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

Case number: 20057/2018

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:

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")

MTN'S HEADS OF ARGUMENT

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INTRODUCTION

1. On 7 May 2018, the Independent Communications Authority of South Africa ("**ICASA**") published the End-User and Subscriber Service Charter Amendment Regulations, 2018 (the "**Amendment Regulations**").[1] The Amendment Regulations purport to amend the End-User and Subscriber Service Charter Regulations, 2016 (the "**Charter Regulations**").

2. The Amendment Regulations impose onerous obligations on licensees, such as MTN, to provide customers with new services and options, including usage notifications, the option to transfer unused data, the option to opt-out of out-of-bundle for voice and SMS services, and the need for consent to opt-in to out-of-bundle data charges.

3. The Amendment Regulations require the development of new systems and the acquisition of additional resources, all of which will take time to implement. ICASA does not dispute this. Indeed, ICASA was made aware of this fact in extensive submissions from stakeholders during the notice and comment process. ICASA chose to ignore all of those submissions. Instead it provided in clause 8 that the Amendment Regulations will come into force one month after their publication.

4. This prompted Cell C to launch a two-part application ("**the main application**"). In essence, the main application seeks to set aside clause 8 of the Amendment

[1] GDV 4, Pleadings Bundle Vol 5 p 496-501.

Regulations on the basis that it provides an unreasonably short period of time for licensees to comply with the Amendment Regulations, and to ensure that the Amendment Regulations are of no force and effect in the interim. Pursuant to the institution of the main application, ICASA agreed to suspend the operation of the Amendment Regulations pending the final determination of Part A of the main application.

5. MTN has brought its own application ("**the counter-application**") to support the relief sought by Cell C, and to seek additional relief. The counter-application is, like the main application, in two parts:

5.1. In Part A, MTN seeks an order suspending the Amendment Regulations pending the final determination of Part B, alternatively, directing ICASA to publish a notice in the *Government Gazette* amending the commencement date in clause 8 and, further alternatively, interdicting ICASA from implementing or enforcing the Amendment Regulations pending the final determination of Part B.

5.2. In Part B, MTN seeks final relief in the form of an order reviewing and setting aside or correcting ICASA's decision to make clause 8 of the Amendment Regulations, and declaring clause 8 to be invalid.

6. All of the papers in the main application and the counter-application have been filed. Given that the interim relief in Part A of both the main application and the counter-application was sought pending the final determination of Part B, little purpose would be served, we submit, by requiring argument on Part A. This

Court may dispose of this matter finally by deciding Part B of the main application and the counter-application.

7. Our submissions are structured as follows:

7.1. first, we set out the legal and regulatory framework in which this matter should be understood, including the standard of review to which ICASA is subject in its regulation-making function;

7.2. second, we set out the factual background to this matter, focusing on the efforts made by MTN and other licensees to warn ICASA of the complexity of compliance with the Amendment Regulations, and to seek an extension before instituting legal proceedings;

7.3. third, we explain the common cause facts regarding the impossibility of compliance with the Amendment Regulations and the considerable efforts already undertaken by MTN to comply;

7.4. fourth, we set out ICASA's grounds of review, namely that:

7.4.1. ICASA failed to comply with section 4(5) of the Electronic Communications Act 36 of 2005 ("**ECA**");

7.4.2. clause 8 of the Amendment Regulations is irrational;

7.4.3. clause 8 of the Amendment Regulations is unreasonable;

7.4.4. ICASA ignored relevant considerations;

7.4.5. ICASA's decision violates section 22 of the Constitution; and

7.5. finally, we briefly explain that, if the Court is minded to determine the question of interim relief, MTN is entitled to such relief.

THE REGULATORY FRAMEWORK

The ECA

8. ICASA is required, in terms of section 4 of the Independent Communications Authority of South Africa Act 13 of 2000 ("**ICASA Act**"), to exercise the powers conferred upon it and to perform the duties imposed upon it by the ICASA Act, the ECA, the Broadcasting Act 4 of 1999 and the Postal Services Act 124 of 1998.

9. The primary object of the ECA is to provide for the regulation of electronic communications in the public interest. To achieve this, the ECA stipulates various ancillary objectives, which seek to strike the appropriate balance between the public interest and the rights of licensees. The most notable of these, for present purposes, are:

    9.1. the promotion of the universal provision of electronic communications networks and electronic communications services and connectivity for all (section 2(c));

    9.2. ensuring the provision of a variety of quality electronic communications services at reasonable prices (section 2(m));

    9.3. the promotion of the interests of consumers with respect to the price, quality and variety of electronic communication services (section 2(n)); and

9.4. refraining from undue interference in the commercial activities of licensees while taking into account the electronic communications needs of the public (section 2(y)).

10. In terms of Chapter 3 of the ECA, ICASA has issued licences for electronic communications network services and electronic communications services to MTN, Vodacom, Cell C and Telkom.

11. ICASA's general regulation-making power is contained in section 4(1) of the ECA. Section 4(3) permits ICASA to declare a contravention of its regulations to be an offence, provided that it specifies the applicable penalty, taking into account the offences and penalties in section 17H of the ICASA Act.

12. Section 69(3), read with section 69(5) of the ECA, empowers ICASA specifically to prescribe regulations setting out a code of conduct for licensees, and prescribing minimum standards for electronic communications services and end-user and subscriber service charters.

13. The Charter Regulations were made pursuant to section 69 of the ECA, and came into effect on 1 April 2016.[2] Their express purposes are to:[3]

13.1. prescribe minimum standards for electronic communications services to end-users by licensees;

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2 See the pre-amendment Charter Regulations at GDV1, Pleadings Bundle Vol 4 p 440-453.

3 Regulation 2, Pleadings Bundle Vol 4 p 442.

13.2. ensure that the quality of service offered to an end-user is in accordance with the prescribed service parameters; and

13.3. protect the rights of end-users in the electronic communications sector, by providing end-users with sufficient information to enable informed decisions, ensuring the efficient and effective resolution of complaints; and facilitating redress to an end-user where appropriate.

14. In pursuance of these purposes, the Charter Regulations impose various obligations on licensees such as MTN[4] and prescribe minimum standards relating to network availability,[5] fault clearances,[6] monitoring,[7] and service interruptions,[8] all of which are aimed at ensuring service quality to end-users.

PAJA and the principle of legality

15. As an organ of state in terms of section 239 of the Constitution, ICASA's decisions, including its regulation-making powers, are subject to administrative law prescripts, including:

15.1. where applicable, the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), which is the legislative embodiment of the requirements in section 33 of the Constitution that organs of state act in a manner that is lawful, reasonable and procedurally fair; and

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4 See regulations 4 to 7 of the Charter Regulations, Pleadings Bundle Vol 4 p 443-445.

5 Regulation 9(1)-(3) of the Charter Regulations, Pleadings Bundle Vol 4 p 446-447.

6 Regulation 9(8)-(11) of the Charter Regulations, Pleadings Bundle Vol 4 p 447-448.

7 Regulation 10 of the Charter Regulations, Pleadings Bundle Vol 4 p 449.

8 Regulation 11 of the Charter Regulations, Pleadings Bundle Vol 4 p 449.

15.2. the principle of legality, which requires that all public power is exercised lawfully, rationally and consistently with the Constitution.

16. We submit that the promulgation of the Amendment Regulations constitutes administrative action and is subject to PAJA.

17. In *Cable City,* the Supreme Court of Appeal held that the making of regulations constitutes administrative action and is thus reviewable under PAJA (rather than in terms of the principle of legality).[9] However, in *Mostert*,[10] the Supreme Court of Appeal explained that the position had been stated too strongly in *Cable City.*[11] It suggested instead that the relevant question in determining whether regulation-making is an exercise of administrative action depends on the specific regulations in question.

18. We submit that publication of the Amendment Regulations amounts to administrative action in terms of PAJA. We make this submission for the following reasons:

18.1. The decision to publish the Amendment Regulations was plainly of an administrative nature.[12] The Regulations merely instance the bureaucratic application or implementation of the policy of the ECA and

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[9] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; [2010] 1 All SA 1 (SCA); 2010 (3) SA 589 (SCA) para 10. This was based on the Court's interpretation of *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) para 135. See, also, *Security Industry Alliance v Private Security Industry Regulatory Authority* 2015 (1) SA 169 (SCA) paras 15-16 and *Medirite (Pty) Ltd v South African Pharmacy Council* [2015] ZASCA 27 para 9, where the Supreme Court of Appeal concludes that rule-making powers amount to administrative action.

[10] *Mostert NO v Registrar of Pension Funds and Others* 2018 (2) SA 53 (SCA) paras 8-10.

[11] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; [2010] 1 All SA 1 (SCA); 2010 (3) SA 589 (SCA) para 10.

[12] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 34, citing *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP) para 61.

are thus not in the high-policy nature of executive powers.[13] ICASA's decision to publish Amendment Regulations was not legislative in character, since it was not taken by an elected deliberative legislative body.[14]

18.2. The Amendment Regulations do, in terms of the definition of administrative action in PAJA, have a "*direct, external legal effect*" and they "*adversely affect rights*".[15] They have the potential adversely to affect the rights both of licensees and consumers. This is made plain by the express purposes of the Charter Regulations to protect the rights of consumers and to impose substantive minimum standards on licensees. As we explain below, it is made equally plain by the contents of the Amendment Regulations.

19. In any event, to the extent that the Amendment Regulations are not subject to PAJA, they are subject to the principle of legality. On the review grounds applicable under that principle, the decision to promulgate clause 8 of the Amendment Regulations falls to be reviewed and set aside.

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[13] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) para 37.

[14] See, *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) paras 84-8, where the majority concludes that a decision of a judicial (i.e. adjudicative) character taken by an administrative functionary amounts to administrative action. See, also, the judgment of O'Regan J at paras 126-41. As Klaaren and Penfold point out, it would therefore seem to follow from *Sidumo* that a decision of a legislative character (i.e. regulation-making) taken by such an administrative functionary (and not an elected legislative body) would similarly constitute administrative action (Klaaren & Penfold "Just administrative action" in Woolman, Stuart & Bishop, Michael (eds) *Constitutional Law of South Africa* 2 ed Cape Town: Juta & Co, Ltd (OS 06-08) Chapter 63 at 63-47 to 63-48.

[15] Section 1 of PAJA. These phrases must be understood in terms of their judicial interpretation in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23, which was endorsed by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 60.

THE FACTUAL BACKGROUND

MTN's submissions on the draft Amendment Regulations

20. When ICASA initially considered amending the Charter Regulations, it consulted with stakeholders.

21. On 31 March 2017, ICASA issued a request for information from stakeholders on out-of-bundle and data expiry practices within the mobile telecommunications industry.[16] Then, on 19 May 2017, it held a workshop on these issues and, pursuant to that workshop, published draft regulations on 7 August 2017 (the "**First Draft Regulations**") that were intended to amend the Charter Regulations.[17]

22. On 18 September 2017, MTN made submissions on the First Draft Regulations.[18] It explained that, if ICASA were to publish the First Draft Regulations in their existing form, it would not be reasonably practicable to expect licensees to comply with those regulations immediately.[19]

23. On 17 November 2017, ICASA published a second draft of the Draft Regulations (the "**Second Draft Regulations**"), together with an explanatory note and a notice inviting interested parties to submit written comments.[20]

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[16] FA: para 37, Pleadings Bundle Vol 4 p 401.

[17] FA: para 37, Pleadings Bundle Vol 4 p 401.

[18] GDV2, Pleadings Bundle Vol 4 p 454-472.

[19] FA: para 38, Pleadings Bundle Vol 4 p 401.

[20] FA: para 39, Pleadings Bundle Vol 4 p 401.

24. On 2 January 2018, MTN furnished its written submissions[21] on the Second Draft Regulations. It explained that, while it supported certain proposed amendments to the Charter Regulations, others posed practical and legal concerns. MTN drew attention to various proposed regulations, which it explained were unlawful, an interference with the design of products and consumer choice, unnecessary and overly prescriptive.[22] MTN explained that additional notifications at multiple levels would be excessive and aggravate end-users, particularly for low-denomination bundles.[23]

25. Most importantly, MTN explained in both its comments of 18 September 2017[24] and 2 January 2018[25] the following:

> "*MTN submits that should the Authority elect to publish the Amended Draft Regulations in their current form and without further amendments, it would not be reasonably practicable to expect Licensees to comply with the Amended Draft Regulations immediately upon the date of publication. In many instances, system development (that comes at a significant cost that needs to be recouped) will be required to implement the changes required. MTN urges the Authority to consult widely with all relevant stakeholders and to ensure that Licensees are afforded a reasonable time to implement the requisite compliance programs*" (emphasis added).

Other stakeholders' submissions on the draft Amendment Regulations

26. Numerous other stakeholders made detailed submissions in response to the publication of the various draft iterations of the Amendment Regulations. These submissions included express warnings – by, among others, Cell C,[26]

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[21] GDV3, Pleadings Bundle Vol 4 p 473-495.

[22] FA: para 40, Pleadings Bundle Vol 4 p 401-402.

[23] FA: para 42, Pleadings Bundle Vol 4 p 403.

[24] GDV2: para 5.3, Pleadings Bundle Vol 4 p 471.

[25] GDV3: para 4.6, Pleadings Bundle Vol 4 p 493.

[26] SFA: para 25.2, Pleadings Bundle Vol 7 p 821; GDV13, Pleadings Bundle Vol 7 p 846.

the South African Communications Forum ("**SACF**"),[27] Telkom,[28] Vodacom[29] and Wireless Access Providers' Association of South Africa ("**WAPA**")[30] – that the requirements were onerous and would take time to implement.[31]

27. Vodacom[32] and Telkom,[33] in particular, reiterated their concerns during the public hearings held on 1 and 2 March 2018. Telkom[34] and Cell C[35] repeated their concerns in supplementary submissions, between 8 and 13 March 2018, made subsequent to the public hearings.

28. Most pertinently, the following submissions were made to ICASA during the process that culminated in the publication of the final Amendment Regulations:

    28.1. Cell C[36] and the SACF[37] called for ICASA to conduct a regulatory impact assessment to understand the technical and financial implications of the regulations for licensees.

    28.2. Cell C noted that the regulations would affect licensees' technical and operational configuration and cause them financial prejudice.[38]

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27 SFA: para 25.5, Pleadings Bundle Vol 7 p 822; GDV16, Pleadings Bundle Vol 7 p 853-854.

28 SFA: para 25.3, Pleadings Bundle Vol 7 p 821; GDV14, Pleadings Bundle Vol 7 p 847-849; SFA: para 26.2, Pleadings Bundle Vol 7 p 823; GDV18, Pleadings Bundle Vol 7 p 858-864.

29 SFA para 25.4, Pleadings Bundle Vol 7 p 821-822; GDV15, Pleadings Bundle Vol 7 p 850-852; SFA: para 26.3, Pleadings Bundle Vol 7 p 823-824; GDV19, Pleadings Bundle Vol 7 p 865-868.

30 SFA: para 26.4, Pleadings Bundle Vol 7 p 824; GDV20, Pleadings Bundle Vol 7 p 869.

31 SFA: para 23, Pleadings Bundle Vol 7 p 820.

32 SFA: para 27.1, Pleadings Bundle Vol 7 p 824-825; GDV21, Pleadings Bundle Vol 7 p 870-871.

33 SFA: para 27.2, Pleadings Bundle Vol 7 p 825; GDV22, Pleadings Bundle Vol 7 p 872-874.

34 SFA: para 28.1, Pleadings Bundle Vol 7 p 825-826; GDV23, Pleadings Bundle Vol 7 p 875-876.

35 SFA: para 28.2, Pleadings Bundle Vol 7 p 826; GDV24, Pleadings Bundle Vol 7 p 877-878.

36 SFA: para 25.2, Pleadings Bundle Vol 7 p 821; GDV13, Pleadings Bundle Vol 7 p 846; SFA para 25.4, Pleadings Bundle Vol 7 p 821-822; GDV15, Pleadings Bundle Vol 7 p 850-852.

37 SFA: para 25.5, Pleadings Bundle Vol 7 p 822; GDV16, Pleadings Bundle Vol 7 p 853-854.

38 SFA: para 28.2, Pleadings Bundle Vol 7 p 826; GDV24, Pleadings Bundle Vol 7 p 877-878.

28.3. The SACF noted that the regulations would take time to implement and called for the provision of "*necessary time for systems development and [to] allow for the delayed implementation thereof*".[39]

28.4. Telkom stated, on a number of occasions, that compliance with the regulations would require the provisioning of additional network resources[40] and would require it to reconfigure its systems.[41]

29. On the particular issue of the commencement date of the regulations, Vodacom stated the following with respect to the Second Draft Regulations:

> "*In the event that the Authority wishes to promulgate the proposed amendments, licensees should be given sufficient time (at least 6 months) to develop systems in order to comply with the regulations from the date of publication*" (emphasis added).[42]

30. Similarly, WAPA recommended that the final regulations implement a "*phasing-in timeline rather than come into operation on the date of publication*" in order to "*ensure that licensees understand the new Regulations and can comply with the provisions contained therein*".[43]

31. ICASA was dismissive of these concerns. It ignored the proposals of Cell C and the SACF to conduct a regulatory impact assessment in order to identify the challenges that would be faced by licensees in implementing the regulations and the time that it would take licensees to do so. It also ignored

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[39] SFA: para 25.5, Pleadings Bundle Vol 7 p 822; GDV16, Pleadings Bundle Vol 7 p 853-854.

[40] SFA: para 25.3, Pleadings Bundle Vol 7 p 821; GDV14, Pleadings Bundle Vol 7 p 847-849; SFA para 28.1, Pleadings Bundle Vol 7 p 825-826; GDV23, Pleadings Bundle Vol 7 p 875-876.

[41] SFA: para 26.2, Pleadings Bundle Vol 7 p 823; GDV18, Pleadings Bundle Vol 7 p 858-864.

[42] SFA: para 26.3, Pleadings Bundle Vol 7 p 823-824; GDV19, Pleadings Bundle Vol 7 p 865-868.

[43] SFA: para 26.4, Pleadings Bundle Vol 7 p 824; GDV20, Pleadings Bundle Vol 7 p 869.

MTN's suggestion to consult stakeholders specifically on the question of an appropriate commencement date.

32. ICASA was thus repeatedly alerted by stakeholders to the fact that licensees would need to overcome technical, practical and financial challenges in order to comply with any amendments to the Charter Regulations.

The promulgation of the Amendment Regulations

33. On 7 May 2018, ICASA published the final Amendment Regulations,[44] together with a document titled "*Reasons Document for the End-User and Subscriber Services Charter Amendment Regulations, 2018*" (the "**Reasons Document**").[45]

34. The Amendment Regulations seek to introduce the following material additions to the Charter Regulations:

    34.1. Regulation 8A(1), which, in respect of voice and SMS services, provides that licensees must send usage depletion notifications via SMS, push notification or any applicable means to end-users when their usage reaches 50%, 80% and 100% depletion.

    34.2. Regulation 8B(1)(a), which, for purposes of out-of-bundle data billing practices, provides that licensees must ensure that an end-user is sent data usage depletion notifications via SMS, push notification or any

[44] GDV4, Pleadings Bundle Vol 5 p 496-501.

[45] FA: para 44, Pleadings Bundle Vol 4 p 404.

other applicable means when usage reaches 50%, 80% and 100% depletion of data bundles.

34.3. Regulations 8B(3)-(4) regarding the option to transfer unused data in terms of the Amendment Regulations.

34.4. Regulation 8B(2) regarding the option to opt-out of bundle for voice and SMS services in terms of the Amendment Regulations.

34.5. Regulation 8B(1)(d) regarding express consent to opt-in to out-of-bundle data charges in terms of the Amendment Regulations.

35. For purposes of these proceedings, the key clause in the Amendment Regulations is clause 8. It provides that the Regulations "*will come into force one (1) month after publication in the* Gazette".

MTN's attempts to engage with ICASA after the promulgation of the Amendment Regulations

36. On 21 May 2018, two weeks after the Amendment Regulations were gazetted, and after MTN had had an opportunity to analyse the work that would be required to comply with the Amendment Regulations, the Chief Executive Officer of MTN, Mr Godfrey Motsa, wrote to the Chairperson of ICASA.[46]

37. Mr Motsa explained that it was necessary that ICASA allow the ICT sector, and especially licensees, sufficient time to provide solutions to the challenges raised in the Amendment Regulations. The letter contained a list of MTN's concerns,

[46] FA: para 49, Pleadings Bundle Vol 4 p 405; GDV6, Pleadings Bundle Vol 5 p 536-540.

together with indicative time frames within which MTN would be able to make the necessary changes to its systems.[47] In particular, the letter explained that while MTN was treating the Amendment Regulations with the seriousness they deserved:

37.1. MTN has 40 core systems and over 400 peripheral systems that all need to align;

37.2. a period of one month was insufficient to allow for consideration of the requirements; conceptual design of new products and services; technical design and development of solutions; and their testing, release and deployment into the live environment;

37.3. MTN would embark on a phased approach to implementing the Amendment Regulations according to five initiatives, over a period of six months, during which it would provide monthly progress reports to ICASA, as follows:

37.3.1. 90 calendar days for usage notifications, particularly given the variety of bundles, and the uncertainty of the application of these notifications to mobile broadband packages, telemetry, and Fixed LTE or APN services, which do not make use of a handset to which notifications can be sent;

37.3.2. 60 calendar days for opt-out of voice and SMS, and 180 calendar days for opt-in for out of bundle data charges, given the complexities involved in the differential treatment of voice

[47] FA: para 50, Pleadings Bundle Vol 4 p 406-407.

and SMS versus data, and the fact that these requirements are in any event dependent on the prior implementation of usage notifications;

37.3.3. 120 calendar days for roll-over of unused data, which, while already current practice for post-paid inclusive value and monthly bundles, must be extended to other products and services, including enterprise products and MTN's fixed line division; and

37.3.4. 180 calendar days for the transfer of data, which, while already made available by MTN on a family sharing product, requires further development to implement across all product ranges, and requires consideration of, *inter alia*, anti-money laundering issues.

38. No response was ever received to Mr Motsa's letter.[48]

39. On 6 June 2018, Webber Wentzel wrote to the Chairperson noting that no response had been received to Mr Motsa's letter, requesting ICASA to give a decision by 17h00 the same day as to whether it would grant the extension requested in Mr Motsa's letter, and reserving MTN's rights to approach the High Court on an urgent basis for the appropriate legal relief.[49]

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[48] FA: para 51, Pleadings Bundle Vol 4 p 407; GDV6, Pleadings Bundle Vol 5 p 536-540.

[49] FA: para 52, Pleadings Bundle Vol 4 p 407; GDV7, Pleadings Bundle Vol 5 p 541-547.

40. Later the same day, and pursuant to a telephone call with an ICASA representative, Webber Wentzel again wrote to the Chairperson, noting that it had been informed that the ICASA Council was due to meet the following morning regarding the extension of the deadline for compliance with the Amendment Regulations, and again reserving MTN's right to approach the High Court in the event that ICASA failed to postpone the commencement of the Amendment Regulations.[50]

The institution of legal proceedings

41. On 6 June 2018, Cell C launched the main application on an urgent basis.

42. At the hearing of Part A on 7 June 2018, the parties reached a settlement agreement, which was made an order of court.[51] The agreement provided for the removal of the matter from the roll and stipulated that, pending the final determination of Part A:

    42.1. ICASA would take no steps to implement the Amendment Regulations; and

    42.2. ICASA would not make any determination, publish any notice, take any steps, or institute any proceedings against Cell C or any other licensee for non-compliance with the Amendment Regulations.

[50] FA: para 53, Pleadings Bundle Vol 4 p 408; GDV8, Pleadings Bundle Vol 5 p 548-549.

[51] GDV9, Pleadings Bundle Vol 5 p 550-552.

43. On 7 June 2018, ICASA published a notice in the *Government Gazette*[52] in which it indicated that the Amendment Regulations would no longer be effective from 8 June 2018, and suspended the effective date pending the final determination of Part A of the main application.

[52] GDV10, Pleadings Bundle Vol 5 p 553-555.

IT IS COMMON CAUSE THAT IMMEDIATE COMPLIANCE IS IMPOSSIBLE

44. It is not in dispute that it was not practically possible for MTN to comply with the Amendment Regulations within the one-month period stipulated in clause 8. We set out below the common cause facts regarding the impossibility of compliance with each of the relevant requirements of the Amendment Regulations, and thereafter the considerable efforts that MTN has already made to comply.

The practical impossibility of immediate compliance

45. In respect of compliance with the usage notifications in the Amendment Regulations, the following is common cause:

    45.1. MTN offers a wide variety of data bundles, such as monthly inclusive value bundles, recurring bundles, ad hoc bundles, special bundles and promotional bundles, which have varying validity periods and sizes.[53]

    45.2. These bundle types give rise to significant complexities in respect of usage notifications. For example, MTN must determine whether to send three notifications per bundle type, or whether to aggregate the bundles per bearer type. Either option poses considerable difficulties and requires substantial revision of MTN's existing systems.[54]

    45.3. MTN already sends its customers numerous usage notifications, including when a customer loads a bundle, at 90% of data usage for

[53] FA: para 65, Pleadings Bundle Vol 4 p 411-412; AA (Part A): paras 6.11-6.12, Pleadings Bundle Vol 6 p 741.

[54] FA: para 66, Pleadings Bundle Vol 4 p 412; AA (Part A): para 6.13, Pleadings Bundle Vol 6 p 742.

certain products, two days before the expiry of the bundle validity period, and reminders to purchase additional bundles once a customer goes out-of-bundle.[55]

45.4. The Amendment Regulations require that significantly more usage notifications must now be delivered. That is because MTN will have to send usage notifications for voice calling and for SMS traffic in circumstances where this does not currently occur, and will also have to send additional data usage notifications at 50%, 80% and 100% intervals.[56]

45.5. Every project that MTN implements must go through a detailed and sequential process of design, testing and implementation, consisting of multiple phases, comprising the innovation phase; the concept capture phase; the definition phase; the design phase; the build phase; the test phase; the launch phase; and the post-implement check phase.[57]

45.6. The usage notification requirements in the Amendment Regulations give rise to three significant implementation difficulties:

45.6.1. 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

[55] FA: para 67, Pleadings Bundle Vol 4 p 412-413; AA (Part A): para 6.14, Pleadings Bundle Vol 6 p 742.

[56] FA: para 68, Pleadings Bundle Vol 4 p 413; AA (Part A): para 6.15, Pleadings Bundle Vol 6 p 742.

[57] FA: paras 71 and 72, Pleadings Bundle Vol 4 p 414-415; AA (Part A): paras 6.20-6.22, Pleadings Bundle Vol 6 p 743.

commenced, but which could take as long as 12 months to complete;[58]

45.6.2. new systems need to be developed specifically to ensure that MTN is able to deal with customers in respect of new usage notifications, including developing the infrastructure to deal with subscriber disputes, all of which is likely to take between 3 months and 6 months;[59] and

45.6.3. 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.[60]

46. In respect of the option to transfer unused data,[61] it is common cause that MTN needs to develop its reporting and recordal capacity, and develop its capabilities in respect of corporate accounts. These changes affect 14 of MTN's systems and applications, and will take approximately 4 to 6 months to implement.[62]

47. In respect of the option to opt-out of bundle for voice and SMS services, it is common cause that MTN needs to implement new capabilities to bar and unbar

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[58] FA: para 74, Pleadings Bundle Vol 4 p 416-418; AA (Part A): paras 6.24-6.25, Pleadings Bundle Vol 6 p 744.

[59] FA: para 75, Pleadings Bundle Vol 4 p 419-420; AA (Part A): para 6.26, Pleadings Bundle Vol 6 p 744.

[60] FA: para 76, Pleadings Bundle Vol 4 p 420-421; AA (Part A): para 6.27, Pleadings Bundle Vol 6 p 744.

[61] Regulations 8B(3) and 8B(4) of the Amendment Regulations, Pleadings Bundle Vol 5 p 500-501.

[62] FA: para 78, Pleadings Bundle Vol 4 p 422; AA (Part A): para 6.30, Pleadings Bundle Vol 6 p 745.

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.[63]

48. In respect of express consent to opt-in to out-of-bundle data charges, it is common cause that MTN will need to update channels to provide for out-of-bundle data to be barred and unbarred, which is expected to take 3 months to implement for prepaid customers and 6 months for post-paid customers.[64]

MTN's considerable efforts to comply[65]

49. On 8 May 2018, the day after the Amendment Regulations appeared in the *Government Gazette*, MTN performed an analysis of the specific Regulations that was sent to the relevant business owners (that is, MTN's Responsible Executives, General Managers and Product Managers).

50. A week later, on 14 May 2018, 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.

51. The same day, MTN's EXCO met in an effort to devise solutions. A follow-up session took place the next day, to workshop various proposals and tasks in an effort to refine the proposals. Four subsequent sessions were held with the

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[63] FA: para 79, Pleadings Bundle Vol 4 p 422-423; AA (Part A): para 6.31, Pleadings Bundle Vol 6 p 745.

[64] FA: para 80, Pleadings Bundle Vol 4 p 423; AA (Part A): para 6.32, Pleadings Bundle Vol 6 p 745.

[65] FA: paras 82 to 89, Pleadings Bundle Vol 4 p 424-427; AA (Part A): para 7, Pleadings Bundle Vol 6 p 746-747.

Chief Financial Officer and senior staff members where solutions were workshopped.

52. 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.

53. These meetings and discussions culminated in specific projects and developments, implementation of which has begun. In broad terms, these include the following:

53.1. Two projects currently underway involving the upgrading of charging systems, which will increase the capacity for the charging systems to handle the predicted increase in traffic occasioned by usage notifications. This is scheduled to be completed by November 2018, at the earliest.

53.2. In particular, the charging system planning team is currently redesigning all real-time rated products in order to improve various subscriber-related issues.

53.3. A major part of this product redesign involves the redesign of notifications. Instead of addressing the question of value as MTN has historically, it will seek to calculate 50%, 80% and 100% depletion according to a new measure. This will allow MTN to calculate the sum of remaining value in a customer's products, irrespective of their bundle type, and send the appropriate notification at the appropriate time.

53.4. However, moving all data bundles to this system of notifications and upgrading to the appropriate charging system is expected to take approximately 9 months.

53.5. A hardware upgrade project is also underway, which has taken into consideration a projected growth in data share traffic. In order for data sharing to function, additional communication is required between charging system nodes that is not required for a standard data session. Considering that data sharing is currently only offered to a small proportion of the MTN customer base (less than 5%), if it is opened up to the entire base, the charging systems hardware will need to be significantly expanded.

53.6. Initial engagements with MTN's hardware provider indicate that MTN will need to significantly increase signalling between charging systems, and, in order to account for data-share alone (and not increased usage notifications), will need to increase the capacity of its real-time charging systems by building 23 additional service data point node clusters (which are component parts of the charging systems). The currently planned expansion only caters for 18 additional nodes of this kind, and MTN will need to consider how to provide for the extra nodes required.

54. In short, MTN has at all times sought to comply in good faith with the Amendment Regulations to the best of its ability. It endeavoured, prior to the promulgation of the Amendment Regulations, to persuade ICASA to consider a longer period for implementation. And it engaged with ICASA afterwards in an effort to obtain an extension to the unreasonable time periods imposed,

together with a monthly reporting system. At the same time, it has commenced work on revising its systems in order to comply.

PART B: FINAL RELIEF

55. As explained at the outset, Part B of this application is ripe for determination. Given that the relief in Part A is sought on an interim basis pending the final determination of Part B, we respectfully submit that little purpose would be served by requiring the determination of Part A as a prior matter.

56. We set out below the various grounds upon which MTN submits that clause 8 of the Amendment Regulations should be reviewed and set aside.

There was no compliance with section 4(5) of the ECA

57. Section 4(5) of the ECA provides that:

> "*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.*"

58. At the commencement of these proceedings, MTN was not aware whether ICASA had complied with its obligations under section 4(5). It accordingly called upon ICASA to provide written evidence of its compliance with section 4(5).[66]

59. ICASA had no answer. Instead, it baldly denied that it was "*in law required to inform the Minister when it amended the regulations*".[67] ICASA also cited a

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[66] FA: para 93, Pleadings Bundle Vol 4 p 428.

[67] AA (Part A): para 8.4, Pleadings Bundle Vol 6 p 748.

memorandum that it claimed demonstrated that it informed the Minister of "*various issues*" relating to the proposed amendments.[68]

60. But ICASA cannot rely on this memorandum to show compliance with section 4(5). The memorandum, which is dated 2 August 2017,[69] was addressed to the Minister and informed her of the proposed amendments to the Charter Regulations. Attached as Appendix B to the memorandum is a document titled "*Proposed Draft Amendments*", which describes the proposed amendments as they stood at the time.

61. Self-evidently, section 4(5) requires ICASA to inform the Minister of its intention to make final regulations, and to provide the Minister with a copy of those final regulations, not less than 30 days before they are made.

62. However, after the memorandum was sent to the Minister, two further rounds of consultation were held and three further versions of the Amendment Regulations were published (i.e. the First Draft Regulations on 7 August 2017; the Second Draft Regulations on 17 November 2017; and the Amendment Regulations on 7 May 2018). The final Amendment Regulations differed markedly from the Proposed Draft Amendments sent to the Minister.[70]

63. Section 4(5) required ICASA, not less than 30 days before 7 May 2018, to inform the Minister in writing of its intention to make the Amendment

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[68] AA5, Pleadings Bundle Vol 7 p 774-786.

[69] GDV11, Pleadings Bundle Vol 7 p 832-844.

[70] SFA: para 15, Pleadings Bundle Vol 7 p 818. See GDV4, Pleadings Bundle Vol 5 p 496-501 and appendix B to GDV11, Pleadings Bundle Vol 7 p 843-844.

Regulations and to provide a copy to the Minister. It did not do so. At most, ICASA informed the Minister of its intention to amend the Charter Regulations by way of the Proposed Draft Amendments, which bear little resemblance to the Amendment Regulations in their final form.[71]

64. ICASA offers two responses this submission:

64.1. First, it says that section 4(5) is inapplicable as it applies to the "*making*" of regulations and not their amendment.[72]

64.2. Second, it says that it in any event complied with section 4(5) by informing the Minister of its intention to amend the Charter Regulations. The purpose of the section was thus met.[73]

65. Both responses are incorrect.

66. First, section 4(5) does apply to the amendment of regulations by ICASA:

66.1. The reference in section 4(5) to the power to "*make*" regulations under the ECA must include the power to amend the regulations so made. Were this not the case, ICASA would have no power to amend the regulations it had prescribed, as there is no express provision in the ECA for the "*amendment*" of the regulations in question.

66.2. Section 10(3) of the Interpretation Act 33 of 1957 provides as follows:

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[71] See GDV4, Pleadings Bundle Vol 5 p 496-501 and appendix B to GDV11, Pleadings Bundle Vol 7 p 843-844.

[72] AA (Part B): paras 3.1, Pleadings Bundle Vol 8 p 948, and 3.6, Pleadings Bundle Vol 8 p 950.

[73] AA (Part B): paras 3.2, Pleadings Bundle Vol 8 p 948.

> "*[w]here a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws*" (emphasis added).

The effect of this provision is that, where ICASA exercises its power to amend regulations published under the ECA, it must do so in the same manner and subject to the same conditions that apply when it publishes new legislation. This includes complying with the requirements of section 4(5).

66.3. If ICASA's interpretation were correct, it would logically apply also to other provisions of section 4 of the ECA that refer to the "making" of regulations (or cognate words). This follows from the interpretive presumption that the legislature uses the same phrase consistently in a legislative instruments,[74] and more so within a particular provision in the instrument. Section 4(4), which requires public consultation before regulations are published, applies to "*any regulation [which] is made*" (emphasis added). ICASA's logic would therefore entail that it would not have to undertake public consultation before even the most drastic of amendments to existing regulations. But it is evident that ICASA does not apply its own logic: ICASA conducted consultations before the publication of the Amendment Regulations, implicitly conceding that section 4(4) applies to the amendment of regulations.

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[74] See, for example, *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) at 404; *Pantanowitz v Sekretaris van Binnelandse Inkomste* 1968 (4) SA 872 (A) at 879; and *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 949.

66.4. To accept the proposition that the process requirements in sections 4(4) and 4(5) apply only to the initial publication of regulations and not to their subsequent amendment would lead to absurd consequences. It would mean that regulations addressing a narrow issue which has no or minimal impact on the citizenry would be subject to the procedural protections provided by sections 4(4) and 4(5), but not amendments to existing regulations which are so extensive as to completely alter the character and purpose of those regulations. Such an interpretation should be avoided.[75]

66.5. Accepting ICASA's interpretation of section 4(5) would also defeat the purpose of the section, viz., to ensure that the Minister is apprised of material changes to the content of the electronic communications regulatory framework before these changes are effected.[76] This is to ensure that the Minister has the opportunity to consider the regulations and provide any feedback to ICASA.[77] Were section 4(5) not to apply to the amendment of existing regulations (however significant), the

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[75] *Barnard NO v Regspersoon van Aminie en 'n Ander* 2001 (3) SA 973 (SCA) at para 27.

[76] It is trite that legislative provisions must be interpreted in light of their purpose: see *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18.

[77] That this is the purpose of section 4(5) is evident in light of the legislative history of the ECA. Section 4(5) of the ECA was amended by section 4 of the Electronic Communications Amendment Act 1 of 2014. Prior to this amendment, section 4(5) of ECA only required ICASA to inform the Minister "*in writing of its intention and the subject matter of the regulations*".

Tellingly, in its prior form, section 4(5) did <u>not</u> require ICASA to place the proposed regulations before the Minister. The legislature plainly intended to depart from this in its amendment of 2014 by specifically requiring that the proposed regulations be placed before the Minister (see, *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) paras 23-24; see, also, *Commissioner for the South African Revenue Services v Amawele Joint Venture CC* [2018] ZASCA 115, especially at para 29, and *De Lange v Multilaterale Motorvoertuigongelukkefonds* 2000 (1) SA 921 (T) at 923H-J).

This is instructive, and is consistent with the purpose of the provision, for in terms of section 4(5) in its present, amended form, the Minister is provided with the opportunity to consider and engage with ICASA on the proposed regulations.

Minister would be left uninformed of regulatory changes until after they are made and therefore unable to provide her input.

66.6. For all of these reasons, we submit that section 4(5) of ECA does apply to the making of the Amendment Regulations.

67. Second, ICASA's conduct did not achieve the purpose of section 4(5):

67.1. Section 4(5) is a mandatory statutory requirement.[78] ICASA does not dispute this.

67.2. In *AllPay1*, the Constitutional Court authoritatively confirmed that the correct approach to assessing compliance with a statutory requirement is:

> "*to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in* ACDP v Electoral Commission *as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provisions will lead to a different result.*"[79]

67.3. The purpose of section 4(5) is to ensure that the Minister is apprised of material changes to the content of the electronic communications regulatory framework before these changes are effected in order that she might consider these changes and provide her feedback to ICASA.

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[78] The use of the word "must", as is used in section 4(5) of ECA, as a "general principle" is construed as peremptory rather than directory: *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) at para 32.

[79] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at 23-4, citing *African Christian Democratic Party v Electoral Commission and Others* 2006(3) SA 305 (CC) at para 25.

67.4. ICASA's memorandum of 2 August 2017[80] did not come close to achieving this purpose. It provided the Minister only with the details of the Proposed Draft Amendments to the regulations. The Minister was, by contrast, not provided with a copy of the final Amendment Regulations published, which differed materially from the first draft. The Minister was thus denied an opportunity to consider and provide feedback on the Regulations before their publication.

68. It is plain, then, that ICASA failed to comply with the mandatory requirement in section 4(5) of the ECA. ICASA's decision to publish the Amendment Regulations is accordingly reviewable in terms of section 6(2)(b) of PAJA since ICASA failed to comply with a "*mandatory and material procedure or condition prescribed by an empowering provision*". Even were this Court to find that PAJA does not apply, a failure to comply with the empowering provision would be reviewable under the principle of legality.[81]

69. Accordingly, ICASA's decision falls to be reviewed, declared invalid and set aside in terms of section 6(2)(b) of PAJA, or under the principle of legality.

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[80] GDV11, Pleadings Bundle Vol 7 p 832-844.

[81] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 at para 58; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) para 73.

The irrationality, unreasonableness and unconstitutionality of Clause 8

The proper approach to assessing the rationality and unreasonableness of Clause 8

70. As explained above, ICASA does not contest MTN's version of the factual impossibility of compliance within one month. ICASA says that, had MTN informed it prior to the publication of the Amendment Regulations of the complexity of compliance, it would have provided for a longer lead-in time and would have provided licensees with a later implementation date by which to comply.

71. We have indicated above that ICASA is not correct to say that it was not properly informed of the need for a longer period of implementation. Numerous submissions alerted ICASA to the considerable difficulties that licensees would face complying with the Amendment Regulations. But even if ICASA were correct that MTN and other licensees had not sufficiently informed it of the complexity of compliance, its stance would still be unsustainable for at least two reasons.

72. The first reason is that the irrationality, unreasonableness and unconstitutionality of ICASA's decision cannot depend on whether it subjectively knew or believed that its decision was rational, reasonable and constitutionally compliant based on the information that MTN had provided to it:

    72.1. It is well-established that the standard for rationality and reasonableness review is objective. In the words of the Constitutional Court:

> *"[t]he question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.*"[82]

72.2. ICASA has admitted that compliance with the one-month period in clause 8 is factually impossible. This effectively entails an admission that the decision to provide only one month for implementation is objectively irrational and unreasonable. That, with respect, is the end of the matter.

73. The second reason is that, until the Amendment Regulations were published on 7 May 2018, licensees had not completed the process of determining how to comply. MTN did not and could not know what the Amendment Regulations' final contents would be, and could not have been expected to determine with any precision what would be required to comply. It was simply impossible for stakeholders to make submissions any more detailed than those provided – which in any event contained extensive detail – regarding what it would take to comply.

<u>Clause 8 of the Amendment Regulations is irrational</u>

74. ICASA's decision to require licensees to comply with the Amendment Regulations within a period of one month is irrational.

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[82] *Pharmaceutical Manufacturers Association of South Africa and Another In Re: Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 para 86.

75. Rationality review demands a rational connection between the means chosen by the decision-maker and the end sought to be achieved.[83] In *Democratic Alliance*, the Constitutional Court explained this as follows:

> *"The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.*"[84]

76. Rationality review is "*about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved*".[85] The inquiry focuses on the specific objective or purpose that the decision-maker seeks to achieve.[86]

77. The fundamental purpose of the power to make and amend the Charter Regulations is to prescribe a set of minimum standards for the benefit of end-users. The Charter Regulations' own purposes, which relate primarily to the quality of services and the rights of end-users, recognise this.

78. But clause 8 will undermine the consumer-beneficial aspects of the Amendment Regulations, and will cause harm to end-users. That is, if immediately implemented without the proper systems in place, the Amendment Regulations

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[83] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) paras 27-32; *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) para 69; *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) paras 34-35.

[84] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 32.

[85] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 32

[86] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 33.

will diminish end-users' capacity to make informed decisions, and will give rise to disputes and complaints about which little can be done.[87] It cannot be rational or to the benefit of consumers to set a requirement that it is impossible for licensees to comply with.

79. There is accordingly no rational connection between the purpose for which the power to make the Amendment Regulations was granted and the content of clause 8 of the Amendment Regulations. On the contrary, the content of clause 8 cuts directly against the objective envisaged by ECA.

80. In addition, there is no rational connection between the information before ICASA regarding the complexity of compliance, and clause 8 of the Amendment Regulations.

    80.1. We have already detailed the extensive stakeholder submissions demonstrating the impossibility of compliance within a one-month period.

    80.2. According to ICASA's Reasons document, its explanation for introducing the one-month commencement date was that it agreed with WAPA's submission and "*amended this regulation accordingly*".[88] But the relevant WAPA submission recommended a <u>phased</u> approach, and made no mention whatsoever of a one-month implementation period.

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[87] FA: paras 95.2, Pleadings Bundle Vol 4 p 429, and 112, Pleadings Bundle Vol 4 p 436-437. ICASA offers only a bald denial of para 95.2 stating "*[n]o evidence has been placed before the court to substantiate the wild allegation that the bringing into force and effect of the regulations will undermine the interests of the consumers for whose benefit they were promulgated*". To the contrary, MTN sets out, in chapter and verse, the difficulties it will experience in seeking timeously to comply with the Regulations, and the impossibility of doing so. An attempt to meet these time periods will inevitably disrupt the services MTN offers to customers. ICASA does not attempt to address para 112.

[88] GDV5: para 3.17.2, Pleadings Bundle Vol 5 p 535.

80.3. No stakeholder motivated for a one-month commencement period. And no document in the Rule 53 record explains how or why ICASA arrived at its decision to limit the period for compliance to one month.

80.4. There is simply no rational connection between ICASA's decision and the material before it. It is also apparent that ICASA made no effort, despite the repeated calls for it to do so, to ascertain what a reasonable implementation period would be.

81. In short, no rational purpose is achieved by making a regulation that requires licensees to perform the impossible. And no rational justification is apparent for ICASA's decision to impose a one-month implementation period for the Amendment Regulations.

82. Accordingly, ICASA's decision to make clause 8 is reviewable under:

82.1. section 6(2)(f)(ii) of PAJA, in that it is not rationally related to the information before the decision-maker or the purpose of its power;

82.2. section 6(2)(e)(vi) of PAJA, in that it is arbitrary and capricious; and

82.3. the principle of legality, in that it is irrational.

Clause 8 of the Amendment Regulations is unreasonable

83. In *Bato Star,* the Constitutional Court explained that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not

reach.[89] Review for reasonableness tests the decision itself[90] and is about striking an appropriate balance between competing considerations and interests. A decision is reasonable in administrative-law terms if, considering the reasons for and against the decision, it falls in the realm of decisions a reasonable person could reach.

84. ICASA's decision to require licensees to comply with the Amendment Regulations within a one-month period is plainly unreasonable:

    84.1. First, it was impossible for ICASA reasonably to conclude, and ICASA did not in fact conclude, that licensees could comply with the Amendment Regulations within a period of one month.

    84.2. Second, no reasonable decision-maker could impose a commencement date for onerous regulations with which it is practically impossible to comply.

85. A component of the assessment of whether a decision is unreasonable is whether it is proportional. In other words, "*rationality plus (at least) proportionality equals reasonableness*".[91]

86. Proportionality is encompassed by the idea that an administrator should not "*use a sledgehammer to crack a nut*".[92] Proportionality demands more than mere rationality. The purpose of the proportionality enquiry is:

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[89] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 44.

[90] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 69, fn. 101.

[91] H Corder "Without deference, with respect: A response to Justice O'Regan" (2004) 121 *SALJ* 438 at 443.

> *"to avoid an imbalance between the adverse and beneficial effects … of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.*"[93]

87. Measured against these principles, ICASA's decision lacks any sense of proportionality:

87.1. The obligations imposed by the Amendment Regulations are complex.[94] This is evidenced by the fact that they took more than a year, from 31 March 2017 to 7 May 2018, to conceptualise and draft.[95]

87.2. The consequences of non-compliance are punitive. The monetary penalty comprises a fine not exceeding R5 million. Added to this is the reputational harm occasioned by the non-monetary penalties, which include the widespread publication of the licensee's non-compliance.

87.3. There are obvious less restrictive means by which ICASA could achieve the same purpose. Many of these were explained to ICASA by stakeholders:

87.3.1. Most straightforwardly, a delayed implementation period would have provided licensees with the time to develop the systems necessary to ensure compliance with the Amendment Regulations, without subverting any of their purposes.

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[92] *Medirite (Pty) Limited v South African Pharmacy Council and Another* [2015] ZASCA 27 para 22, citing *S v Manamela* [2000] ZACC 5; 2000 (3) SA 1 (CC) para 34.

[93] C Hoexter "Standards of Review of Administrative Action: Review for Reasonableness" in J Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) at 64.

[94] MTN set out these complexities in detail in its papers (FA: paras 62-81, Pleadings Bundle Vol 4 p 410-424). ICASA does not deny these complexities (see AA (Part A): paras 6.8-6.33, Pleadings Bundle Vol 7 p 741-746).

[95] FA: para 96.2.1, Pleadings Bundle Vol 4 p 431.

87.3.2. Both Cell C and the SACF suggested that ICASA should conduct a regulatory impact assessment prior to making clause 8 of the Amendment Regulations in order to understand the costs and complexity of compliance.[96]

87.3.3. MTN suggested that ICASA should consult widely specifically on the issue of a commencement date.[97]

87.3.4. Without reason, ICASA elected to adopt none of these paths.

87.4. Bearing in mind the complexity involved in compliance, considering that it took over a year to promulgate the Amendment Regulations, and having regard to the prospect of punitive consequences for non-compliance, it is unreasonable to provide licensees with a one-month period within which to comply.

88. Accordingly, ICASA's decision to make clause 8 is reviewable in terms of section 6(2)(h) of PAJA, on the basis that it was unreasonable.

ICASA ignored relevant considerations

89. ICASA's decision to require licensees to comply with the Amendment Regulations within a period of one month is irregular because, in arriving at this decision, ICASA ignored relevant considerations.

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[96] SFA: para 25.2, Pleadings Bundle Vol 7 p 821; GDV13, Pleadings Bundle Vol 7 p 846; SFA: para 25.4, Pleadings Bundle Vol 7 p 821-822; GDV15, Pleadings Bundle Vol 7 p 850-852; SFA: para 25.5, Pleadings Bundle Vol 7 p 822; GDV16, Pleadings Bundle Vol 7 p 853-854.

[97] GDV2: para 5.3, Pleadings Bundle Vol 4 p 471; GDV3: para 4.6, Pleadings Bundle Vol 4 p 493.

90. MTN expressly alerted ICASA to the risks inherent in a short commencement period. It explained that system development would be required to implement the changes, and urged ICASA to consult widely.[98]

91. Other stakeholders alerted ICASA to the fact that licensees would face significant challenges in developing, implementing, and budgeting for system changes required for compliance with amendments to the Charter Regulations. Cell C, Telkom, MTN, and Vodacom all made detailed submissions that showed one month would be unfeasible.[99]

92. These were plainly relevant considerations. They could not simply be ignored. Yet the Reasons Document reveals that ICASA indeed ignored them.[100]

93. The only stakeholder submission to which ICASA referred in its Reasons document in respect of clause 8 was the WAPA submission. But even WAPA suggested a phased approach, and never proposed a one-month period for compliance.[101]

94. No mention is made of the various other stakeholder submissions, or, more importantly, ICASA's reasons for rejecting them. Indeed, Vodacom's specific

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[98] FA: para 97.1, Pleadings Bundle Vol 4 p 432; SFA: para 34.1, Pleadings Bundle Vol 7 p 829; GDV2: para 5.3, Pleadings Bundle Vol 4 p 471; GDV3: para 4.6, Pleadings Bundle Vol 4 p 493.

[99] See paragraphs 26 to 32 above.

[100] SFA: para 34.2, Pleadings Bundle Vol 7 p 829; GDV5, Pleadings Bundle Vol 5 p 502-535.

[101] SFA: para 34.5, Pleadings Bundle Vol 7 p 830; GDV5: 3.17.2, Pleadings Bundle Vol 5 p 535; GDV20: para 17, Pleadings Bundle Vol 7 p 869.

suggestion of a six-month period within which to comply[102] is not referred to in ICASA's Reasons document at all.[103]

95. As the Supreme Court of Appeal recently affirmed, an authority is bound by the reasons it gives at the time it takes a decision, and "*[a]ny further reasons are irrelevant*".[104] It is thus impermissible for an authority, after the fact, to recruit a new reason as a purported justification for a decision.[105] Such reasons are, in the words of the Supreme Court of Appeal, "*in truth … not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision*".[106]

96. ICASA thus cannot belatedly seek to justify its decision. The reason for imposing a one-month commencement period was that ICASA took account of WAPA's submission. As we have explained, it misconstrued WAPA's submission. But it also clearly ignored all other submissions on this question, which formed no part whatsoever of its reasons.

97. Ignoring relevant considerations is a review ground under PAJA. It is also a component of irrationality, under legality review. With respect to the test under the principle of legality, the Constitutional Court has held:

> "*[t]here is … a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to*

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[102] GDV19: para 85, Pleadings Bundle Vol 7 p 868.

[103] GDV5, Pleadings Bundle Vol 5 p 502-535.

[104] *PG Group Ltd and Others v National Energy Regulator of South Africa and Another* [2018] ZASCA 56; 2018] 3 All SA 52 (SCA); 2018 (5) SA 150 (SCA) para 41.

[105] *National Lotteries Board & others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) paras 24-28.

[106] *National Lotteries Board & others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) para 27. See, also, the Constitutional Court's decision in *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 55, fn. 85.

> *consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.*"[107]

98. ICASA's wholesale failure to have regard to the repeated and extensive submissions on the difficulties of implementing the Amended Regulations within the one-month compliance period "*colours the entire process with irrationality*".

99. Accordingly, ICASA's decision to make clause 8 is reviewable under:

    99.1. section 6(2)(e)(iii) of PAJA, in that ICASA failed to have regard to relevant considerations; and

    99.2. the principle of legality, in that ignoring MTN's submissions coloured the entire process with irrationality and thus rendered the final decision irrational.

ICASA's decision violates section 22 of the Constitution

100. In terms of section 22 of the Constitution, any law regulating "*the practice of a trade, occupation or profession*" must, at a minimum, satisfy the test for rationality.[108]

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[107] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 32.

[108] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) para 83.

101. ICASA's decision to require licensees to comply with the Amendment Regulations within a period of one month violates section 22 of the Constitution in that, for the reasons given above, it is arbitrary and irrational for ICASA to require licensees to comply with the Amendment Regulations within a period of one month. ICASA's decision accordingly falls to be set aside in terms of section 6(2)(i) of PAJA, in that it is otherwise unconstitutional or unlawful, and under the principle of legality.

Conclusion

102. For the reasons set out above, ICASA's decision to make clause 8 of the Amendment Regulations falls to be reviewed and set aside.

PART A: INTERIM RELIEF

103. We have explained above that, since Part B of this application is ripe for determination and Part A is sought on an interim basis pending the final determination of Part B, little purpose would be served by requiring the determination of Part A as a prior matter. Nevertheless, we address Part A of MTN's counter-application briefly below in order to cater for the possibility that this Court may take a different view of the matter.

104. It is well-established that to be granted an interim interdict, an applicant must demonstrate:

104.1. a *prima facie* right, though open to some doubt;

104.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (to set aside the impugned decision) is eventually granted;

104.3. that the balance of convenience favours the granting of an interim interdict; and

104.4. that there is no other satisfactory remedy.[109]

105. We demonstrate, under the headings that follow, that MTN satisfies these requirements.

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[109] *Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) at para 49; *Setlogelo v Setlogelo* 1914 AD 221 at 227.

Prima facie right

106. To assess whether an applicant can establish a *prima facie* right a Court will take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief in due course. An applicant must be granted relief even if its right is open to some doubt.[110]

107. The grounds of review set out above in support of Part B of the notice of motion amply demonstrate that MTN has established a clear right to prevent immediate implementation of the Amendment Regulations. Since clause 8 is unlawful, MTN's rights would be violated if it were compelled to comply with the Amendment Regulations at the present time. The factual basis of MTN's case is, as explained above, largely undisputed. MTN thus at the very least satisfies the requirement of a *prima facie* right.

Irreparable harm

108. An applicant for an interim interdict must establish a reasonable apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (to set aside the impugned decision) is eventually granted.[111] The test for harm is objective: the question is whether a reasonable person, if confronted by the

[110] See the test set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, as amended by *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D–E.

[111] *Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) at para 55; *Setlogelo v Setlogelo* 1914 AD 221 at 227.

facts, would apprehend the probability of harm.[112] It is well-established that the harm may include financial loss where recovery of the loss is impossible or improbable.[113]

109. MTN has a real apprehension of irreparable harm in the event that interim relief is not granted. Non-compliance with the Charter Regulations may result in a monetary fine of up to R5 million and/or a non-monetary penalty, which may include the publication of non-compliance on ICASA's websites as well as awareness campaigns in national newspapers, radio and/or television and additional platforms as determined by ICASA.[114]

110. If interim relief is not granted, MTN would be exposed to these penalties for failing to comply with the Amendment Regulations. They entail not only financial harm, but also irremediable reputational harm, this being the intended objective of the non-monetary penalties.[115]

111. In addition, while it would be simply impossible for MTN to bring itself into immediate compliance with the Amendment Regulations, there are considerable risks in it even attempting to do so to avoid hefty fines, given that its existing systems are not currently set up in order to comply. This harm will be suffered not only by MTN, but also by its customers, who will suffer the

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[112] *Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) at para 56; *Minister of Law and Order and Others v Nordien and Another* 1987 (2) SA 894 (A) at 896, citing *Nestor and Others v Minister of Police and Others* 1984 (4) SA 230 (SWA) at 244.

[113] Erasmus *Superior Court Practice* Service Issue 36 (Juta, Cape Town 2011) at D6–19.

[114] FA: paras 109-110, Pleadings Bundle Vol 4 p 435-436.

[115] FA: para 112, Pleadings Bundle Vol 4 p 436-437.

effects of services that are frustrating and unhelpful. There is a concomitant risk that end-users will lose trust in MTN's service as a result.[116]

112. These harms are irreparable and would not be undone in the event that MTN were ultimately to obtain final relief.

113. ICASA concedes that non-compliance with the Amendment Regulations is punishable.[117] However, it contends that a licensee remains free to make out a case that compliance was impossible and that it could escape punishment on that basis.[118] This submission does not assist ICASA in resisting the relief sought in Part A:

113.1. 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 unlawful provision, and to suffer the reputational harm that such a finding would occasion.

113.2. In any event, the question of punishment should not be left to ICASA's discretion. 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 enforce them for a specified

[116] FA: para 112, Pleadings Bundle Vol 4 p 436-437.

[117] AA (Part A): para 9.10, Pleadings Bundle Vol 6 p 753.

[118] AA (Part A): paras 9.10-9.15, Pleadings Bundle Vol 6 p 753-754.

period of time. The only reasonable inference is that it will in fact seek to enforce them against MTN.[119]

114. 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.[120]

115. 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.[121]

Balance of convenience

116. The balance of convenience must favour the granting of interim relief. This means that the prejudice to the applicant if interim relief is refused must be weighed against the prejudice to the respondent if it is granted.[122] It is well-established that "*the stronger the prospects of success, the less need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.*"[123]

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[119] RA (Part A): para 54, Pleadings Bundle Vol 7 p 809-810.

[120] RA (part A): para 55, Pleadings Bundle Vol 7 p 810.

[121] RA (part A): para 56, Pleadings Bundle Vol 7 p 810.

[122] *Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 62 and *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[123] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-G, cited with approval in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691F-G. See, also, *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) at 231G.

117. The Court must weigh against the irreparable harm MTN will suffer (as described above) the harm that would arise if an interim interdict were to be granted. The grant of the interdict would, however, cause no harm. The status quo will merely persist for the intervening period until Part B is finally determined, at which point, if MTN does not succeed, the Amendment Regulations will come into effect.[124] While ICASA contends that the grant of the interim will cause it and consumers harm,[125] it provides no evidence of the actual harm that would be caused by the interdict.[126]

118. To the extent that ICASA complains of the consequences of delay, it has only itself to blame. Had ICASA afforded MTN and other interested parties an appropriate opportunity to make representations on the period for the implementation of the Amendment Regulations or responded to MTN's correspondence between 21 May 2018 and 6 June 2018 seeking to engage in respect of the commencement date of the Amendment Regulations, it is likely that the matter could have been resolved sooner and without a resort to litigation. But ICASA did not do so. It simply ignored MTN's requests.[127]

119. In any event, a delay in the commencement of the Amendment Regulations cannot conceivably be described as a harm that is irreparable. It will merely perpetuate for a while longer the position that has already existed for decades.[128]

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[124] FA: para 113, Pleadings Bundle Vol 4 p 437.

[125] AA (Part A), para 9.21, Pleadings Bundle Vol 6 p 755.

[126] RA (Part A), para 60, Pleadings Bundle Vol 7 p 811.

[127] FA: para 115, Pleadings Bundle Vol 4 p 437-438.

[128] FA: para 116, Pleadings Bundle Vol 7 p 438.

120. ICASA's submits that MTN's interim interdict may not be granted because it has not acted *mala fides*.[129] But this has never been a requirement for the grant of an interim interdict, even against an organ of State.

121. ICASA's final submission – that MTN "*will not in any way be inconvenienced if the interim interdict is not granted*" because it is working diligently towards being compliant[130] – is simply absurd. As MTN has shown at length, it is working diligently towards compliance, but is factually incapable of complying immediately.[131]

No alternative remedy

122. The Supreme Court of Appeal has noted that, to establish that an alternative remedy is available, "*the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court.*"[132]

123. MTN has no remedy other than to seek interim relief in Part A. As explained above, if, pending the final determination of Part B, the Amendment Regulations are of full force and effect and ICASA is able to enforce them, MTN would suffer irreparable harm.[133]

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[129] AA (Part A): para 9.19, Pleadings Bundle Vol 6 p 755.

[130] AA (Part A): para 9.22, Pleadings Bundle Vol 6 p 755.

[131] RA (Part A): para 61, Pleadings Bundle Vol 7 p 811.

[132] *Hotz and Others v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) para 35. The Constitutional Court did not disturb this finding on appeal.

[133] FA: para 117, Pleadings Bundle Vol 4 p 438. ICASA only baldly, and therefore ineffectively, denies this averment: see AA (Part A): para 9.24, Pleadings Bundle Vol 6 p 756.

Separation of powers

124. ICASA contends in its answering affidavit that interim relief should not be granted because this would infringe the doctrine of separation of powers.[134] We assume that this contention is based on the judgments of the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd ("**SCAW**")*[135] and *National Treasury v Opposition to Urban Tolling Alliance and others ("**OUTA**")*.[136]

125. Neither the unanimous decision in *SCAW* nor the majority decision in *OUTA* altered the common-law requirements for interim relief. However, both judgments emphasised the special character of attempts to interdict national government from exercising its executive powers in matters of high policy:

125.1. In *SCAW*, the Constitutional Court held that the interdict granted by the High Court had improperly breached the doctrine of separation of powers by extending the life-span of an anti-dumping duty. It explained this as follows:

- *"… the setting, changing and removal of an anti-dumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade policy. That power resides in the kraal of the national executive authority*."[137]

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[134] AA (Part A): para 9.18, Pleadings Bundle Vol 6 p 754.

[135] 2012 (4) SA 618 (CC).

[136] 2012 (6) SA 223 (CC).

[137] *SCAW* para 103.

- "*Courts may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive*."[138]
- "*It was inappropriate for the high court to grant an interim order which invaded the terrain of the national executive function without appropriate justification*".[139]

125.2. In *OUTA*, the interdict granted by the High Court had interfered with a fiscal decision of national government regarding the funding of new roads. The Constitutional Court held that this trenched impermissibly on the doctrine of separation of powers for similar reasons as in *SCAW*:

- "*… the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament*."[140]
- "*… the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not well-suited to make decisions of that order*."[141]

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[138] *SCAW* para 105.

[139] *SCAW* para 111.

[140] *OUTA* para 67.

[141] *OUTA* para 68.

126. We submit that these considerations do not apply in the present case for at least three reasons.

127. The first reason is that interim relief would not restrain the national executive from formulating or implementing policy. Unlike in *SCAW* and *OUTA*, the national government played no role in the decision to make clause 8 of the Amendment Regulations. The present case does not concern a decision which "*lies in the heartland of Executive Government function and domain*" that will, if interdicted, "*disrupt executive or legislative functions [and thus] implicate the tenet of division of powers*".[142]

128. The second reason is that *OUTA* held that, when it comes to assessing separation-of-powers harm, "*one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights"*.[143] That is the case here since clause 8 of the Amendment Regulations violates section 22 of the Constitution.

129. The third reason is that *OUTA* acknowledged that separation-of-powers concerns must give way in the "*clearest of cases*".[144] For the reasons given above, we submit that this indeed is indeed the "*clearest of cases*".

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[142] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 65-7.

[143] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 47.

[144] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 47 and para 66.

Conclusion

130. For all the above reasons, MTN is entitled to the primary relief sought by MTN in Part A (i.e. the suspension of the Amendment Regulations pending the final determination of Part B). If the Court is not minded to grant this relief, then MTN seeks, in the alternative, the relief set out in prayers 2 or 3 of Part A of the notice of motion.

PRAYER

131. MTN prays for the relief set out in Part B and in Part A of the notice of motion (should the Court find it necessary to deal with Part A at all), including an order that ICASA should pay MTN's costs (including the costs of two counsel).

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11 October 2018

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