

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING: EXCEPTION

Case No: HC-MD-CIV-ACT-OTH-2019/01370

In the matter between:

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

PLAINTIFF

and

TELECOM NAMIBIA LTD

DEFENDANT

Neutral Citation: *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd* (HC-MD-CIV-ACT-OTH-2019/01370) [2020] NAHCMD 452 (2 October 2020)

CORAM: PRINSLOO J

Heard: 4 September 2020

Delivered: 2 October 2020

Reasons: 6 October 2020

Flynote: Interpretation of court's judgment or Order – Basic principles applicable to construing documents also apply to the constructions of a court's judgment or order – Court's intention to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rule – The judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention – If, on such a reading, 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.

Summary: During 2013 the defendant instituted proceedings in the High Court against the plaintiff, 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 as unconstitutional as it constituted the imposition of tax by the plaintiff as opposed to regulatory levies for defraying its expenses. 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 invalid. The plaintiff appealed to the Supreme Court against the judgment and order of the High Court. The appeal was heard and the Supreme Court delivered its judgment on 11 June 2018 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 struck down. The Supreme Court also dealt with the consequences arising from the order it made in respect of the unconstitutional nature and invalidity of the related provisions of the Act and regulations.

However, subsequent to the Supreme Court's order a dispute arose between the parties with regard to the meaning and the import of the order read together with certain paras of the judgment. Based on its understanding of the Supreme Court order, the plaintiff then proceeded to institute action against the defendant on 29 March 2019 for payment of levies and related charges in an amount of N\$ 66 559 010, which comprises of regulatory levy due as at 31 March 2016, 31 March 2017 and 31 March 2018. The

defendant however filed an exception on 23 May 2019 on the ground that the plaintiff's particulars of claim discloses no cause of action and is accordingly excipiable.

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 the Supreme Court confirmed the unconstitutionality of the concerned section. The conflicting interpretation by the defendant 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.

Held that the basic principles applicable to construing documents also apply to the constructions 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 rule. 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. If, on such a reading, 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.

Held that from reading the reasoning of the Supreme Court's judgment the words that were used by the Court were ordinary English dictionary words and do not appear to be of such a complicated nature to create ambiguity. They should be given their ordinary grammatical meaning. The words such as 'confirmed by this court', 'from now', 'immediate effect after this judgment' are direct and unmistakable and that the defendant's interpretation would render the choice and use of words by the Supreme Court redundant.

ORDER

1. The second ground of exception raised by the excipient/defendant is dismissed with costs. Such costs to include the costs of two instructing counsel, which is capped and limited to Rule 32(11).
2. The matter is postponed to 29 October 2020 at 15h00 for further Case Planning Conference.
3. Further joint case plan must be filed on or before 26 October 2020.

RULING

PRINSLOO J

The Parties

[1] The plaintiff/respondent 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 2009. The defendant/excipient 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 1992.¹

Background

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

[2] During 2013 the defendant instituted proceedings in the High Court against the plaintiff,² 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 Act³ (the Act) as unconstitutional as it constituted the imposition of tax by the plaintiff as opposed to regulatory levies for defraying its expenses.

[3] 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 invalid.⁴ 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.

[4] The appeal was heard and the Supreme Court delivered its judgment on 11 June 2018⁵ 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 struck down. The Supreme Court also dealt with the consequences arising from the order it made in respect of the unconstitutional nature and invalidity of the related provisions of the Act and regulations under paras 94 to 112 of the judgment.

[5] The order made by the Supreme Court reads as follow:⁶

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

² *Telecom Namibia Limited v Communications Regulatory Authority of Namibia* (A 448/2013) [2016] NAHCMD 292 (29 September 2016).

³ 8 of 2009.

⁴ *Ibid.*

⁵ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Another* 2018 (3) NR 663 (SC).

⁶ *Supra* para 113.

- (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.”

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

[6] However, subsequent to 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.

[7] Based on its understanding of the Supreme Court order, the plaintiff then proceeded to institute action against the defendant on 29 March 2019 for payment of levies and related charges in an amount of N\$ 66 559 010, which comprises of regulatory levy due as at 31 March 2016, 31 March 2017 and 31 March 2018. The defendant however filed an exception on 23 May 2019 on the ground that the plaintiff’s particulars of claim discloses no cause of action and is accordingly excipiable. The exception could however not be heard at the time as the plaintiff filed an application at 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.

[8] After the Supreme Court’s decision to decline to interpret the order , the plaintiff filed a stay of proceedings application, pending the outcome of the decision of the stated

case filed between the plaintiff and MTC,⁷ which application was refused by this court on 16 June 2020.⁸

The application in casu

[9] The defendant raised two grounds of exception, the first being that the plaintiff relies on s 23(1) of the Act which authorises the plaintiff to impose a levy by regulation, after having followed a rule making procedure, the latter being prescribed for purposes of making regulations to impose regulatory levy. Defendant however argues 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 that such a rule making procedure was published in the Government Gazette or followed.

[10] The above ground, although argued extensively in oral by defendant's counsel, was abandoned subsequent to the hearing after plaintiff's counsel handed up in court the rule making procedure as defined in the Act published in Government Gazette 4839 of 2011. The defendant's counsel filed a status report after the hearing wherein he indicated that the defendant withdraws the first ground of exception, i.e the rule making procedure exception and costs in relation to the the said exception is to stand over for determination. The court was therefore only required to deal with the second exception.

[11] The second exception relates to the judgment date (as Mr Heathcote puts it) which I will deal with below.

The defendant's argument

⁷ *Communications Regulatory Authority of Namibia vs Mobile Telecommunications Namibia* (HC-MD-CIV-ACT-OTH-2019/01367). The same issue regarding the interpretation of the Supreme Court's order arose between the plaintiff and MTC.

⁸ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd* (HC-MD-CIV-ACT-OTH-2019/01370) [2020] NAHCMD 238 (16 June 2020).

[12] Mr Heathcote, in a nutshell, argued that the invalidity of s 23(2)(a) of the Act is from the High Court order, which is 29 September 2016 and accordingly s 23(2)(a) of the Act and as a consequence the regulation which was made thereunder, were null and void since 29 September 2016. The charge of regulatory levies for the period from 29 September 2016 and premised on the said s 23(2)(a) of the Act and the regulation is unenforceable. It therefore follows that the plaintiff's particulars of claim, as a consequence, does not disclose a cause of action, alternatively the particulars of claim do not contain averments necessary to sustain a cause of action against the defendant.

[13] Mr Heathcote submitted that the default position when an Act is declared unconstitutional is that the said Act is null and void since inception. He argued that the court however has the power to provide a different date from which the unconstitutional order operates, which the Supreme Court did in this matter by substituting the High Court's order with effect from the High Court order's date which declared the section unconstitutional. He argued that the Supreme Court did not alter the date of the High Court judgment and that the High Court's order is quite clear and effect must be given to it. He referred the court to the case of *Handl v Handl*⁹ and *Fish Orange Mining Consortium (Pty) Ltd v !Gooseb.*¹⁰ Counsel argued that if an order is clear in light of the ordinary grammatical meaning of the words used, then no further enquiry arises, as the Supreme Court confirmed in the *Handl* matter. In such an instance effect must be given to the ordinary grammatical meaning of the order itself. He argued that: 'nothing is vague about the date of the High Court judgment. It is simply the date, nothing else. . . No amount of evidence or interpretation will ever move the date of the judgment of the High Court. It is and will always remain 29 September 2016. It is fixed, and unalterable. No evidence, and argument, however ingenious, can alter that'

[14] Counsel further referred the court to the case of *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others*¹¹ wherein it was

⁹ 2008 (2) NR 489 (SC) para 61.

¹⁰ 2014 (2) NR 385 (SC).

¹¹ (A199/09) [2010] NAHC 85 (08 September 2010).

stated that: ‘the application of this test,¹² the point of departure, also in this instance, will be to consider the language and the court reasons used in those portions of the judgment which are relevant to the part of the order which is sought to be rectified in order to ascertain from a reading thereof whether or not they are clear and unambiguous or not and whether same requires clarification’.

[15] In conclusion counsel prayed that the exception be upheld and the plaintiff’s claim be dismissed because the general rule providing for an opportunity for an amendment cannot find application in this case as no amendment will be able to rectify the ground of exception raised. He further submitted that costs should be awarded in the defendant’s favour, including costs of one instructing counsel and two instructed counsel.

The plaintiff’s argument

[16] 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 confirming the unconstitutionality of the concerned section.

[17] Mr Namandje, counsel for the plaintiff, submitted that defendant’s ground of exception of no cause of action with regard to the interpretation of the Supreme Court order is premised on its wrong interpretation and understanding of the court’s reasoning and order. He argued that the Supreme Court was unequivocal in its stance when it made its order that the invalidity of the provision under dispute will operate from the date the Supreme Court confirmed the invalidity – he referred this court to para 94 to 112 of the Supreme Court’s judgment. Counsel referred the court to the case of *ABSA*

¹² Established in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) and confirmed in the *Handl* matter.

*Bank Ltd t/a Volkskas Bank v Page and Another*¹³ which dealt with the legal principles on interpretation of court orders wherein the court stated that:

‘. . . . The manner in which ambiguities in an order of court are to be dealt with is explained in *Firestone South Africa (Pty) Ltd v Gentiruco* (case number 105/2000, judgment delivered on 28 September 2001). The order and the court’s reason for giving it must be read as a whole. If uncertainty on the meaning of the order still exists extrinsic circumstances leading up to the court’s judgment may be investigated in order to clarify it’.

[18] Mr Namandje referred the court to some of the important parts of the Supreme Court’s judgment and the language used to support the plaintiff’s case that the invalidity operates from 11 June 2018. For purposes of completeness I will quote the plaintiff’s interpretation and understanding of the Supreme Court’s order as appearing in its heads of argument. Mr Namandje submitted and argued as follows:

23.1 Under para 95 of the judgment the Supreme Court started off by referring to Article 25(1)(a) of the Namibian Constitution which, *in contra* to the ordinary default position referred to above, empowers the Court to suspend the order of invalidity and afford the Legislature the opportunity to correct the defect identified by it. During the period of suspension, the implicated provision would continue to have the full force despite the invalidity confirmed.

23.2 In response to Telecom’s counsel during the hearing urging the Court not to apply its constitutional discretion in respect of remedy under Article 25(1)(a), the Supreme Court, with reference to Article 80(2), discussed the discretion the High Court has when dealing with consequences of declaring Acts of Parliament as invalid.

23.3 After discussing cases from comparative jurisdictions in respect of discretionary powers of Courts when dealing with consequences of invalidity, the Supreme Court under para. 104 found that the High Court has jurisdiction to delay the order of invalidity if it found, as it did, that section 23(2)(a) and Item 6 were unconstitutional.

¹³ (105/2000) [2001] ZASCA 114; [2002] 1 All SA 99 (A); [2002] 2 All SA 241 (A) (28 September 2001).

23.4 The Supreme Court then, in the last sentence under para. 104 stated that: “The question arises whether the order of invalidity should be delayed.” After posing such a question, it remarkably stated under paras. 105 and 106 that:

“[105] The levy of 1.5% on annual turnover is not per se an unconstitutional exercise of discretionary powers 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.¹⁴ In other words, the order of invalidity will operate ex nunc. (own emphasis)”

23.5 From the above two quoted paragraphs of the Supreme Court’s judgment the following is plainly clear:

23.5.1 The Court found that the levy of 1.5% on annual turnover is not per se an unconstitutional exercise of discretionary power as it was well within the international norm. It found that because of such a fact same was a compelling reason “for not making the order of invalidity operate ex tunc”.

23.5.2 Under para. 106 the Court, after setting out the reasons why it should delay the invalidity so that such would not operate ex tunc, decided to validate section 23(2)(a) of the Act and Item 6 **up to** the point that the invalidity of section 23(2)(a) and section 6 was confirmed¹⁵ “by this court” (**Supreme Court**)

¹⁴ The words “up to the point that its invalidity has been confirmed by this court” are deliberate, direct and unmistakable.

¹⁵ The interpretation of the judgment by the Defendant would render the choice and use of the words by the Supreme Court under para. 106 “**confirmed**” and “**by this court**” redundant and superfluous.

23.6 We submit that in fact the interpretation by the Defendant would render the whole para. 106 of the Supreme Court's nugatory

23.7 Such kind of an interpretation of a Court order or a statute which render some part of a statute or Court order nugatory is inappropriate

23.8 The Supreme Court after making remarks under para. 106 quoted above further stated that: *In other words, the order of invalidity will operate ex nunc.*" *Ex nunc*, as opposed to *ex tunc*, would mean that the Supreme Court decided to delay the invalidity of section 23(2)(a) and Item 6 until the date that its invalidity was "confirmed" by (this Court) the Supreme Court.

23.9 We submit that the above becomes even more clearer when one, in context, reads the first sentence of para. 107 of the judgment, which read as follows:

"[107] No doubt the order of invalidity taking immediate effect after this judgment¹⁶ creates a legal vacuum in the levy regime. (own emphasis)"

23.10 The Supreme Court, in relation to Item 6 (regulation) then remarked under para. 111 of its judgment as follows:

*"[111] 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." (own emphasis)"*

23.11 It appears that because of the phrasing of the Supreme Court orders to the effect that the "appeal succeeds and the order of the High Court is set aside and substituted" and, "subject to paragraph (c) the order of invalidity in paragraph (a) will take effect from the

¹⁶ The phrase used by Court "after this judgment" is not open to ambiguity. It is a pertinent reference to the Supreme Court's judgment.

date of this judgment”, the Defendant without regard to the Court’s reasoning under paras. 94 – 112 argues that the invalidity of sections 23(2)(a) operates from the date of the High Court order not from the date of the Supreme Court. The fallacy of the Defendant’s argument in this respect is, with respect, bottomless.’

[19] The above was the argument advanced by Mr Namandje with regard to the plaintiff’s contention that the invalidity operates from 11 June 2018, being the Supreme Court’s order.

[20] On the issue of costs counsel argued that the defendant’s exception is bad in law and must be dismissed with costs not capped under rule 32(11).

The applicable law and its application to the facts

[21] The well known case of *Van Straten N.O and Another v Namibia Financial Institutions and Another*¹⁷ elucidated the principles of determining an exception as follows:

‘[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff’s pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.’

[22] The court therefore has to take the facts as alleged by the plaintiff’s pleadings as correct in determining an exception taken on the ground that no cause of action is disclosed.

¹⁷ (SA 19/2014) [2016] NASC 10 (08 June 2016).

[23] Turning to the issue at hand with regard to the ground of exception raised by the defendant that due to the fact that the invalidity of s 23(2)(a) starts running from the High Court order and not the Supreme Court order no cause of action exists, the legal principles of interpreting a court's judgment or order was well pronounced in the case of *Firestone South Africa (Pty) Ltd v Genticuro AG* where the court held as follows:

'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the constructions 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. See *Garlick v. Smartt and Another*, 1928 A.D 82 at p. 87; *West Rand Estates Ltd. v. New Zealand Insurance Co. Ltd.*, 1926 A.D. 173 at p. 188. Thus, 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. If, on such a reading, 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. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk. v. Peens en Andere*, 1970 (2) S.A. 35 (N.C.) at p. 39F-H).' (own emphasis)

[24] The Supreme Court's reasons, having in mind the above principle that the orders and judgment of a court must be read as a whole, dealing with the invalidity must be considered in order to determine whether the operation of the invalidity starts running from 29 September 2016 (date of High Court order) or from 11 June 20018 (date of Supreme Court order).

[25] To assist in understanding the context in which the order was made and the expression used in paras 94 to 112 of the Supreme Court judgment it is necessary to resort to the reasoning of the judgment itself that preceded the order. From reading the reasoning and as far as I was able to establish, the words that were used by the Supreme Court were ordinary English dictionary words and do not appear to be of such

a complicated nature to create ambiguity. They should therefore be given their ordinary grammatical meaning.

[26] If one has regard to para 106 of the judgment, the Honourable Damaseb DCJ used the words '**confirmed by this court**'. The 4th ed of the *Cambridge Advanced Learner's Dictionary*¹⁸ defines the word '**this**' as follows:

'Used for a person, object, idea, etc. to show which one is referred to. For example: Can you sign this form here for me? This is the one I want. What's this? Is this what you're looking for?'

[27] Considering para 106 it would appear that the Supreme Court was referring to the section as invalidated by it and not by the High Court. If it was the court's intention to refer to the High Court order, the Supreme Court would have referred to it in unequivocal terms and specifically state 'High Court' as opposed to 'this court'. The court clearly made reference to 'this court'. In other words the Supreme Court's invalidation of the section.

[28] The word 'ex nunc' used in para 106 is a Latin phrase which means '**from now on**'. It is used as a legal term to signify that something is valid and/or invalid only from now on and into the future, not the past. And if one have regard to the ordinary meaning of the words used they mean what they say, in other words 'from that very moment' and into the future, not the past. The opposite of ex nunc is 'ex tunc' which means '**from the outset**'. In other words from 'the beginning'.

[29] As held by *Administrator, Cape, and Another v Ntshwaqela and Others*¹⁹

'The Court's intension 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 reasoning for giving it must be read as a whole order to

¹⁸ *Cambridge Advanced Learner's Dictionary* 4th ed 2013 Cambridge University Press.

¹⁹ 1990 (1) SA 705 (A) at 715 F-I.

ascertain its intention. If on such reading, 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. Indeed, in such a case even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.'

[30] I am of the opinion that the Supreme Court's order was clear and unambiguous and nothing more need to be said about it. This position becomes even clearer when you read the first sentence of para 107 which states that: 'No doubt the order of invalidity taking immediate effect after this judgment creates a legal vacuum in the levy regime.' From the reading of this sentence it is clear that the Supreme Court intended for the invalidity to take effect as from the date of the Supreme Court's order by using words such as '**immediate effect after *this* judgment**'.

[31] My argument is cemented more when regard is had to para 109 and 111 of the judgment which reads that:

'[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.

...

[111] . . . the order of invalidity will not have retroactive effect and will have legal consequences only from now and into the future.' (Own emphasis).

[32] There is therefore no ambiguity in any of the terms used by the Supreme Court. The words used do not appear to be complicated terms and so they should be given their ordinary meaning. I agree with Mr Namandje that words such as 'confirmed by this

court', 'from now', 'immediate effect after this judgment' are direct and unmistakable and that the defendant's interpretation would render the choice and use of words by the Supreme Court redundant.

Costs

[33] The issue of cost is ultimately in the discretion of the court. The general rule is that cost follows the event and that the successful party should be awarded his or her costs. The rule of cost to follow the event is normally only departed from when there are good grounds for doing so. In this current matter there are no grounds that exists for me to depart from the general rule nor was the case complicated to warrant such departure. I therefore see no reason why the court should not order costs against the defendant limited to Rule 32(11).

[34] My order is therefore as follows:

1. The second ground of exception raised by the excipient is dismissed with costs. Such costs to include the costs of two instructing counsel. Such costs to be capped and limited to Rule 32(11).
2. The matter is postponed to **29 October 2020** at **15h00** for further Case Planning Conference.
3. Further joint case plan must be filed on or before 26 October 2020.

JS PRINSLOO

Judge

APPEARANCES:

PLAINTIFF/RESPONDENT:

S Namandje, (assisted by T Ileka)
Of Sisa Namandje & Co. Inc.
Windhoek

DEFENDANT/EXCIPIENT:

R Heathcote, SC (assisted by C van der
Westhuizen)
Instructed by Shikongo Law Chambers
Windhoek