

Note on the “Altech Judgement”

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Introduction

In the matter of Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of the Independent Communications Authority of South Africa & Others (“the Altech Case”) the Transvaal Provincial Division of the High Court of South Africa appears to have finally put to rest the ongoing confusion as to whether or not Value Added Network Service (VANS) licence holders may “self-provide” their own facilities.

While the fall-out from the decision is likely to be profound, and bearing in mind the right of any of the Respondents to appeal the matter, this note attempts to tease out some of the implications of the judgement. It is by no means a full analysis – please don’t be silly and treat it as such.

Self-provision

While much of the judgement focuses on administrative law and procedural issues, by far the most important aspect is that relating to self-provision, in respect of which the following order was made:

“10.5 It is declared that the Applicant was entitled to self-provide its own telecommunications facilities with effect from 1 February 2005.

10.6. It is declared that clause 1.1(b) of the value added network services licence issued to the Applicant by the Second Respondent on 18 August 2005 to the extent that it purports to deprive the Applicant of its entitlement to self-provide telecommunications facilities is of no force and effect.”

What does self-provision actually mean? Definitions vary but the one favoured by ICASA in its 2005 Draft VANS Regulations (which the Minister refused to approve) will suffice:

“the procurement of any telecommunication facilities by the Licensee from any supplier of telecommunications facilities and to use them under and in accordance with this licence to provide the telecommunication service”.

In simple terms: VANS have now been held to have the same rights as, *inter alia*, Telkom and Neotel in respect of deploying telecommunications networks on a national basis. A VANS licensee has the right, since 1 February 2005, to go to a equipment vendor, purchase equipment and deploy it in such a way that it makes up a telecommunications network.

Altech or all VANS?

The judgement pertains specifically to Altech and ICASA's initial response thereto seems to indicate that it regards the judgement as being binding only with regard to Altech, and not necessarily all VANS.

In the opinion of the Author such a restrictive interpretation would be absurd and not sustainable for the simple reason that all VANS have the same license. What holds for one in this instance holds for all.

So a VANS can self-provide – now what?

Firstly, VANS licence holders, prior to licence conversion being effected, may now self-provide their networks and provide value added services there over. The exercise of this right will be subject to frequency licensing or lawful use of “unlicensed” spectrum. Where a licensee wishes to self-provide fixed links this will need to be done within the existing framework inherited from the Telecommunications Act (and with one wary eye on the aggressive moves by metropolitan municipalities to further regulate these activities).

Secondly, the Altech judgement has direct implications for the licence conversion process. Remember that the ECA requires ICASA to convert licenses issued under the Telecommunications Act into licenses deemed to have been issued under the ECA “on no less favourable terms”.

In her Answering Affidavit in the Altech matter, the Minister of Communications was explicit with regard to the effect of a finding that VANS could self-provide:

“49 AD PARAGRAPH 122

I have already indicated that chapter 15 regulates the conversion of licences and any licensee which had a right under the Act, has a right to have the licence converted on the same terms.

Any VANS licensee who had a right to self-provide under the Act is entitled to retain that right and be granted an I-ECNS under the ECA. The licensee would have to demonstrate to

ICASA that it had the right to self-provide.”

(my emphasis)

Paragraphs 10.5 & 10.6 of the judgement, quoted above, constitute proof that all VANS licensees (or at least those whose licenses were granted prior to 19 July 2006) were entitled to self-provide as at 19 July 2006. A VANS licence holder could therefore approach ICASA with a copy of the judgement and this would more than adequately demonstrate that such licensee has the right to self-provide.

In the words of the judge:

“10.4 The decisions of the Second Respondent to the effect that the Second Respondent is not obliged to convert the Applicant’s value added network service licence into an individual electronic communications network service licence as well as an individual electronic communications service licence in terms of Sections 92 & 93 of the Electronic Communications Act, 36 of 2005, and that the Applicant is required to apply to the Second Respondent for an individual electronic communications network service licence and that the Applicant must do so by way of participation in a competitive process pursuant to which the Second Respondent will select those value added network services licensees who will be granted the right to acquire an individual electronic communications network service licence, are hereby reviewed and set aside.”

In other words: VANS have the right to self-provide. Accordingly they must, **as of legal right**, be entitled to be converted into an IECNS licence.

Will VANS have to pay to get an IECNS?

The judgement is unfortunately a little confused in this regard.

If VANS have had the right to self-provide then they have had such right since 1 February 2005. No consideration or licence fee was payable in respect of this right.

Note that we are talking here about the licence conversion process & not applications for new licenses. The fact that Neotel were required to pay R100 million for their various licenses is accordingly not relevant (other than to Neotel who will probably regard this as fair value for the extensive frequency licenses which they were also granted). Neither is the R2.5 million paid by WBS/iBurst or Swiftnet.

While this is likely to be fertile ground for future argument, it does not appear to the author as if there are any grounds for requiring VANS to make any additional payment for having their licence converted to an IECNS.

ICASA’s competitive process for conversion of VANS into IECNS

This process, launched pursuant to paragraph 3 of the Ministerial Policies and Policy Directions published in

Government Gazette No. 30308 of 17 September 2007, is dead. VANS who spent a great deal of time and money on participating in this process are probably best advised to simply regard this expenditure as an investment in better defining their future strategy as an IECNS licensee.

This is because said paragraph 3 has now been declared to be *ultra vires* and of no force and effect.

“10.2. It is declared that paragraph 3 of the Ministerial Policies and Policy Directions published in Government Gazette No. 30308 of 17 September 2007 and drafted in terms of section 3 of the Electronic Communications Act, 36 of 2005, is ultra vires and of no force and effect.

10.3 Paragraph 3 of the aforesaid Ministerial Policies and Policy Directions is therefore hereby reviewed and set aside.”

The judge did not pull any punches in criticising the Minister for her role in this debacle and in making it clear that paragraph 3 was badly drafted and that the interpretation which the Minister subsequently attempted to place on her policy direction was preposterous and unsustainable.

Practically speaking?

It needs to borne in mind that legal entitlement to an IECNS does not turn a VANS licensee into a Telkom or a Vodacom overnight. It simply gives them an opportunity to compete with the already-established entities and it is stating the obvious to point out that this will be no easy task.

Both the Minister and ICASA made extensive argument to the effect that granting the right to self-provision to VANS would result in some 600 licensees taking up IECNS licenses and that this would be an absurd result. This was rejected by the judge and is, with respect, an absurd argument which does not tally with certain other pronouncements made by the Authority.

While it is nigh on impossible to accurately forecast in this regard the following needs to be borne in mind when evaluating the practical effect of the judgement:

- ICASA has previously stated that the critical date for the vesting of rights to be carried over for licence conversion is 19 July 2006 and that VANS granted after this date will not be allowed to participate in the licence conversion process. This immediately reduces the 600 figure to approximately 400. [Note that both ICASA and the Minister appear to have negated their earlier statements by referring to 600 as the number of VANS to be converted in their respective affidavits in the Altech matter.]
- As noted by the judge @ paragraph 6.25 of the judgement “of the 600 VANS licensees only 177 responded to the [ICASA]’s request to provide detail for purposes of conversion and that even fewer of them would insist on I-ECNS licences”.

- The IECNS to be awarded is likely to be of limited value in the absence of a radio frequency spectrum licence. The law relating to these licenses is currently a mess and this is unlikely to be sorted out in the near future.
- The vast majority of VANS licensees are simple resellers of SAIX or Internet Solutions bandwidth – there was no regulatory requirement for such resellers to be licensed but it was commercially necessary before wholesale rates could be obtained from Telkom.
- The cost of rolling out a national or provincial network is staggering and will have to be justified against the fact that there are already a number of entrenched and well-resourced incumbents.
- The ECA also makes provision for class ECNS licenses which will authorise the holder to self-provide its network within the boundaries of a local or district municipality. It is likely that a large number of VANS will be satisfied with an outcome whereby they obtain one or more of these licenses pursuant to the licence conversion process.

The author's personal belief is that ICASA should accept the judgement and work with industry to explore the practical implications. Adherence to "slippery slope" and "opening of the floodgates" arguments will not advance the liberalisation of telecommunications in South Africa or lead to greater competition and lower costs to consumers.

Will there be an appeal?

The DoC and ICASA will require an opportunity to study the judgement in detail before deciding on whether they will appeal it or not. In the event of an appeal the usual procedure would be for the judgement to be suspended pending the determination of an appeal. This means that the VANS regulations and licence terms and conditions would remain in force until such time as the appeal is decided.

It is not possible to second-guess the DoC and ICASA in this regard but the following factors would be relevant to their consideration of the matter:

- Any appeal will significantly delay the licence conversion process and it will no longer be possible for ICASA to blame such delays on others (not that they were really positioned to do so in the first place); and,
- The judgement will no doubt result in some bruised egos. Bruised egos are more often than not regarded as grounds for appeal in matters of this nature.

There is also a possibility that another affected party, such as one of the incumbent licensees, will regard it as necessary to intervene, through lobbying or other measures, in order to protect their own interests.

In my opinion it is the self-provision aspect of the judgement which is least open to attack or appeal, and I suspect that balance of the procedural issues covered are largely irrelevant.

Next steps

Assuming there is no appeal and ICASA accepts that it now has to proceed to issue IECNS licenses to those VANS that wish to have them:

- ICASA will need to publish draft IECNS licenses intended to be awarded to VANS licensees entitled thereto. The Authority has already published draft IECNS licensees in respect of incumbents and draft IECS licenses in respect of both incumbents and qualifying VANS.
- These draft IECNS licences will be subject to a public participation process prior to finalisation.
- Once licenses have been finalised and licence conversion takes place ICASA will engage in a further process to try and equalise the obligations attaching to IECNS licenses. This is necessary due to the fact that the IECNS licenses to be issued to the incumbents contain a number of universal service and other obligations.

Indirect effect – emboldening the industry

Perhaps the most significant non-legal implication of the judgement is that it will embolden industry players to challenge decisions made by ICASA and the Minister. In the opinion of the author the history of telecommunications regulation in South Africa is littered with examples of the Minister and, to a lesser extent, the Regulator, simply ignoring the law in pursuit of poorly-formulated policy objectives. It is to be hoped that the Altech judgement will give industry entities greater confidence in not simply accepting bad law.

Outstanding issues

There are still a number of issues relating to the conversion of VANS which require clarification:

- Now that the self-provision issue has been settled in favour of VANS it is likely that some of the licensees that received licenses after 19 July 2006 will have a closer look at ICASA's position that they are not entitled to participate in the licence conversion process.
- What is to be done in situations where ICASA has refused to award numbers to a VANS licensee on the basis that it was unlawfully self-providing? Such licensees would appear to have a claim that they should be awarded individual ECS and not class ECS licenses in the licence conversion process.
- Frequency, frequency, frequency & frequency.

Conclusion

As noted in the introduction the effect of the Altech judgement will take some time to play out in full. For now it is sufficient for those previously marginalised by the regulatory framework to celebrate an all too rare victory.