

**The Altech Decision
Implications for VANS licencees as at 3 November 2008**

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Introduction

The licence conversion process drags on and on. Unsurprisingly there is still a great deal of confusion around the rights of VANS licencees to self-provide their own physical networks and the manner in which VANS licences will be converted by ICASA under Chapter 13 of the Electronic Communications Act (“ECA”).

Central to clearing up this confusion is an understanding of the current standing of the judgment delivered in the Altech Autopage matter and the subsequent legal manoeuvring which has taken place.

This brief note is intended to provide clarity with regard to events to date and outline what we can anticipate going forward with regard to the conversion of VANS licences.

Timeline

- 29 August 2008: Altech decision is delivered. In a nutshell the effect of the decision is that VANS can self-provide & therefore must be issued with IECNS licences.

- 8 September 2008: ICASA formally states that it will not appeal the Altech decision & announces that it will proceed to issue IECNS licences to VANS licensees commencing on 22 September 2008.

- 19 September 2008: Minister lodges a notice of her intention to appeal against the Altech decision

- 23 September 2008: Altech write to ICASA arguing that the decision is not suspended against ICASA and ICASA will be in contempt of court unless it issues an IECNS licence to Altech. ICASA gets legal advice to the effect that Altech’s argument is correct and that it is not bound to follow the Minister’s statements (rather these only need to be taken into

consideration).

3 October 2008: ICASA withdraws its notice that it will commence issuing IECNS licences to VANS.

20 October 2008: The Minister launches an urgent application seeking to prevent ICASA from issuing IECNS to VANS. She believes that if ICASA does this it will frustrate her right to appeal.

30 October 2008: Application for leave to appeal against the Altech decision heard in the High Court

31 October 2008: Judgement in application for leave to appeal delivered. Application refused on all points and Minister ordered to pay costs of application.

Where do we stand now?

As things stand ICASA is now required to proceed to issue all VANS licences issued prior to 19 July 2006 (at least)* with an IECNS licence as well as an appropriate ECS licence. I would anticipate that ICASA will issue out a further notice in this regard shortly.

For the sake of clarity note that the competitive process which certain VANS previously participated in in order to obtain an IECNS licence is now defunct and of no further relevance. This is clear from the judgement refusing the Minister leave to appeal.

* There is still no final clarity on the position of VANS licences granted after 19 July 2006 although it seems likely that these will not be part of the licence conversion process but the holders will be issued with ECS licences.

What could still go wrong?

It is still open to the Minister to lodge a petition with the Supreme Court of Appeal (SCA) in terms of which she can request that they consider whether she should have the right to appeal against the original Altech decision. Such petition must be lodged within 15 court days of the delivery of the TPD judgement refusing her leave to appeal (i.e. 21 November 2008).

In the absence of any clarification from the Minister it would probably be advisable to wait until after this date before the matter can be regarded as settled and VANS licensee's entitlement to an IECNS licence can be regarded as certain.

As noted above the Minister has also launched an urgent application to prevent ICASA from issuing IECNS licences to VANS. In the light of the refusal of her application for leave to appeal it is unlikely that this will

proceed as there seems to be little legal basis for it. But the Minister may argue that she still has the right to petition the Supreme Court of Appeal to give her permission to appeal the original Altech judgement, i.e. she can argue that her right to appeal has not been exhausted. The parties may agree to postpone the hearing of the urgent application until after the SCA has made a decision on the Minister's petition (assuming this has been brought).

Finally, the Minister has also indicated an intention to amend the ECA to make it clear that VANS are not entitled to IECNS licences as part of the licence conversion process. This is, however, unlikely, mainly because it is not clear what would be amended and the entire exercise would be massively complex with very slim prospects of success. This strategy also requires time, and the ability of the Minister to further delay licence conversion has been significantly reduced by the refusal of her application for leave to appeal.

Licence Fee regs

One potential difficulty is that the licence fee regulations remain outstanding and it does not seem that these will be finalised before the end of January 2009. While some VANS may opt to undergo conversion anyway there are going to be some ISPA members who will need to assess the final version of the Fees Regulations before they make this decision due to the proposed differential between annual licence fees for individual licences (3% of revenue due to licensed activities) and class licences (1.5% of revenue due to licensed activities).

Conclusion

VANS licencees are on the brink of being awarded, as part of the licence conversion process, an IECNS licence which will entitle them to self-provide their own networks anywhere in South Africa. At this stage we will need to wait for further guidance from ICASA as to how this is going to be practically achieved while also bearing in mind that there is still an avenue of opposition open to the Minister.

Dominic

3 November 2008