

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

**CASE NO. 2018 / 20057**

In the matter between :-

**CELL C LIMITED** Applicant

and

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

**CHAIRPERSON OF THE 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 NETWORK (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

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**FILING SHEET: APPLICANT'S PART B REPLYING AFFIDAVIT**

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**TAKE NOTICE THAT** the Applicant hereby files its replying affidavit to the First and Second Respondents answering affidavit in relation to Part B.

**SIGNED** at ILLOVO on the 8th day of **OCTOBER 2018**.



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Ref: H Irvine / N Jacobs / MAT1336

TO:  
**THE REGISTRAR**  
High Court of South Africa  
Gauteng Local Division  
Johannesburg

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Fifth Respondent

**INTERNET SERVICE PROVIDERS' ASSOCIATION  
NPC**

Sixth Respondent

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

Seventh Respondent

**MARK P LISTER**

Eighth Respondent

**MOBILE TELEPHONE NETWORK (PTY) LTD**

Ninth Respondent

**MWEB**

Tenth Respondent

**NATIONAL CONSUMER COMMISSION**

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION  
NPO**

Twelfth Respondent

**TELKOM SA SOC LTD**

Thirteenth Respondent

**VODACOM (PTY) LTD**

Fourteenth  
Respondent

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**APPLICANT'S PART B REPLYING AFFIDAVIT**

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I, the undersigned,

**GRAHAM NEIL MACKINNON**

do hereby make oath and say that:

1. I am an adult male and the Chief Legal Officer of Cell C Limited ("Cell C"), the applicant in these proceedings. I am the deponent to the founding affidavit in the so-called Part A of this application, and I depose to this affidavit in the same capacity and with the same authority as before.
2. The allegations contained in this affidavit are, save where the context indicates the contrary, within my personal knowledge and are true and correct. Where I make legal submissions, these are made on the advice of Cell C's legal representatives, which advice I accept as correct.
3. In this affidavit I reply to the ICASA answering affidavit, an unsigned copy of which was served on Cell C on Tuesday 2 October 2018. I have considered the affidavit and respond to the averments contained therein below. Contentions not specifically addressed in this affidavit are denied by Cell C. This affidavit must be read together with my founding affidavit and supplementary founding affidavit.
4. AD PARAGRAPHS 1 – 2
  - 4.1. The contents of paragraph 1.1 are admitted.

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4.2. ICASA's admissions as set out in paragraph 2 are noted, but I deny the allegation in 2.2 that the contents of my earlier affidavit are not true and correct.

5. AD PARAGRAPHS 3.1 – 3.3

5.1. The contents of paragraph 3.3 are admitted, the conclusions drawn therefrom are denied. The compromised position referred to in the answering affidavit included the option for ICASA to argue urgency off the Cell C founding affidavit.

6. AD PARAGRAPHS 3.4 – 4

6.1. The contents of these paragraphs are admitted.

7. AD PARAGRAPHS 5.1 – 5.4

7.1. The contents of these paragraphs are denied. I emphasize that Cell C has never suggested that it would be impossible to comply with the Amendment Regulations; rather, it submitted (and continues to submit) that it was impossible to comply with the Amendment Regulations within 30 days of their publication.

7.2. To the extent that the averments comprise legal argument, complete submissions will be made at the hearing of the application.

8. AD PARAGRAPHS 5.5 – 5.6

8.1. The contents of the paragraphs are denied. Cell C reiterates that it was only able to appreciate the implications of the Amendment Regulations on publication of the final draft. It is only in this form, that Cell C's technical and business units were able to devise the operational plans and

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timeframes necessary to implement the obligations contained in the Amendment Regulations.

- 8.2. Without a final draft document, any prospective planning within Cell C would be subject to change as ICASA altered the draft Amendment Regulations, and amount to resource intensive and, ultimately, fruitless work.

#### 9. AD PARAGRAPHS 5.7 – 5.8

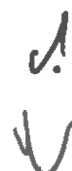
- 9.1. Regulations impose a compliance duty and therefore it stands to reason that a regulator ought not to set a time-period for compliance that is not possible to meet. A regulator such as ICASA ought to bring its own expertise into account in setting time periods for compliance, irrespective of submissions made to it.

#### 10. AD PARAGRAPHS 5.9 – 5.10

- 10.1. Cell C has not contended that the Amendment Regulations are impossible to comply with, it has merely stated that the Amendment Regulations are impossible to comply with within a 30-day period. As I pointed out before, Cell C will be in a position to comply by December 2018, some six months after the publication of the Amendment Regulations. This provides an indication of a reasonable period that ought to have been set for compliance with the Amendment Regulations.

#### 11. AD PARAGRAPHS 5.11 – 5.14

- 11.1. The conclusions drawn and arguments advanced in these paragraphs are denied and submissions thereon will be made at the hearing of the application.



- 11.2. ICASA accepts that regulations require changes to the way in which a firm does business, but it wishes to argue away the reality that those changes (particularly technical changes) take time to implement. ICASA unreasonably refuses to accept that it had to have made an assessment of the time it might take firms to comply before it set an implementation date. The decision-makers at ICASA did not apply their minds to the practical and technical realities, and have defended that position in costly litigation when a reasonable extension of the time period for compliance would hardly have pushed back the implementation date by much more than what will be the case in consequence of the suspension pending this litigation.
- 11.3. What ICASA cannot say, is that the parties did not make sufficiently detailed submissions on the practical implications of implementation. As a responsible regulator, faced with a requirement that it decide on a time period for compliance, ICASA ought to have invited particular submissions if it did not enjoy sufficient expertise of its own to make an assessment of compliance requirements. It is rather odd that the specialist regulator insists that it could not have been expected to have had an understanding of the extent of technical changes required to implement the significant changes required by the Amendment Regulations.

#### 12.AD PARAGRAPHS 5.15 – 5.16

- 12.1. It matters not that Cell C is now providing greater detail of the practical difficulties experienced by it. It now knows the content of the Amendment Regulations and it is in the process of implementing the necessary changes. Naturally, it is in a better position to provide to the court details

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on such changes than before it even knew what the final content of the Amendment Regulations was going to be.

- 12.2. ICASA, as a regulator, cannot rely on the submissions of parties to it alone. It must be expected, prior to regulating, to have considered the impact of such regulation on business and the technical requirements to be met in order to secure compliance. It is not good enough for ICASA to simply state that nobody told it that significant additional regulation would lead to significant technical changes being required. It is a specialist regulator, it ought to have the knowledge or ought to have satisfied itself prior to regulation by asking for specific submissions if it did not have such knowledge.

#### 13.AD PARAGRAPHS 5.17 – 5.19

- 13.1. Save for admitting that the technical and operational details set out in the Cell C founding affidavit were not contained in the Cell C submissions to ICASA at the March 2018 public hearings, the remainder of paragraph 5.19 are denied.
- 13.2. The intricacies of the technical, operational and business changes necessitated by the Amendment Regulations could only be ascertained with accuracy, and the timelines projected, once Cell C knew the precise nature of each of the obligations imposed on it in the Amendment Regulations. Any submission made in March 2018, would have been speculative.

#### 14.AD PARAGRAPHS 5.20 – 5.21

- 14.1. The contents of these paragraphs are denied.
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14.2. ICASA reserves for itself the right to assert that submissions made to it were not detailed enough and therefore that they could be ignored. The approach is unreasonable and irrational. If the submissions were not detailed enough for ICASA to have made a decision, it ought to have called for additional detail. It did not.

#### 15. AD PARAGRAPHS 5.22 – 5.26

15.1. In paragraphs 18 to 19 of the founding affidavit, Cell C referred to submissions made by licensees regarding the implementation of the Amendment Regulations during the public participation process.

15.2. In addition, within a week of the press briefing held on 26 April 2018, Cell C informed ICASA of the technical and operational changes that would be required in order to implement the Amendment Regulations. This correspondence was sent to ICASA three days prior to it promulgating the Amendment Regulations. In the answering affidavit, ICASA again fails to state why the Amendment Regulations had to be promulgated on 7 May 2018, or why ICASA had set its mind to a 30-day implementation period in clause 8.

15.3. ICASA puts the cart before the horse: it says that submissions had to be made on how long it would take to implement regulations that were not yet known to Cell C (in their final form). Surely, the calculation of the time period required for compliance can only be known once the content of the Amendment Regulation was made clear.

#### 16. AD PARAGRAPHS 5.27 – 5.29

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16.1. Save for admitting that the Cell C letter of 27 May 2018 was sent to ICASA after the promulgation of the Amendment Regulations on 7 May 2018, the contents of these paragraphs are denied.

17.AD PARAGRAPHS 5.30 – 5.32

17.1. It is denied that the implementation period for compliance with the Amendment Regulations could have been less than six months. How ICASA can assert so confidently that the period would have been shorter, is not explained. What is evident is that not even ICASA goes as far as to say that it could have been done within 30 days of promulgation of the Amendment Regulations.

17.2. On ICASA's version, in order to ensure compliance by 8 June 2018, licensees would have had to work off the November 2017 draft Regulations (ie make operational, business and technical plans off a draft document that, it is apparent, was not the final version of the Amendment Regulations as promulgated). Any changes required in consequence of differences between the draft Regulations and the Amendment Regulations would have taken additional time to make.

17.3. Such an approach does not make business sense and is not an economical or efficient application of Cell C's operational resources.

18.AD PARAGRAPHS 5.33 – 5.46

18.1. The contents of these paragraphs are denied.

18.2. To the extent the contents comprise legal argument, legal argument will be made at the hearing of the application.



18.3. ICASA appears to suggest that it, as the specialist regulator, had no understanding of what might be required to secure compliance and that, in the absence of full details being provided by those subject to its regulation, it did not have to consider the reasonable and rational period that would be required to fully implement. This position must be rejected. What was unreasonable, was for ICASA not to have interrogated the time period that would be required to secure compliance upon promulgation of the Amendment Regulations.

#### 19.AD PARAGRAPHS 5.47 – 5.54

19.1. I note the admissions, and the denial of the applicability of section 4(5) of the ECA. Legal argument will be presented at the hearing of the application.

19.2. I am not required to deal with the bare denials in the remainder of the paragraphs.

#### 20. AD PARAGRAPH 6

20.1. The contents of this paragraph are admitted.

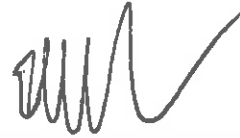
20.2. ICASA opposes this application, even though it notes that it will have taken Cell C about six month to ensure compliance with the Amendment Regulations.

#### 21.AD PARAGRAPH 7

21.1. Cell C is entitled to relief, in respect of which a case has been made out.

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**WHEREFORE** the applicant prays for relief as set out in Part B of the Notice of Motion to which this affidavit is attached.



**GRAHAM NEIL MACKINNON**

I CERTIFY that this affidavit was signed and sworn to before me at *cs* on this the *8<sup>th</sup>* day of *September* ~~SEPTEMBER~~ 2018, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".

  
**COMMISSIONER OF OATHS**

Name:

Address:

Capacity:

**Cebo Nzuzonhle Nzuza**  
The Central, 96 Rivonia Road  
Sandton, Johannesburg, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.