appeal determined how the matter should have been disposed of.⁶

Approach to interpreting a court's judgment or order

[24] The well-established test accepted by this court for the interpretation of court orders or judgments, emanating from *Firestone South Africa (Pty) Ltd v Genticura AG*,⁷ is essentially the same as that for the construction of documents.⁸ This test has recently been succinctly summarised by the South African Supreme Court of Appeal⁹ (and subsequently expressly approved of by that country's Court of Appeal)¹⁰ thus:

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

[25] The well-known rules relating to the construction of text or documents, as recently restated, stress the importance of the context in which a document is

⁶ *Ngede* paras 20-21.

⁷ 1977 (4) SA 298 (A) at 304D-F.

⁸ *Handl* para 16.

⁹ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* 2013 (2) SA 204 (SCA) para 13.

¹⁰ *Eke v Parsons* 2016 (3) SA 37 (CC) para 29; *Member of the Executive Council for Health, Gauteng Provincial Government v PN* 2021 (6) BCLR 584 (CC) para 22.

drafted which is 'relevant to its construction in all circumstances, not only when the language appears to be ambiguous'.¹¹

[26] As was recently stated by this court in *Fischer* in the context of construing a court order:

'At the risk of repetition, the clear and unambiguous meaning must be ascertained in the context and not semantically without regard to the context.

The starting point thus is to determine whether the order is clear and unambiguous, because, if it is, and the context does not indicate a different meaning, that is the end of the matter . . .'¹²

(Emphasis supplied).

[27] Against this background, I turn to this matter. The point of departure in this exercise is that the portion of this court's order setting the date from which the order of invalidity is to apply is to be construed in the context of the whole order itself as well as the entire judgment and its purpose.

[28] I turn to examine the whole order, its purpose and the context within the entire judgment.

[29] The first paragraph of the order states that, although the provision was set aside, the appeal succeeded and the order of the High Court set aside. That was because the unconstitutionality of s 23(a) did not lie on the basis found by the High Court as being an impermissible tax measure. But rather because s 23(2)(a)

¹¹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC) and followed in this context by *Fischer* para 27.

¹² Paras 27 and 28.

amounted to an impermissible outsourcing of plenary legislative power by the legislature to CRAN, given the absence of guidelines and limits for its exercise.¹³

[30] After upholding the appeal and setting aside the High Court order, this court proceeded to make the order which the High Court should have made, as is customary in successful appeals as execution and enforcement would take place in the High Court.¹⁴ The judgment and order of the High Court thus set aside, this court's judgment and the order given then replace those given by the High Court. The judgment of the High Court is thus irrelevant to the interpretation of the order given by this court.

[31] The issue as to when the order of invalidity was to operate from was dealt with at some length in the judgment of this court. This court referred to competing considerations which arise when determining the date from which invalidity is to operate.

[32] After referring to the default position of retroactivity which arises when setting aside a provision as conflicting with the Constitution (*ex tunc* – from inception), this court referred to Art 25(1)(a) which empowers the court to suspend an order of invalidity where appropriate. This court further referred to the consequences of an order of invalidity and that the size of the levy imposed was accepted as being well within the international norm¹⁵ and concluded:

¹³ CRAN paras 87-93.

¹⁴ *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality & another* 2012 (9) BCLR 951 (CC) (24 May 2012) para 7; *General Accident Versekeringsmaatskappy van Suid Africa Bpk v Baily N.O.* 1988 (4) SA 353 (A) at 358H-I.

¹⁵ CRAN para 105.

[105] 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*.¹⁶

[33] Reference was also made to a resultant legal vacuum in the levy regime which would arise with an order of invalidity taking immediate effect. The court expressed the view that the legislature would be capable of acting with deliberate haste to address that vacuum, by stating:

[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.'

[34] With reference to the point taken by CRAN that a challenge to the regulation was time barred, this court held:

[108] 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.'

[35] In addressing the retrospective effect imposed by the regulation when it was enacted, this court stated:

¹⁶ CRAN para 105 – 106.

[109] Telecom pleaded in its founding affidavit that in the event that the court finds the impugned regulation to be valid, it be declared that it should only apply prospectively. Although that ground was not canvassed by Mr Heathcote in the written heads of argument, the relief was not abandoned and must be considered especially because the order of invalidity will operate *ex nunc* and Telecom will be expected to honour its liability under the impugned regulation up to the point it is no longer of any force and effect.'

[36] Finally, in dealing with the question of costs, this court explained:

[111] 'Each party has had success and failure in equal measure. Although s 23(2)(a) of the Act and Item 6 have been declared unconstitutional, the order of invalidity will not have retroactive effect and will have legal consequences only from now and into the future. That does not detract from the fact that Telecom will only be required to pay a part of the levy which operated retroactively, and it will also not be liable for any levy after the order of invalidity. On the other hand, Telecom, which has to date refused to pay the levy, will from the date the levy was gazetted until the date of invalidity be liable to CRAN for the payment of the levy imposed by Item 6. Not least significantly, CRAN has succeeded in obtaining from this court an unequivocal statement of principle that a levy under s 23(2)(a) of the Act is not a tax.'

(Emphasis supplied)

[37] This court's intention, as ascertained from the entire judgment and order thus becomes abundantly clear, as demonstrated emphatically from these passages. This court intended that the order of invalidity operate *ex nunc* (from now on) from the confirmation of invalidity, by this court. The reference to the judgment of this court in subparagraph (b) of the order clearly intended to mean from the date of the judgment of the Supreme Court.

[38] The contrary conclusion reached by the High Court would appear to be based upon the statement by the court in *Administrator, Cape*, to the effect:

‘If the meaning of an order is clear and unambiguous, it is decisive, and cannot be extended by anything else stated in the judgment.’

[39] That statement in *Administrator, Cape*, follows a detailed exposition of the rules for interpreting judgments or orders and expressly following *Firestone* in spelling out that the basic principles concerning the construction of documents is to be applied¹⁷ in ascertaining the court’s intention, stating:

‘. . . the basic principles applicable to the construction of documents also apply to the construction of a Court’s judgment or order: 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. As in the case of any document, the judgment or order and the Court’s reasons for giving it must be read as a whole in order to ascertain its intention.’¹⁸

[40] The court in *Administrator, Cape*, proceeded to stated:

‘It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court’s directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.’¹⁹

[41] The latter statement must be read together with the general principles which preceded it (that the judgment and order be read as a whole to ascertain the

¹⁷ At 715F.

¹⁸ At 715F-G.

¹⁹ At 716B-C.

court's intention) – and in the context of the facts which presented themselves in *Administrator, Cape*, – and not taken out of that overall context.

[42] As I have indicated, the intention of this court was for the order of invalidity to operate *ex nunc* from the confirmation of invalidity. The order, read in context, demonstrates that it could never have clearly and unambiguously meant from the date when the High Court had made its original order when that very order was set aside and reasons for it were repudiated. At the very best for MTC, the order could be said to be ambiguous if read in a vacuum, given what preceded it, but any ambiguity is immediately removed by the context and once the clear contrary intention is ascertained from the judgment which gave rise to the order.

[43] The intention of the order is to be ascertained from a reading of the court's reasons for giving the order read as a whole. Only after that exercise has been conducted and not in the absence of it, as argued on behalf of MTC and accepted by the court below, can the order be considered. In this case it concerns the date of invalidity being only prospective in effect after this court has set aside the provision. The context makes it plain which court's judgment is referred to.

[44] This is unlike the position in *Administrator, Cape*, where the court below had given an order directing respondents to restore applicants to undisturbed possession of sites occupied by them (from which the applicants had been unceremoniously and coercively removed) in a spoliation application. It was contended by the applicants on appeal that the order was to be interpreted to include an order directing the respondents to transport the applicants back to those sites. The Appellate Division found that the order could not be construed as

a transportation order as it made no mention of transportation and that, if that it was intended by the court below, it would have set out exactly what each respondent was required to do to transport the applicants back to the site and when to do so and what persons were to be transported and whether family members of applicants were included and the like. The applicants had also not sought a transportation order. The Appellate Division found that these and other factors listed pointed strongly to the conclusion that there was no intention on the part of the trial judge to make a transportation order. The conclusion by that court as to the order being clear and unambiguous was made after interpreting the reasons to establish the intention of the court below in accordance with *Firestone* and the approach articulated at the outset of its own judgment.

[45] It follows that the statement in *Administrator, Cape*, relied upon by MTC is taken out of the context of that court's judgment and is not authority for the proposition that if an order is clear, the ratio and reasoning of the court are to be ignored as MTC would have it. Whether the order is clear and unambiguous is thus to be first determined in the context of the judgment and reasons. The position in *Administrator, Cape*, is moreover unlike the present position where a date is given from when the invalidity of a provision is to apply. That date is referenced to 'the judgment of this court' in the order given by this court to replace the High Court's judgment. Once the intention of this court is ascertained, as had occurred in *Administrator, Cape*, it becomes clear that the date of the judgment of this court in that order means precisely that – the date of the judgment of the Supreme Court. This interpretation becomes clear by following the established test for interpreting judgments or orders and does not entail any word-changing or reading-in as contended on behalf of MTC.

[46] The admonition given by this court in *Fischer*²⁰ that the meaning of the order is to be ascertained in context and not semantically without regard to the context should have been heeded.

[47] It follows that the appeal should succeed and the exception should have been dismissed.

Costs

[48] Both parties had in the court below requested the court in its discretion not to apply the costs cap imposed by rule 32(11) of the High Court rules. That sub-rule limits the total costs to be awarded in interlocutory proceedings to N\$20 000. The parties were again in agreement in this court that the court below should not have found that the costs cap in rule 32(11) should be applied.

[49] The rationale behind the rule 32(11) is explained by the Judge-President in *South African Poultry Association & others v Ministry of Trade and Industry others (SAPA)*.²¹ It is to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case.²²

[50] This case is a matter of public interest and considerable importance to the parties and the sums involved are also considerable. Furthermore, another important consideration is the dispositive nature of the exception in the dispute

²⁰ Para 27.

²¹ 2015 (1) NR 260 (HC) para 67 (*SAPA*).

²² Para 67.

between the parties. Both sides also consider that the costs cap should have been dispensed with.

[51] In my view, the High Court erred in not taking into account the approach and considerations set out in *SAPA* and thus acted upon a wrong principle in the exercise of its discretion in considering the costs cap contained in rule 32(11) to be apt. In my view, it should have been dispensed with in the exercise of the court's discretion. The costs award in the High Court should reflect that.

[52] As for the costs on appeal, they should follow the result, save for the costs of the application for condonation and reinstatement. Both sides sought the costs of two instructed counsel, where engaged. Given the importance of the matter to the parties and the issues raised by it, those costs are justified in this appeal.

Order

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

- (a) The application for condonation is granted and the appeal is reinstated, with the appellant to pay the costs of that application.
- (b) The appeal succeeds with costs and the respondent is ordered to pay the costs of appeal, including the costs of one instructing and two instructed legal practitioners.
- (c) The order of the High Court is set aside and in its place the following order is made:

'The exception is dismissed with costs in respect whereof the costs cap set in rule 32(11) will not apply and include the costs of two legal practitioners.'

- (d) The matter is referred back to the High Court for further case management.

SMUTS JA

DAMASEB DCJ

MAINGA JA

APPEARANCES

APPELLANT:

V Maleka SC, with him S Namandje

Instructed by Sisa Namandje & Co
Inc

RESPONDENT:

N Tjombe

Instructed by Tjombe-Elago Inc