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OF THE

REPUBLIC OF NAMIBIA

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General Notice

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 223

2021

NOTICE OF INTENTION TO AMEND REGULATIONS REGARDING RULE-MAKING PROCEDURES: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority of Namibia, under section 129 of the Communications Act, 2009 (Act No. 8 of 2009), and in terms of the Regulations Regarding Rule-Making Procedures published under General Notice No. 334 of 17 December 2010 -

- (a) publishes this Notice of Intention to Amend the Regulations Regarding Rule-Making Procedures as set out in Schedule 2; and
- (b) sets out the concise statement of the reasons and purpose for the proposed regulations in Schedule 1.

The Authority invites the public to submit comments in writing to the Authority within 30 days from the date of publication of this notice in the *Gazette*, and a written comment must -

- (a) contain the name and contact details of the person making the written submissions and the name and contact details of the person or entity on whose behalf the written submissions are made, if different;

- (b) be clear and concise; and
- (c) be sent or delivered -
 - (i) by hand to the head office of CRAN, Communications House, 56 Robert Mugabe Avenue, Windhoek;
 - (ii) by post to CRAN, Private Bag 13309, Windhoek, Namibia;
 - (iii) by electronic mail to CRAN email address: legal@cran.na;
 - (iv) by facsimile to CRAN facsimile number: +264 61 222790; and
 - (v) by facsimile-to-email to number: 0886550852.

H. M. GAOMAB II
CHAIRPERSON
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

SCHEDULE 1

CONCISE STATEMENT OF PURPOSE

The purpose of the proposed amendment is to -

- (a) ensure that the regulations are in line with the enabling Act and in particular section 129 read with the other relevant sections; and
- (b) repeal the process for requests for reconsideration of regulations made in terms of section 129 of the Act for being inconsistent with section 31 of the Act.

SCHEDULE 2

**AMENDMENT OF REGULATIONS REGARDING RULE-MAKING PROCEDURES:
COMMUNICATIONS ACT, 2009**

The Communications Regulatory Authority of Namibia, under sections 129 of the Communications Act, 2009 (Act No. 8 of 2009), after having followed the rule-making procedure in terms of the Regulations Regarding Rule-Making Procedures published under General Notice No. 334 of 17 December 2010, has amended the regulations as set out in the Schedule.

SCHEDULE

Definitions

1. In these regulations “the Regulations” means the Regulations Regarding Rule-Making Procedures published under General Notice No. 334 of 17 December 2010.

Amendment of regulation 4 of Regulations

2. Regulation 4 of the Regulations is amended by the substitution for subregulation (2) of the following subregulation:

“(2) The Authority -

- (a) must initiate rule-making proceedings in respect of sections 23(1), 38(2)(c) and (6), 44(2), 48(6), 49(1) and (11)(d), 50(9), 53(20), 56(2), 57(1) and (10), 59(4), (81) (1), (84)(1), 89(1) and (6) and 93(2) of the Act that require the following of a rule-making procedure as contemplated in section 30(3) of the Act and as set out in these regulations;
- (b) may, when the Authority thinks appropriate, initiate rule-making proceedings in respect of the making of regulations for which the Act does not require a rule-making procedure as contemplated in section 30(7) of the Act.”.

Repeal of regulation 12 of Regulations

- 3. The Regulations is amended by the repeal of regulation 12.

SCHEDULE 3

LEGISLATIVE OPINION

Instructions: Advice on the Interpretation of Section 31 Read with Section 32 of the Act.

Facts:

- 1. Section 31 and 32 of the Act provides as follow:

“Reconsideration

31. *The Authority may, on its own motion or on a petition filed by an aggrieved party to any proceedings, reconsider any order or decision that it has made, within 90 days from the date of making that decision or issuing that order.”.*

“Review of actions of Authority

32. (1) *Any person may take any regulation for which procedures have been prescribed in terms of section 30 on review on the same grounds and in the same manner as a decision of an administrative body.*

(2) *Any person who has a substantial interest in any proceedings before the Authority may not take any decision, order, regulation or any other action that is made or taken by the Authority as a result of such proceedings, on review after a period of six months from the date on which that person has become aware of the decision, order, regulation or action concerned.”.*

- 2. Regulation 12 of the Regulations Regarding Rule-Making Procedures published under General Notice No. 334 of 17 December 2010 provides as follows:

“Reconsideration

12. (1) *The Authority may reconsider any regulation made in terms of these rule- making procedures, within the time frame set out in section 31 of the Act.*

Any person may submit a request in writing to the Authority to reconsider any regulation made in terms of these rule-making procedures, within 30 days of the publication of the final regulations, and the Authority must reconsider such regulation within the time frame set out in section 31 of the Act.

The Authority may publish its decision on reconsideration without further submissions being received, or it may provide an opportunity for the public to provide further written or oral submissions in a manner stated by the Authority.”.

3. The Notice of Intention to Amend the Regulations Regarding Rule-Making Procedures published under General No. 457 of 3 November 2020 seeks, among others, to amend regulation 12 in order to insert certain provisions probably to improve the provision.

Question:

The question is whether for all purposes and intent section 31 that applies to “orders” and “decisions” also applies to “regulations” in respect of reconsideration after final publication in the *Gazette*?

Another pertinent question is whether for all purposes and intent a word “order or decision” includes “regulation” properly made by the Authority and finally published in the *Gazette* for implementation?

Discussion:

The answer to the latter question is unequivocally no, because the word “order” does not include “regulation” neither does the word “decision” includes “regulation” nor can either of them be interpreted to mean “regulation”.

In our view, section 31 is crystal clear when it only refers to the words “order” and “decision” and excludes the word “regulation” since that is the intention of the Legislature.

A “regulation” is a subsidiary legislation, a legislative action derived from a “legislative making process (law making process)” and cannot be construed to be an “order” or “decision” made by a functionary in the normal course of business.

The Authority when it made regulation 12, after having followed the rule-making procedure, confers powers on itself to make regulations providing for “reconsideration of a “regulation” (a *final published regulation*). And by the same regulation it confers powers on itself to reconsider a regulation made by it and finally published in the *Gazette* for implementation.

Section 31 deliberately refers to “order” or “decision” and does not refer to the word “regulation”. Despite section 31 of the Act being crystal clear on the choice of words, the Authority decided to read into and inserts the word “regulation” in that section.

In the final analysis the end result in terms of the Authority thinking is that section 31 of the Act would now read hypothetically speaking as follows:

“31. The Authority may, on its own motion or on a petition filed by an aggrieved party to any proceedings, reconsider any order, decision or regulation that it has made, within 90 days from the date of making that decision or issuing that order or making that regulation.”.

The Authority is not correct to read the word “regulation” into section 31.

It follows therefore that the Authority has no power to make section 31 applicable to “regulation”. A principal legislation (Act) or subsidiary/subordinate legislation (regulation) once passed or made and published in the *Gazette*, whether operational or not, cannot be reconsidered.

Once legislation, whether principal or subsidiary, is published in the *Gazette* it becomes fixed and can only be “amended” or “repealed”, if it is lacking, or otherwise a subsidiary legislation (regulation) can be “reviewed” (*by the court*) on the same grounds and in the same manner as a decision of an administrative body as contemplated in section 32.

Conclusion:

A “reconsideration” of a principal legislation (Act) or a subsidiary legislation (regulation) passed or made and published in the *Gazette* is not part of our law making process, Statute Book or jurisprudence, neither part of the rule of law nor is it part of other many jurisdictions we share the same jurisprudence with.

What the Authority has legislated as regulation 12 “to reconsider a regulation made and finally published in the Gazette” and the attempt the Authority is making to improve on that regulation is *ultra vires* its powers to make regulations under the Act.

The action of the Authority is based on the wrong interpretation of section 31 read with section 32 of the Act.

Therefore regulation 12 is entirely invalid and has no legal force and effect due to the functionary’s lack of power to make such regulation.

Advice:

We therefore advise that regulation 12 should not be amended but rather repealed in its entirety.
