

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**CASE NO 2018/20057**

**PH NO 342**

In the matter between:

**CELL C LIMITED**

Applicant

and

**THE INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON, INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

Second Respondent

**AMANDLA.MOBI**

Third Respondent

**CRYSTAL WEB MOBILE AND LEASP (PTY) LTD**

Fourth Respondent

**FREE MARKET FOUNDATION**

Fifth Respondent

**INTERNET SERVICE PROVIDERS'  
ASSOCIATION NPC**

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH  
AFRICA (PTY) LTD**

Seventh Respondent

**MARK P LISTER**

Eighth Respondent

**MOBILE TELEPHONE NETWORKS (PTY) LTD**

Ninth Respondent

**MWEB**

Tenth Respondent

**NATIONAL CONSUMER COMMISSION**

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO**

Twelfth Respondent

**TELKOM SOC SA LTD**

Thirteenth Respondent

**VODACOM (PTY) LTD**

Fourteenth Respondent

**("the main application")**

And the matter between:

<b>MOBILE TELEPHONE NETWORKS (PTY) LTD</b>	Applicant
and	
<b>THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA</b>	First Respondent
<b>THE CHAIRPERSON, INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA</b>	Second Respondent
<b>CELL C LIMITED</b>	Third Respondent
<b>AMANDLA.MOBI</b>	Fourth Respondent
<b>CRYSTAL WEB MOBILE AND LEASP (PTY) LTD</b>	Fifth Respondent
<b>FREE MARKET FOUNDATION</b>	Sixth Respondent
<b>INTERNET SERVICE PROVIDERS' ASSOCIATION NPC</b>	Seventh Respondent
<b>LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LTD</b>	Eighth Respondent
<b>MARK P LISTER</b>	Ninth Respondent
<b>MWEB</b>	Tenth Respondent
<b>NATIONAL CONSUMER COMMISSION</b>	Eleventh Respondent
<b>WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO</b>	Twelfth Respondent
<b>TELKOM SOC SA LTD</b>	Thirteenth Respondent
<b>VODACOM (PTY) LTD</b>	Fourteenth Respondent
<b>("the counter application")</b>	

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### FILING NOTICE

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**TAKE NOTICE THAT** the Ninth Respondent in the main application and Applicant in the counter-application presents the following document for service and filing:

1. MTN's Replying Affidavit in Part A of MTN's Counter-Application, dated 02 August 2018.

Dated at Johannesburg on

2 August 2018

**WEBBER WENTZEL**

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To:

**The Registrar**

High Court of South Africa

Gauteng Local Division, Johannesburg

And to:

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And to:

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And to:

**MARK P LISTER**

Ninth Respondent in the counter application

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\_\_\_\_\_ 2018

\_\_\_\_\_  
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**BY EMAIL PER AGREEMENT**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 20057/2018

In the matter between:

**CELL C LIMITED**

Applicant

and

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AUTHORITY OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON, INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

Second Respondent

**AMANDLA.MOBI**

Third Respondent

**CRYSTAL WEB MOBILE AND LEASP (PTY) LTD**

Fourth Respondent

**FREE MARKET FOUNDATION**

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Ninth Respondent

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**NATIONAL CONSUMER COMMISSION**

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO**

Twelfth Respondent


**TELKOM SOC SA LTD**

Thirteenth Respondent

**VODACOM (PTY) LTD**

Fourteenth Respondent

**("the main application")**

 NG

And the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD** Applicant

and

**THE INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA** First Respondent

**THE CHAIRPERSON, INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA** Second Respondent

**CELL C LIMITED** Third Respondent

**AMANDLA.MOBI** Fourth Respondent

**CRYSTAL WEB MOBILE AND LEASP (PTY) LTD** Fifth Respondent

**FREE MARKET FOUNDATION** Sixth Respondent

**INTERNET SERVICE PROVIDERS'  
ASSOCIATION NPC** Seventh Respondent

**LIQUID TELECOMMUNICATIONS SOUTH  
AFRICA (PTY) LTD** Eighth Respondent

**MARK P LISTER** Ninth Respondent

**MWEB** Tenth Respondent

**NATIONAL CONSUMER COMMISSION** Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO** Twelfth Respondent

**TELKOM SOC SA LTD** Thirteenth Respondent

**VODACOM (PTY) LTD** Fourteenth Respondent

**("the counter-application")**

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**REPLYING AFFIDAVIT IN PART A OF MTN'S COUNTER-APPLICATION**

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I, the undersigned

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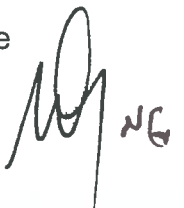
**WILLIAM GRAHAM DE VRIES**

state under oath as follows:

- 1 I am the Corporate Services Executive of the applicant in the counter-application, Mobile Telephone Networks Proprietary Limited (“**MTN**”).
- 2 I am the deponent to the founding affidavit in the counter-application and to the answering affidavit in the main application and remain authorised to represent MTN in these proceedings and to depose to this replying affidavit on its behalf.
- 3 The facts contained in this affidavit are both true and correct, and within my personal knowledge unless the context indicates otherwise.

**INTRODUCTION**

- 4 The purpose of this affidavit is to reply to the answering affidavit of the Independent Communications Authority of South Africa (“**ICASA**”) in MTN’s counter-application.
- 5 I have, in preparing this affidavit, dealt only with issues that call for a reply. I have also sought to avoid unnecessary repetition.
- 6 Accordingly, I do not deal with every averment in ICASA’s answering affidavit paragraph-by-paragraph. My failure to do so does not amount to an admission that any particular factual allegation is admitted or that any legal contention contained in the answering affidavit is well-founded. Any averment in the

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answering affidavit that is inconsistent with what is set out in my founding affidavit and this affidavit is denied.

7 On 21 June 2018, MTN filed a two-part counter-application:

7.1 In Part A, it seeks an order suspending the operation of the End-User and Subscriber Service Charter Amendment Regulations, 2018 (the “**Amendment Regulations**”), alternatively directing ICASA to do so, further alternatively interdicting and restraining ICASA from taking steps to implement or enforce the Amendment Regulations; and

7.2 In Part B, in terms of Rule 53, it seeks to review and set aside ICASA’s decision to make clause 8 of the Amendment Regulations.

8 Part B requires the filing by ICASA of the record of its decision in terms of Rule 53. The record has not been filed to date. MTN files this replying affidavit for purposes of Part A, but expressly reserves its right to file a supplementary founding affidavit and amended notice in respect of Part B, once it has had sight of the Rule 53 record.

9 This replying affidavit is structured as follows:

9.1 First, I explain that, having regard to the common cause facts, ICASA’s position on the rationality of the Amendment Regulations is fatally flawed, in that it effectively concedes that, objectively speaking, the decision to provide for a one-month lead-in period was wrong.



- 9.2 Second, I demonstrate that ICASA's answering affidavit confirms MTN's ground of review based on non-compliance with section 4(5) of Electronic Communications Act 36 of 2005 ("the **ECA**").
- 9.3 Third, I respond to ICASA's answering affidavit paragraph-by-paragraph to the extent necessary.

**ICASA'S POSITION ON THE RATIONALITY AND REASONABLENESS OF THE AMENDMENT REGULATIONS IS FATALLY FLAWED**

10 In the light of ICASA's answering affidavit, the issues in this case have crystallised considerably. ICASA does not deny most of the factual allegations in MTN's founding affidavit. Instead, ICASA relies on a single defence in support of the rationality of the Amendment Regulations. ICASA says that:

- 10.1 MTN did not inform ICASA prior to the publication of the Amendment Regulations of the nature of the changes and developments that would be required to comply, and the extent to which compliance would require systemic changes, or the length of time that would be required to implement such changes.
- 10.2 Had MTN done so, ICASA would have provided for a longer lead-in time and provided licensees with a later implementation date by which to comply, and this litigation would have been avoided.
- 10.3 Given that MTN did not bring detailed information regarding the impossibility of immediate compliance to ICASA's attention, ICASA's failure to provide for a longer lead-in time cannot be impugned.

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11 I am advised that this is mistaken as a matter of law. ICASA effectively concedes that the decision to allow one month for implementation was, objectively speaking, wrong. However, once that is so, the decision is irrational and unreasonable because the test is an objective one, and cannot depend on whether ICASA subjectively believed at the time that its decision was rational and reasonable, based on the information that MTN had provided to it.

12 On this basis alone, MTN submits that it has established a clear right, and not merely a *prima facie* right.

13 Moreover and in any event, ICASA's stance overlooks two crucial facts:

13.1 First, until the publication of final Amendment Regulations on 7 May 2018, MTN did not know what the final contents of these regulations were going to be. In the answering affidavit, ICASA itself accepts that, prior to that, it had engaged in a consultative process. That process had yielded extensive submissions by various third parties in response to the draft regulations published by ICASA on 7 August 2017 and on 17 November 2017 (the "**Draft Regulations**") that were intended to amend the End-User and Subscriber Service Charter Amendment Regulations, 2016 ("**Charter Regulations**"). It was accordingly wholly uncertain what the contents of the final version of the Amendment Regulations would be until its publication of 7 May 2018.

13.2 Second, both the Draft Regulations invited interested persons such as MTN to make written representations regarding the substance of the regulations that were proposed. Since the Draft Regulations were, at

that time, in a state of flux, it was neither appropriate nor timely for any interested persons to make submissions regarding the nature and extent of any changes that would be required to comply with the final version of the regulations.

***The absence of factual disputes***

- 14 With the filing by ICASA of its answering affidavit, there is remarkably little in dispute in these proceedings.
- 15 In its founding affidavit, MTN set out, chapter and verse, the factual details of the impossibility of immediate compliance with the Amendment Regulations.
- 16 ICASA is unable to deny this. In particular, ICASA does not deny the following facts:
- 16.1 in respect of compliance with usage notifications:
- 16.1.1 MTN offers a wide variety of data bundles offered, with varying validity periods and sizes (founding affidavit, paragraph 65; answering affidavit, paragraph 6.11-6.12);
- 16.1.2 these bundle types give rise to significant complexities in respect of usage notifications (founding affidavit, paragraph 66; answering affidavit, paragraph 6.13);



- 16.1.3 MTN already sends its customers numerous usage notifications (founding affidavit, paragraph 67; answering affidavit, paragraph 6.14);
- 16.1.4 the Amendment Regulations require that significantly more usage notifications must now be delivered (founding affidavit, paragraph 68; answering affidavit, paragraph 6.15);
- 16.1.5 every project that MTN implements must go through a detailed and sequential process of design, testing and implementation, consisting of multiple phases (founding affidavit, paragraphs 71 and 72; answering affidavit, paragraph 6.20-6.22);
- 16.1.6 the usage notification requirements in the Amendment Regulations give rise to three major implementation difficulties, namely:
- (a) the facilitation of new notifications for voice, SMS and data depletion, and the inclusion of percentages as a trigger, will require capacity upgrades, and will take time and resources to implement, including developing new systems, and purchasing new hardware – processes that have already been commenced, but which could take as long as 12 months to complete (founding affidavit, paragraph 74; answering affidavit, paragraph 6.24-6.25);
  - (b) new systems need to be developed specifically to ensure that MTN is able to deal with customers in respect of new

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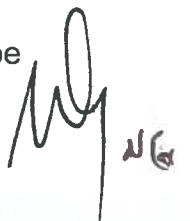
usage notifications, including developing the infrastructure to deal with subscriber disputes, all of which is likely to take between 3 months and 6 months (founding affidavit, paragraph 75; answering affidavit, 6.26);

(c) in the absence of being granted an opportunity to redesign its systems so that notifications are sent appropriately according to bundle type, and at the correct intervals, customers are at risk of being bombarded with notifications or of receiving notifications that serve little practical purpose (founding affidavit, paragraph 76; answering affidavit, paragraph 6.27);

16.2 in respect of the option to transfer unused data, MTN needs to develop its reporting and recordal capacity, and to develop its capabilities in respect of corporate accounts, changes that affect 14 of MTN's systems and applications and will take approximately 4 to 6 months to implement (founding affidavit, paragraph 78; answering affidavit, paragraph 6.30);

16.3 in respect of the option to opt-out of bundle for voice and SMS services, MTN needs to implement new capabilities to bar and unbar out-of-bundle voice and SMS services, which is expected to take 3 months to implement for prepaid customers and 6 months to implement for post-paid customers (founding affidavit, paragraph 79; answering affidavit, paragraph 6.31);

16.4 in respect of express consent to opt-in to out-of-bundle data charges, MTN will need to update channels to provide for out-of-bundle data to be

A handwritten signature in black ink, appearing to be 'M. G.', is located in the bottom right corner of the page.

barred and unbarred, which is expected to take 3 months to implement for prepaid customers and 6 months for post-paid customers (founding affidavit, paragraph 80; answering affidavit, paragraph 6.32);

16.5 in respect of MTN's efforts thus far to comply (founding affidavit, paragraphs 82 to 89; answering affidavit, paragraph 7):

16.5.1 an analysis was performed the day after the publication of the Amendment Regulations;

16.5.2 a week later, MTN conducted a workshop with executives and managers in an effort to unpack and understand the requirements in the Amendment Regulations, which revealed that there were significant compliance-related concerns;

16.5.3 the same day, MTN's EXCO met in an effort to devise solutions;

16.5.4 a follow-up session took place the next day, to workshop various proposals and tasks;

16.5.5 between the publication of the Amendment Regulations and the commencement date, MTN held at least 16 internal meetings in an effort to devise and implement a compliance plan;

16.5.6 these meetings and discussions culminated in specific projects and developments, implementation of which has begun;

16.6 in respect of MTN's communications with ICASA:

- 16.6.1 on 18 September 2017 and again on 2 January 2018, MTN explained in its comments on the Draft Regulations that, if ICASA were to publish the Draft Regulations in the form proposed, it would not be reasonably practicable to expect licensees to comply immediately upon publication. MTN thus advised that, given the system development that would be needed, ICASA should consult widely to ensure that Licensees were afforded a reasonable time to implement;
- 16.6.2 MTN wrote to the Chairperson of ICASA on 21 May 2018 expressing its view that ICASA should allow licensees sufficient time to provide solutions to the Amendment Regulations;
- 16.6.3 MTN wrote to the Chairperson of ICASA again on 6 June 2018 requesting a decision by 17h00 that day whether it would grant an extension.

17 All of the facts summarised in the preceding paragraph are common cause on the papers.

***ICASA's defence in answer to the complaint of irrationality and unreasonableness***

18 Against the backdrop of the common cause facts set out above – which demonstrate that compliance with the Amendment Regulations within the time required is impossible, and that MTN has acted swiftly and diligently to comply

A handwritten signature in black ink, appearing to be 'Mg' followed by a small mark that could be 'NB'.

with the Amendment Regulations – ICASA has pinned its colours to a single mast.

- 19 ICASA complains that MTN did not specify the nature and details of the difficulties of implementation, the programs that would need to be developed, or the time it required to implement the requisite programs (for example, paragraphs 5.18 and 5.27). This meant that ICASA was “*practically left in the dark*” as to what would be required in order to comply (paragraph 5.8), and, without MTN and other licensees particularizing these kind of details, ICASA could not have known of them (paragraph 5.18).
- 20 ICASA states that if MTN had brought the extent of the technical challenges to its attention during the consultation phase, it would have specified a different implementation date (paragraph 5.20, 5.24), and this litigation would have been avoided (paragraph 5.30).
- 21 ICASA suggests that it is wrong in law for MTN to particularise what it would take to comply with the regulations for the first time in its founding affidavit (paragraph 5.10), and it should not be permitted to use the court process to achieve what it did not achieve in the consultation process (paragraph 5.19). It cannot be contended, ICASA claims, that it acted unreasonably or irrationally if it was not fully aware of the technical difficulties raised by MTN in its founding affidavit (paragraph 5.25).

***ICASA's defence is unsustainable in fact and law***

22 There are five separate reasons why ICASA's defence is unsustainable.

23 First, in suggesting that MTN informed ICASA of the difficulties of compliance for the first time in its founding affidavit, ICASA's defence proceeds from an incorrect factual premise:

23.1 MTN explained in its submissions on both versions of the Draft Regulations that compliance would take time, and encouraged ICASA to consult widely on the specific question of the commencement date.

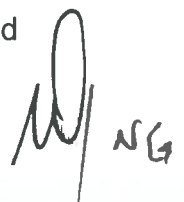
23.2 MTN also explained in its letter dated 21 May 2018 (i.e. after the publication of the Amendment Regulations, but before instituting proceedings), attached to the founding affidavit marked "**GDV6**", that it was important that ICASA allow licensees sufficient time to provide solutions. It provided a list of MTN's concerns, together with indicative time frames within which MTN would be able to make the necessary system changes.

23.3 ICASA was thus afforded an opportunity to reconsider the unrealistic commencement date in the Amendment Regulations, and to suspend the operation of the Amendment Regulations to allow operators to comply. ICASA declined to do so.

24 Second, ICASA is mistaken as a matter of law:

A handwritten signature in black ink, appearing to be 'NG' with a stylized flourish above it.

- 24.1 While this is a matter for argument and will be addressed as such, I am advised that the rationality and reasonableness of decisions is an objective question. ICASA's decision regarding the commencement date is either rational or irrational, reasonable or unreasonable; it cannot be made one or the other by ICASA's subjective beliefs as informed by MTN's submissions.
- 24.2 Viewed objectively, and having regard to the complexity of the Amendment Regulations and the impossibility of compliance within the timeframes provided, ICASA's decision was objectively irrational and unreasonable.
- 24.3 Indeed, ICASA appears to accept the objective irrationality and unreasonableness of the commencement date. It admits in its answering affidavit that, had it had the information that MTN subsequently provided, it would not have stipulated the commencement date that it did.
- 24.4 ICASA also concedes that its decision was taken "*in the dark*". But no rational decision should be taken in the dark. If ICASA was indeed in the dark, then it ought to have done precisely what MTN suggested in its comments on the Draft Regulations, and consulted further on the specific question of an implementation date.
- 25 Third, the fact that ICASA simply ignored MTN's comments, and thus ignored relevant considerations, stands unrebutted:
- 25.1 MTN submitted in its comments on the Draft Regulations that immediate commencement was not practicable, that system development would

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take time, and that ICASA should consult widely before determining a commencement date.

25.2 ICASA simply ignored this suggestion. In its Reasons Document for the End-User and Subscriber Services Charter Amendment Regulations, 2018, in which it provided its reasons for accepting or rejecting the submissions of interested parties, it never mentioned any reason for rejecting MTN's proposal. In fact, it did not mention the proposal at all. Thus, for all its protestations about MTN's failure to provide additional detail in its comments, ICASA has failed to explain the basis upon which it ignored MTN's suggestions. MTN thus persists in its contention that ICASA ignored relevant considerations.

26 Fourth, it is unreasonable to expect MTN to have made more detailed submissions on the system development that would be required until after the final Amendment Regulations were published:

26.1 As MTN explained in detail in its founding affidavit (which facts are common cause), MTN acted promptly once the final Amendment Regulations were published to determine what compliance would require. This involved performing an analysis of the Amendment Regulations, consulting with executives and managers, conducting no less than 16 internal meetings and workshops, and engaging with hardware providers.

26.2 MTN cannot be expected to undertake this costly and labour-intensive exercise every time a draft regulation is published. Indeed, to suggest

otherwise is to make a nonsense of the notice and comment procedure, and to ask MTN and other licensees to assume that every set of Draft Regulations will become final in substantially the same form.

26.3 MTN took seriously the notice and comment procedure. It commented on the lawfulness and the substance of the proposed Draft Regulations. It had every reason to believe that there would be substantial changes from the Draft Regulations to the final Amendment Regulations.

26.4 It was for precisely this reason that MTN encouraged ICASA, if it persisted with the substance of the Draft Regulations, to consult specifically on the question of a reasonable implementation date. This litigation arises from ICASA's blinkered refusal to do so.

27 Fifth, it is astonishing for ICASA – a specialist regulator established to regulate communications – to claim that it knows nothing whatsoever, in the absence of detailed submissions from licensees, regarding what it would take to comply with regulations. While ICASA might not be aware of the granular detail of what compliance would require, it must know, at least in general terms, that an implementation period of one month is simply untenable.

28 I accordingly submit that, in the light of ICASA's answering affidavit, MTN has established a clear right and not merely a *prima facie* right.

#### **ICASA'S NON-COMPLIANCE WITH SECTION 4(5) OF THE ECA HAS BEEN CONFIRMED**

29 Section 4(5) of the ECA provides that:

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*“The Authority must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and provide the Minister with a copy of the proposed regulations.”*

- 30 In its founding affidavit, MTN called upon ICASA to provide written evidence of its compliance with section 4(5), failing which it would contend that the Amendment Regulations should be set aside on the basis that a mandatory and material condition was not complied with.
- 31 In answer, ICASA attached as “**AA5**” a memorandum dated 2 August 2017, in which it informed the Minister of various issues, including the proposed amendments to the Charter Regulations. Attached as Appendix B is the “*Proposed Draft Amendments*”, which describes the proposed amendments as they stood at the time.
- 32 The first Draft Regulations were then published for comment on 7 August 2017. MTN submitted comments on 18 September 2017. The second Draft Regulations were published for comment on 17 November 2017. MTN submitted comments on 2 January 2018.
- 33 The final Amendment Regulations were published on 7 May 2018.
- 34 In other words, after the memorandum attached to ICASA’s affidavit was sent to the Minister, two further rounds of consultation were held, and two further versions of the Draft Regulations were published. Section 4(5) required the

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final Amendment Regulations to be sent to the Minister not less than 30 days before 7 May 2018.

35 It is clear that ICASA never informed the Minister of its intention to make the final Amendment Regulations, and never provided the Minister with a copy of the final Amendment Regulations. ICASA has thus self-evidently failed to comply with section 4(5). The Amendment Regulations are therefore irregular because a mandatory and material condition was not complied with (within the meaning of section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000).

36 For this reason too, I am advised that MTN has established a clear right and not merely a *prima facie* right.

### **AD SERIATIM RESPONSES**

37 I now turn to deal with the answering affidavit *ad seriatim*. I do so only to the extent necessary, and in seeking to avoid repeating myself, do not address those issues that have been addressed above. Instead, I ask that my responses be read together with the earlier portions of this affidavit. Where an allegation made by ICASA is inconsistent with any part of this affidavit, it is denied.

### **Ad paragraphs 5.28 to 5.31**

38 ICASA has misunderstood MTN's statements at paragraph 49 of its founding affidavit.

- 39 It was not two weeks after the Amendment Regulations were gazetted that MTN began its analysis of what would be required to comply. Rather, it took MTN a period of two weeks from the publication of the Amendment Regulations within which to conduct an assessment of what would be required. As soon as that process was completed, MTN wrote promptly to the Chairperson of ICASA indicating its concerns, and providing specific timeframes within which compliance would be possible.
- 40 The details of MTN's compliance efforts are set out at paragraphs 82 to 89 of its founding affidavit. These paragraphs demonstrate that MTN began its compliance efforts promptly and diligently.
- 41 ICASA also makes the allegation that it is *"troubling that a big operator such as MTN did not take any steps during the consultation process to assess or analyse the work that would be required by it to comply with the regulations"*.
- 42 As explained earlier in this affidavit, what is in fact troubling is that ICASA expects operators to commence compliance with regulations before they are finalised. MTN takes seriously the notice and comment process, and assumes that it is conducted in good faith. That being so, there was every reason to believe that the comments of MTN and other operators would be taken into account, and that the final version of the Amendment Regulations might differ markedly from the draft version.

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***Ad paragraphs 5.32 to 5.35***

43 The contents of these paragraphs have been addressed elsewhere in this affidavit. For present purposes, I only note that it is not open to ICASA to assert, without any attempt at a showing with evidence, that “*the poorest of the poor will continue to suffer if the regulations are not implemented immediately*”.

44 On the contrary, MTN has shown in detail, and ICASA has not denied, that immediate implementation of the Amendment Regulations would likely result in consumer harm (founding affidavit, paragraph 76; answering affidavit, paragraph 6.27).

***Ad paragraphs 5.36 and 5.37***

45 The fact that ICASA's council does not sit every day provides no answer to why MTN's letter never received a response.

***Ad paragraphs 5.38 to 5.42.9***

46 Much of what is said in these paragraphs is addressed elsewhere in this affidavit.

47 ICASA complains there was no basis for the unreasonable time frames imposed by MTN for responses to its letters. The basis for the time frames was clear: the Amendment Regulations were due to come into force imminently,

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which, in the absence of the extension requested, would have placed MTN in immediate contravention.

48 ICASA's acknowledgement of the complexity of the issues raised in the letter is correctly made. However, it serves only to demonstrate the irrationality of the timeline within which MTN was expected to comply with the Amendment Regulations.

49 Put differently, if two weeks was insufficient time within which for ICASA to consider the system changes described in MTN's letter of 21 May 2018, then it can hardly be contended that a month was a reasonable period within which for MTN to implement those changes.

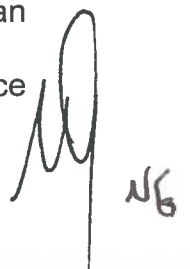
50 ICASA is mistaken when it says that no explanation has been given as to why MTN took two weeks to realize that it required an extension of the period within which to comply. MTN explained in detail at paragraphs 82 to 89 in its founding affidavit that it acted promptly to assess what would be required in order to comply with the Amendment Regulations.

***Ad paragraph 7***

51 It is unclear what the news article published on 5 December 2017, attached to ICASA's answering affidavit as "AA1", is intended to illustrate. ICASA alleges that, in the light of a media report that MTN had been developing out-of-bundle management features, "*no explanation has been given as to why MTN is still not ready to implement the regulations*". There is no basis for this allegation:

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- 51.1 First, the fact that MTN has historically considered and tested various products, partly in response to ICASA's public position on the issue of out-of-bundle costs, is irrelevant. MTN made a business decision to do so, independently and irrespective of whether the Amendment Regulations would ultimately include such a provision. Its decision to do so can have no bearing on the speed with which it can be expected to comply with the final Amendment Regulations.
- 51.2 Second, the news article concerns only the issue of out-of-bundle barring. It says nothing about the various other aspects of the Amendment Regulations, which, as MTN has explained, will require significant time and resources to implement. In any event, the Amendment Regulations require the implementation of an opt-in mechanism and do not require the implementation of out-of-bundle barring, which is what was being tested by MTN at that particular time.
- 51.3 Third, as the article makes clear, and ICASA would have done well to mention, the Out of Bundle Barring system was part of "*a pilot programme which was 'unintentionally exposed' to the public network*". MTN never completed nor implemented the product.
- 52 To the extent that ICASA suggests that MTN was legally obliged to begin implementing the changes brought about by the Amendment Regulations before they were finally promulgated, that is of course an absurd proposition.
- 53 The other news articles referred to in these paragraphs do nothing more than indicate that other operators have begun implementing their compliance

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measures. While MTN is not aware of other operators' compliance measures, MTN has shown in detail that it has begun doing so. The fact that operators have begun implementing the Amendment Regulations says nothing about how long they will require in order to achieve full compliance. MTN, Cell C and Telkom have all indicated that they are unable to do so within the timeframes provided.

***Ad paragraph 8.13 and paragraphs 9.10 to 9.15***

54 ICASA concedes that non-compliance with the Amendment Regulations is punishable. However, ICASA contends that a licensee remains free to make out a case that compliance was impossible and that it could escape punishment on that basis. This submission does not assist ICASA in resisting the relief sought in Part A of the counter-application:

54.1 First, there is a distinction between the question of non-compliance and the question of punishment. Quite apart from the question of punishment, MTN has a right not to be regarded as non-compliant with an irrational or unreasonable provision, and to suffer the reputational harm that such a finding would occasion.

54.2 Second, the question of punishment should not be left to ICASA's discretion. It should be recalled that MTN wrote to ICASA on 21 May 2018 setting out in detail its practical difficulties, and the timeframes within which it would be able to comply. Those issues appear now to be common cause. Yet ICASA has remained unwilling to suspend the Amendment Regulations and has given no undertaking that it will not

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enforce them for a specified period of time. The only reasonable inference is that it will in fact seek to enforce them against MTN.

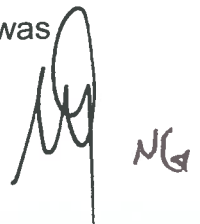
55 In the absence of an express undertaking from ICASA that it will not seek to enforce the Amendment Regulations for a specified period of time (which undertaking has not been given), MTN's apprehension of irreparable harm is real and reasonable.

56 Indeed, given that ICASA has accepted that MTN is incapable of complying, it is inexplicable why it would not now agree to suspend the Amendment Regulations for a reasonable period. If ICASA will not do so, then it must be interdicted from implementing them.

57 In any event, for purposes of interdictory relief, I am advised that where an applicant is able to show a clear right, as I submit MTN has shown, it is not necessary to satisfy the requirement of irreparable harm.

***Ad paragraphs 9.7 to 9.9***

58 I deny the contents of these paragraphs. I explained in paragraph 107 of my founding affidavit that ICASA has no lawful power to compel MTN to comply with the Amendment Regulations, and that MTN's rights would be violated if it were required to comply with the Amendment Regulations at the present time. Paragraphs 109 to 112 of my founding affidavit set out the harm that would be suffered by MTN in the absence of interim relief. I also explained in paragraph 98 of my founding affidavit that section 22 of the Constitution was

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violated by the Amendment Regulations. My founding affidavit therefore made it plain what rights of MTN would be violated if interdictory relief were not granted.

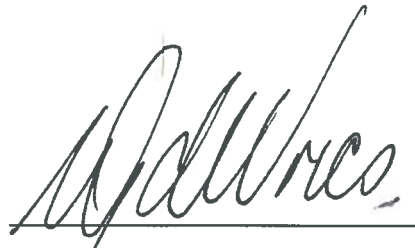
***Ad paragraphs 9.16 to 9.24***

- 59 It is denied that the decision at issue implicates separation of powers concerns. MTN has not challenged the substance of the Amendment Regulations in its counter-application. MTN does not question ICASA's constitutional functions, or its powers to make delegated legislation. It challenges only a discrete aspect of the implementation of the Amendment Regulations: their commencement date.
- 60 ICASA has provided no indication of the actual harm that would be caused by the interdict. This is not a case of a major infrastructure development by an organ of state being stymied by an interim interdict. It is simply the implementation of a set of regulations being delayed.
- 61 In any event, for the reasons set out above I submit that MTN has made out a clear right and not merely a prima facie right.
- 62 ICASA's statement that MTN "*will not in any way be inconvenienced if the interim interdict is not granted*" because it is working diligently towards being compliant, is simply absurd. As MTN has shown at length, it is working diligently towards compliance, but is factually incapable of complying immediately.

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**CONCLUSION**

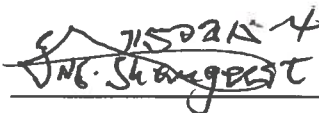
63 For the reasons set out above, MTN prays for the relief in Part A of the notice of counter-application.


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**WILLIAM GRAHAM DE VRIES**

Signed and sworn before me at Fairland on this the 07 day of August 2018, the deponent having acknowledged that he knows and understands the contents of the affidavit, that he has no objection to taking the prescribed oath and that he considers such oath to be binding on his conscience.

~~J.N.C. Shange~~  


**COMMISSIONER OF OATHS**  
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