IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 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 SA SOC LTD	Thirteenth Respondent
VODACOM (PTY) LTD	Fourteenth Respondent

APPLICANT'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 Services Charter Amendment Regulations by way of Notice 233 of Government Gazette 41613 ('**the Amendment Regulations**'). In terms of regulation 8, the Amendment Regulations were to come into force one month after publication in the Gazette, namely, by 8 June 2018.

2 Cell C Limited ('**Cell C**') was in no position to comply with the Amendment Regulations within a month, given the technical and commercial changes required to ensure compliance without causing disruption to consumers. When ICASA could not be convinced to postpone the implementation of the Amendment Regulations, Cell C launched these proceedings on 6 June 2018, seeking relief substantively aimed at postponing the effective date of the Amendment Regulations by six months. This was the period that Cell C estimated would be required for compliance by it.

3 ICASA elected not to argue urgency at the time; rather, it agreed to an order[1] regulating the further exchange of papers and undertook not to take any steps against non-compliant licensees. ICASA duly promulgated a notice to this effect in the Government Gazette on 11 June 2018.[2]

[1] Cell C Part B affidavit annexure "GNM1": 913, MTN founding affidavit in the counter application annexure "GDV9": 550

[2] Cell C Replying affidavit: 569 par 6.5 and annexure "RA2": 590

4 Mobile Telephone Network (Proprietary) Limited ('**MTN**') launched a counter-application claiming similar relief to Cell C[3] and the exchange of papers has been regulated through case management. Argument is to be heard on 15 and 16 November 2018, more than five months after the intended implementation date provided for in regulation 8 of the Amendment Regulations.

5 ICASA, the industry-specific regulator tasked with regulating the industry must have appreciated the significant extent of technical and commercial changes required, *even if these had not been brought to its attention.* Although they were brought to its attention, ICASA steadfastly refused to adopt the reasonable and rational approach, which was to postpone the coming into effect of the Amendment Regulations. And, faced with litigation, where its licensees stated on oath that they would not be able to comply with the Amendment Regulations, ICASA simply stood its ground, to this day persisting with arguments on urgency and defending its decision to implement the Amendment Regulations on short notice.

6 Depending on when judgment is handed down, the time period required for compliance with the Amendment Regulations is likely to have been rendered academic (at least from Cell's C's perspective, if it has proved possible to implement these regulations in accordance with its expected timetable). But the record filed by ICASA in consequence of these proceedings has shown that it failed to comply with section 4(5) of the

[3] MTN notice of counter application (additional documents): 41

Electronic Communications Act, 2005 ('**ECA**'), in that the Amendment Regulations in final form were not presented to the Minister of Communications ('**the Minister**') prior to their promulgation. In these circumstances, the promulgation of the Amendment Regulations must be set aside, and fresh procedures must be followed to ensure compliance with the ECA.

7 Cell C pursues this review based on the Promotion of Administrative Justice Act 3 of 2000 ('**PAJA**'), alternatively the principle of legality and further alternatively, the common law.

8 In these heads, we address the following topics:

8.1 The relevant facts;

8.2 The remaining issue of costs under Part A of the notice of motion;

8.3 The basis for the review application;

8.4 The first ground of review: impossibility for licensees to comply with regulation 8;

8.5 The second ground of review: the decision is unreasonable and irrational;

8.6 The third ground of review: ICASA failed to comply with a mandatory statutory provision; and

8.7 The appropriate relief.

RELEVANT FACTS

9 As appears from the papers exchanged in this application, the facts are largely common cause. [4]

10 ICASA issued a request for information from stakeholders concerning out of bundle and data expiry practices within the industry.[5] This was followed by a public participation process that included:

10.1 a workshop on Industry/Data Expiry Rules and Out-of-Bundle Data Billing held on 19 May 2017;[6]

10.2 publication, on 7 August 2017, of the proposed amendments to the End-User and Subscriber Services Charter Regulations, 2016;[7]

10.3 publication in November 2017 of a draft of the Amendment Regulations;[8]

10.4 receipt of written submissions from stakeholders on the November 2017 draft of the Amendment Regulations;[9]

10.5 a public hearing convened on 1 and 2 March 2018;[10]

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[4] ICASA answering affidavit: 154 par 9.1 – 9.6; MTN founding affidavit in the counter-application: 401 par 37- 40

[5] Founding affidavit: 7 par 24

[6] Founding affidavit: 7 par 25

[7] Founding affidavit: 7 par 25

[8] Founding affidavit: 7 par 27

[9] Founding affidavit: 8 par 28

[10] Founding affidavit: 8 par 29

10.6 publication of a further draft of the Amendment Regulations on 26 April 2018, at an ICASA convened media briefing;[11] and

10.7 publication of the Amendment Regulations in their final form in the Government Gazette on 7 May 2018.[12]

11 In all of these engagements, the primary focus was the proposed substantive content of regulations dealing with out of data and bundle expiry practices. It must have been abundantly clear to ICASA that regulatory changes on these matters would require significant changes to the product offerings of licensees, and thus the operational and technical configuration of licensees' businesses,[13] even if the time period required for compliance without compromise to the quality of customer services were not pertinently raised.

12 But the time period was raised. ICASA now contends that it was not raised in sufficient detail, but that cannot be accepted as the response from a responsible regulator: if it appeared to ICASA that the time period required for compliance necessitated consideration, it had to bring that into account and seek further information, if necessary. ICASA's defence on this underscores that it declined to engage with the time period required for compliance.

[11] Founding affidavit: 8 par 30

[12] Founding affidavit: 12 par 38

[13] Cell C Part B affidavit: 892-893 par 18 – 20; Record of proceedings: 83 (MTN); 90, 96, 104 (Telkom); 216 (MTN); 319 (Vodacom); and 322 (WAPA); and 602 (Cell C)

13 ICASA's stated position, that the licensees ought to have prepared themselves for implementation, cannot be sustained on the common cause facts. It is common cause that there were changes to the draft regulations between November 2017 and April 2018, and once more by the time of publication of the Amendment Regulations. On ICASA's version, the licensees ought to have relied on the November draft (which was still to be debated and subjected to public participation processes before ICASA) to ready itself for implementation, in order to allow six months for implementation. It can never be the expectation of a regulator that a licensee prepares itself in this manner in circumstances where there is no certainty as to the content of the proposed regulations.

14 The parties agree that Cell C raised the issue of the time period for compliance with ICASA prior to the publication of the Amendment Regulations, after the April 2018 press conference and again after the publication of the Amendment Regulations, as is discussed more fully in the following section. ICASA does not dispute that it had been unresponsive to Cell C's requests to postpone implementation of the Amendment Regulations.[14]

15 It is further common cause that, pursuant to the present litigation, ICASA has provided –

[14] Founding affidavit: 10-12 par 35 and 37; ICASA answering affidavit: 159 par 10.13 – 10.15 and 162 par 11.13

15.1 reasons for its decision;[15] and

15.2 the record of its processes, in accordance with rule 53(1) of the Uniform Rules.

THE REMAINING ISSUE UNDER PART A

16 Cell C submits that there is no need for this court to determine the urgency of the application under Part A, since the question has been rendered academic.[16] The issue of costs under Part A, however, remains a live issue.

17 In the absence of agreement with ICASA on the postponement of the implementation date of the Amendment Regulations, Cell C sought an order that its application be enrolled on an urgent basis, and an order interdicting ICASA from implementing the Amendment Regulations until the determination of the review proceedings set out in Part B of the notice of motion.

18 The agreement reached between the parties on the morning of 7 June 2018 and made an order of court[17] afforded the parties the necessary period within which to institute the Part B review and to file further affidavits. The undertaking tendered by ICASA not to implement the

[15] Founding affidavit annexure "FA1": 24

[16] Director-General Department of Home Affairs vs Mukhamadiva 2014 (3) BCLR 306 (CC) at par [37]

[17] Cell C Part B affidavit annexure "GNM1": 913; MTN founding affidavit in the counter application annexure "GDV9": 550

Amendment Regulations was in effect a concession that the interim relief fell was justified pending the determination of the Part B review. The practical effect of the order of 7 June 2018 was to delay the implementation of the Amendment Regulations for at least five months, and probably more, depending on the time it might take to issue judgment in this matter. In the circumstances, the only matter for consideration before this court is the substantive review relief.

19 To the extent that a finding on urgency might be relevant to a costs determination in respect of the hearing of Part A on 7 June 2018, we submit Cell C had no other reasonable remedy available to it but to approach the court on an urgent basis.

20 The pertinent facts arise from the ICASA media briefing on 26 April 2018, which is the first time that Cell C and the other licensees were informed of the final content of the Amendment Regulations and the one-month period within which the Amendment Regulations would be brought into force. It is from this point in time that Cell C's conduct ought to be judged. As at this time, the undisputed facts show:

20.1 Cell C immediately considered the implications of the Amendment Regulations and communicated their concerns regarding the one-month implementation timeframe to ICASA on 4 May 2018.[18]

20.2 ICASA did not respond to Cell C's letter.

[18] Founding affidavit annexure "FA2": 59 and 10 par 35

20.3 ICASA instead elected to promulgate the Amendment Regulations three days later, on 7 May 2018.[19] At this point, Cell C and other licensees became informed that, in accordance with regulation 8, the Amendment Regulations would come into force on 8 June 2018.

20.4 Cell C again corresponded with ICASA on 28 May 2018, with a further, more comprehensive outline of the commercial and technical changes that the Amendment Regulations necessitate.[20]

20.5 ICASA did not respond to Cell C's letter.

20.6 Having received no response from ICASA, Cell C contacted an ICASA official, Mr Mphahlele, on 4 June 2018 to inquire whether ICASA had received Cell C's correspondence and whether ICASA would engage with Cell C regarding the looming implementation date set out in the Amendment Regulations.[21]

20.7 Cell C was informed that the ICASA Council would be meeting on Tuesday 5 June and that Cell C's concerns would be discussed at that meeting.[22]

20.8 On 5 June 2018, Cell C again wrote to ICASA, this time requesting a written undertaking that it grant an extension to licensees to implement the Amendment Regulations, and that such extension be published in the Government Gazette.

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[19] Founding affidavit annexure "FA3": 61

[20] Founding affidavit annexure "FA4": 105

[21] Founding affidavit: 14 par 50

[22] Founding affidavit: 14 par 51 and 17 par 67

20.9 Having received no further communication from ICASA, and having exhausted all non-litigious means of engaging with it, Cell C instituted the present application on an urgent basis on 6 June 2018, [23] two days prior to the entry into force of the Amendment Regulations.

21 It is thus clear that once Cell C learnt of the content of the final version of the Amendment Regulations, it immediately took steps to determine the commercial and technical changes it would have to effect to comply with the obligations in the Amendment Regulations. It and other licensees[24] engaged ICASA in correspondence to alert ICASA to the impossibility of complying with a one-month timeframe. It cannot be disputed that Cell C had hoped to resolve the matter without resorting to litigation and that the matter had become urgent by 5 June 2018, when no feedback on the meeting was provided, contrary to what had been promised. No doubt an earlier application would have evoked the response that it was premature, since ICASA was still to consider Cell C's submissions at the 5 June 2018 meeting. Axiomatically, Cell C cannot be criticized for bringing its application only on 6 June 2018.

22 Yet, ICASA contends that the urgency was self-created. [25]

[23] Cell C notice of motion (additional documents): 6

[24] Telkom answering affidavit annexure "AD5": 384

[25] ICASA answering affidavit: 148-149 par 5.17 and 5.21.

23 However, in *Transnet Limited v Rubenstein*[26] the Supreme Court of Appeal ('**SCA**') explained that an applicant could not legitimately be criticised for attempting to resolve a matter amicably before resorting to litigation.[27] It is an accepted principle in our law that, where an applicant first seeks compliance from the respondent before lodging an application, it cannot be said that the applicant had been dilatory in bringing the application or that the urgency is self-created.[28] An applicant ought not to be prejudiced for seeking to avoid instituting litigation.

24 It is also important that Cell C simply sought relief aimed at protecting it from the application of the Amendment Regulations pending the determination of Part B. In *Pikoli v President of the Republic of South Africa and Others*[29] the relevant principles are set out and may be summarised as follows:

24.1 One of the main aims of an interim interdict is to preserve the *status quo* pending the final determination of the rights of parties to pending litigation.

24.2 The law requires of all concerned to respect the pending legal process and, as far as is reasonably possible, to limit the practical consequences of the challenged action. Therefore, in appropriate

[26] 2006 (1) SA 591 (SCA)

[27] At 603B/C.

[28] Nelson Mandela Metropolitan Municipality v Greyvenouw 2004 (2) SA 81 (SE) at 94C–D; Stock v Minister of Housing 2007 (2) SA 9 (C) at 12I–13A. See also South African Informal Traders Forum and others v City of Johannesburg 2014 (4) SA 371 (CC).

[29] 2010 (1) SA 400 (GNP)

circumstances, a litigant should halt its actions if it is aware that those actions are being challenged and that failure to do so may even result in liability for contempt of court.

24.3 When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief.

25 The relief sought in Part A of this application had clearly been aimed at preserving the integrity of the main litigation that was to follow, so that Cell C may, in due course, receive adequate and effective relief. Had interim relief not been sought, the main application would have been rendered academic:

25.1 The Amendment Regulations were due to enter into force on Friday 8 June 2018. At that point Cell C (and other non-compliant licensees) would have been acting in contravention of the obligations under the Amendment Regulations, and would have been subject to regulatory sanction under section 74 of the ECA.[30] A hearing in due course would have provided Cell C no relief in respect of historical regulatory non-compliance.

[30] Founding affidavit: 21 par 84

25.2 Cell C engaged ICASA on its inability to comply with the obligations contained in the Amendment Regulations as of 8 June 2018.

25.3 Cell C carried out this obligation as soon as it became aware of the impossibility – not in an abstract way, but having completed the necessary scope of works and engaging the various business units within the company on a realistic time frame within which it could be compliant with the Amendment Regulations. ICASA refused outright to engage with Cell C or even acknowledge the receipt of Cell C's letters following the media briefing on 26 April 2018.

25.4 In the face of a non-communicative and non-responsive regulatory authority, Cell C had no alternative but to approach the Court on the basis of extreme urgency. ICASA effectively accepted the urgency of the application when the application came before court.

26 In these circumstances, there is no basis for an adverse costs order against Cell C. Indeed, the facts indicate that the costs of the urgent application must be paid by ICASA, for the following reasons:

26.1 ICASA tendered an undertaking that substantively amounted to a concession that the relief sought, be granted – namely, that it suspend the entry into force of the Amendment Regulations pending a determination of the application under Part B.[31]

[31] Cell C replying affidavit: 568 par 6.3 and "RA1": 588

26.2 The undertaking tendered by ICASA was precisely the basis of Cell C's engagement with ICASA during May and June 2018.

26.3 Cell C at all times sought no more than to engage ICASA on its difficulties in complying with the Amendment Regulations, offering to meet with ICASA to explain the technical and operations changes necessitated by the Amendment Regulations and, consequently, seeking an undertaking from ICASA to delay the entry into force of the Amendment Regulations.

26.4 ICASA elected to ignore Cell C's attempts for five weeks.

27 We now turn to the basis for review.

THE BASIS FOR REVIEW

28 This application for review is brought in terms of PAJA, alternatively the principle of legality, further alternatively the common law. Nothing of substance turns on these alternatives because of the overlap between these possible bases of review.[32]

[32] *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) par [38] fn 25

29 In *Mostert*,[33] the SCA raised the question whether all acts of regulation-making necessarily comprise administrative action under PAJA. This position is contrasted with the earlier dicta of Maya JA in *Cable City.*[34]

30 In the case of *Democratic Alliance*, Rogers J for the full court held that it is unnecessary to decide the issue unless something in the case turns on the determination, such as the question of time limits.[35]

31 The powers exercised by ICASA are sourced in a statute,[36] and the exercise of these powers clearly has a direct effect on licensees. Any non-compliance would be visited with statutory-based sanction procedures.[37]

THE FIRST GROUND OF REVIEW: IMPOSSIBILITY OF CELL C COMPLYING WITH THE AMENDMENT REGULATIONS IN A PERIOD OF ONE MONTH

32 Regulation 8 of the Amendment Regulations falls to be reviewed and set aside in terms of:

32.1 the principle of legality; alternatively

[33] Mostert NO v Registrar of Pension Funds and Others 2018 (2) SA 53 (SCA) par [8] – [10]

[34] City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) par [10], placing reliance on Pharmaceuticals Manufacturers Association of SA: In Re Ex Parte President of the RSA 2000 (2) SA 674 (CC) para 50.

[35] Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others [2017] 1 All SA 530 (WCC) par [165], relying on Albutt v Centre for the Study of Violence and Reconciliation & Others 2010 (3) SA 293 (CC) par [79] – [84]

[36] Section 4 of the ECA

[37] See for example, Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae) 2006 (2) SA 311 (CC) par [132]

32.2 section 6(2)(e)(iii) of PAJA, in that ICASA in taking the decision (to promulgate regulation 8 in its current form) failed to take into account relevant considerations;[38]

32.3 section 6(2)(e)(vi) of PAJA, in that the decision taken was arbitrary and capricious;[39] and

32.4 section 6(2)(f)(ii)(cc) of PAJA, in that the decision taken was not rationally connected to information placed before ICASA,[40] further alternatively

32.5 the common law.

33 What is to be taken into consideration by a decision-maker is based on what is relevant to the decision taken and includes '*all material information and all objections and alternatives to the administrative action*'.[41] The entry into force of a regulation or statute is an issue that is always of relevance. Whatever the substantive content of a regulation may be, it is imperative that a regulation is capable of compliance by those directly affected.

34 ICASA took a decision that ignored factual submissions made by stakeholders when it decided to promulgate the Amendment Regulations

[38] Cell C Part B affidavit: 896 par 30.1

[39] Cell C Part B affidavit: 897 par 30.2

[40] Cell C Part B affidavit: 898 par 30.3

[41] CTP Limited and others v Director General, Department of Basic Education and others [2018] 2 All SA 745 (GP) par [113]

despite concerns expressed by licensees (for example, Cell C's letter of 4 May 2018). Consequently, the decision in respect of the one-month period in regulation 8 can only be regarded as unreasonable and wholly-unconnected to the information placed before ICASA. ICASA clearly ignored relevant considerations. This is fatal to the legality of its decision.[42]

35 It is a well-established principle of our law that the law does not require people to do that which is impossible. This is a principle derived from "justice and equity".[43] This principle applies also to the performance of statutory requirements.[44]

THE SECOND GROUND OF REVIEW: ICASA'S DECISION WAS UNREASONABLE AND IRRATIONAL

Unreasonableness

36 The test for the reasonableness of an administrative decision is objective and inquires whether the decision reached is one which a reasonable decision-maker could not reach.[45]

[42] Democratic Alliance v President of the Republic of South Africa and Others 2013 (3) SA 268 (CC) par [38] – [40]

[43] Barkhuizen v Napier 2007 (5) SA 323 (CC) par 75.

[44] Cassim and Another v Voyager Property Management and others 2011 (6) SA 544 (SCA) par 15.

[45] Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) par 44 – 45.

37 Cell C's founding affidavit and its affidavit filed in terms of Part B set out comprehensively the information submitted to ICASA by the licensees, and thus the information ICASA had before it at the time of its decision to promulgate regulation 8.[46]

38 The contents of the submissions from licensees are undisputed and, to the extent that ICASA was uncertain whether the technical and operational changes necessitated could be completed within a one-month period, ICASA was unambiguously informed of this impossibility in Cell C's letter of 4 May 2018, prior to the promulgation of the Amendment Regulations.

39 In addition, following the promulgation of the Amendment Regulations on 7 May 2018, ICASA was informed by at least two licensees of the unreasonableness of the one-month period and the licensees' inability to comply therewith.[47]

40 Objectively considered ICASA elected to:

40.1 ignore the implications of the submissions made by the various licensees of the technical and operational changes that would need to be made before any licensee would be in a position to implement the Amendment Regulations without the danger of customers experiencing interrupted services and inaccurate billing invoices.

[46] Cell C Part B affidavit: 892-893 par 18-19 and 23

[47] Cell C letter dated 28 May 2018, founding affidavit annexure "FA4": 105; Telkom letter dated 25 May 2018, Telkom answering affidavit annexure "AD5": 384

40.2 ignore Cell C's repeated attempts to engage ICASA following the ICASA media briefing on 26 April 2018. This included the two letters, setting out projected timelines to ICASA of the steps necessary to implement the Amendment Regulations and a telephone call to ICASA officials seeking further engagement and clarification.

40.3 ignore further correspondence from Cell C in June 2018, inviting ICASA to a site visit to enable ICASA to apply its mind to Cell C's submissions.[48]

40.4 consider Cell C's position at its Council meeting of 5 June 2018[49] but refuse to inform Cell C of the outcome of its deliberations.

40.5 promulgate the Amendment Regulations unaltered on 7 May 2018.

41 ICASA's conduct is thus plainly unreasonable.

42 It is a long-standing principle that delegated legislation may be challenged on the grounds of unreasonableness in the sense used in *Kruse v Johnson*, [50] namely that the regulations in question were, *inter alia,* "manifestly unjust" or if they disclosed "bad faith" or if they involved "such oppressive or gratuitous interference with the rights of those subjected to

[48] Replying affidavit annexure "RA4": 700

[49] Founding affidavit: 17 par 67

[50] 1898 2 QB 91 at 99-100

them as could find no justification in the minds of reasonable men". This approach is well entrenched in our law.[51]

43 Regulation 8 falls to be struck down on this basis. It is manifestly unjust and involves gratuitous interference with the rights of those subject to it.

44 It is also a well-established principle that subordinate legislation can be attacked on the basis that it is unreasonable in its application.[52] Here the manner in which regulation 8 is to be applied is clearly unreasonable, given the impossibility of compliance within the one-month stipulated period. Regulation 8 has an "unnecessarily onerous impact on affected persons".[53]

Legality

45 In the event that this Court is of the view that the decision to promulgate the Amendment Regulations does not constitute administrative action, we set out below the basis on which the Amendment Regulations fall to be set aside on the principle of legality.

46 It is clear that the promulgation of the Amendment Regulations, is an exercise of public power and, as such, must comply with the doctrine of

[51] See, for example, *R v Abdurahman* 1950 (3) SA 136 (A) at 150C-E; *R v Lusu* 1953 (2) SA 484 (A) at 489E-G; Baxter, Administrative Law (1984) at 490-494

[52] See, for example, *S v Adams, S v Werner* 1981 (1) SA 187 (A) at 222-223

[53] *Medirite (Pty) Limited v South African Pharmacy Council and Another* (197/2014) [2015] ZASCA 27 (20 March 2015) par [20]

legality. ICASA may therefore exercise no power and perform no function beyond that conferred upon it by law[54] and any decision taken must be rationally related to the purpose for which the power was conferred.[55]

47 The decision, on the facts set out above, falls to be set aside on the basis that it amounts to irrational conduct when considered against the purpose of the Amendment Regulations and the impossibility of compliance by licensees within the prescribed one-month period.

48 The core principles of a rationality review are set out by the SCA in *Scalabrini:*[56]

> "*… rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare*."

49 In testing the connection between the decision taken and the reasons for the decision, ICASA falls short.

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[54] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 par [58]; Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae) 2006 (2) SA 311 (CC)

[55] Affordable Medicines Trust and Others vs Minister of Health and Others 2006 (3) SA 247 CC par [49]; Democratic Alliance vs President of the Republic of South Africa 2012 (1) SA 417 SCA par [94]

[56] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) par [65]

50 ICASA has a single response: that during the public participation process the licensees failed to inform it of the internal technical and operational changes that would be required in order for licensees to comply with the obligations in the Amendment Regulations.[57]

51 Cell C has pointed to submissions of licensees in the record of proceedings where ICASA was informed that the Amendment Regulations would require numerous technical, operational, and billing changes to licensees' businesses. ICASA's stance in this regard is therefore incorrect.

52 ICASA is further entirely silent on why it decided on an implementation period of one month, in circumstances where:

52.1 It was informed by at least one licensee (Cell C) prior to the promulgation of the Amendment Regulations that the one-month period would be impossible for Cell C to comply with.

52.2 There was no reason provided why the Amendment Regulations had to be promulgated on 7 May 2018.

52.3 ICASA was informed by licensees prior to the entry into force of the Amendment Regulations on 8 June 2018 that compliance with the obligations would be practically impossible and that a reasonable period would be three to six months or, alternatively, a staggered or phased-in entry into force.

[57] ICASA answering affidavit: 145 par 5.9 and 5.11

52.4 A sample of other regulations promulgated by ICASA shows that it often affords licensees a reasonable period within which to arrange their businesses' so as to ensure their ability to comply with regulations. Consequently, the commencement date of regulations is set between six and 24 months, following publication the Government Gazette.[58]

53 ICASA has provided no justification for the one-month period in regulation 8. The purpose of the Amendment Regulations must be to regulate the conduct and business practices of licensees. Where licensees inform the regulatory authority of the implications of the regulatory obligations and specify to the Authority the practical inability of compliance prior to the promulgation of the Amendment Regulations, and ICASA nevertheless decides to prescribe a one-month compliance period, the decision is irrational and falls to be reviewed under the principle of legality.

THE THIRD GROUND OF REVIEW: ICASA'S FAILURE TO COMPLY WITH SECTION 4(5) OF THE ECA

54 The jurisdictional facts necessary for ICASA to lawfully promulgate regulations are contained in section 4(5) of the ECA, which provides:

> "*ICASA must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention*

[58] Cell C replying affidavit annexures "RA3A" to "RA3C": 593-699

and provide the Minister with a copy of the proposed regulations".

55 The jurisdictional facts require that the Minister (i) be informed in writing of ICASA's intention to make regulations; (ii) be informed at least 30 days prior to ICASA making the regulations; and (iii) be provided with a copy of the proposed regulations.

56 From the use of the word "must" it is clear that compliance with the jurisdictional fact is mandatory, non-compliance therewith will render any subsequent exercise of power invalid and unlawful, and the regulatory authority would have no power to condone any failure to comply with a peremptory requirement.[59]

57 The approach to the materiality of any statutory non-compliance is set out in *AllPay*:[60]

> "*The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before*

[59] Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith 2004 (1) SA 308 (SCA) par [31]

[60] AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae) 2014 (1) SA 604 (CC) par [28]. See also Genesis Medical Scheme v Registrar of Medical Schemes and Another 2017 (6) SA 1 (CC) par [21], in which it is confirmed that a court has the power to review every error of law, provided of course it is material.

concluding that a review ground under PAJA has been established."

58 The Court continued:

> "… *the central element 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'*"[61]

59 ICASA failed to provide the Minister with a copy of the proposed regulations. What ICASA did do, was provide the Minister with a copy of a first draft of the Amendment Regulations in August 2017.[62]

60 ICASA contends that section 4(5) of the ECA is applicable only when it contemplates making new regulations and is not applicable each time a regulation is amended. This contention is at odds with the proper approach to statutory interpretation.

61 The starting point in statutory interpretation remains the ordinary meaning of the words used in their proper context. The appropriate interpretation comprises one unitary exercise.[63]

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[61] AllPay Consolidated Investment Holdings (Pty) Ltd (above) par [30]

[62] Cell C Part B affidavit: 900 par 34-35; Record of proceedings: 1-13

[63] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]-[19]; Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at [28]

62 The obvious purpose of section 4(5) is to give the Minister an opportunity to consider proposed regulations and to provide his or her input. That can only be done if the Minister is provided with a copy of the actual Regulations which it is proposed to promulgate. That did not occur.

63 ICASA's statutory non-compliance fundamentally undermined the very purpose of the section, to inform the Minister of ICASA's intention to promulgate particular Regulations and to give the Minister the opportunity to present his or her views.

64 ICASA thus failed to comply with the third jurisdictional fact and this is fatal to the lawful promulgation of the Amendment Regulations as a whole. It matters not whether this ground of review resides under the principle of legality or PAJA. The result is the same.

THE APPROPRIATE RELIEF

65 Cell C's notice of motion sought an order reviewing and setting aside regulation 8 of the Amendment Regulations, coupled with an order remitting to ICASA the decision of the date on which the Amendment Regulations are to come into force.

66 However, the non-compliance with section 4(5) of the ECA is fatal to the Regulations as a whole.

67 On this basis, Cell C seeks an order in the following terms:

1. The first respondent's decision to promulgate the End-User and Subscriber Services Charter Amendment Regulations, Notice 233 of Government Gazette 41613 (the Amendment Regulations), is reviewed and set aside.

2. The first and second respondents are to pay the costs of the application, including the costs of the hearing on 7 June 2018, including the costs of three counsel.

GILBERT MARCUS SC
MARGARETHA ENGELBRECHT
SHA'ISTA KAZEE
Counsel for Cell C

Chambers, Sandton
11 October 2018

Cell C's list of authorities

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1. *Affordable Medicines Trust and Others vs Minister of Health and Others* 2006 (3) SA 247 CC

2. *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) SA 604 (CC)

3. *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

4. *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

5. *Cassim and Another v Voyager Property Management and others* 2011 (6) SA 544 (SCA)

6. *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)

7. *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC)

8. *CTP Limited and others v Director General, Department of Basic Education and others* [2018] 2 All SA 745 (GP)

9. *Democratic Alliance vs President of the Republic of South Africa* 2012 (1) SA 417 (SCA)

10. *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (3) SA 268 (CC)

11. *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others* [2017] 1 All SA 530 (WCC)

12. *Director-General Department of Home Affairs vs Mukhamadiva* 2014 (3) BCLR 306 (CC)

13. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374

14. *Genesis Medical Scheme v Registrar of Medical Schemes and Another* 2017 (6) SA 1 (CC)

15. *Kruse v Johnson* 1898 2 QB 91

16. *Medirite (Pty) Limited v South African Pharmacy Council and Another* (197/2014) [2015] ZASCA 27

17. *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA)

18. *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC)

19. *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA)

20. *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA)

21. *Mostert NO v Registrar of Pension Funds and Others* 2018 (2) SA 53 (SCA)

22. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

23. *Pikoli v President of the Republic of South Africa and Others* 2010 (1) SA 400 (GNP)

24. *R v Abdurahman* 1950 (3) SA 136 (A)

25. *R v Lusu* 1953 (2) SA 484 (A)

26. *S v Adams, S v Werner* 1981 (1) SA 187 (A)

27. *South African Informal Traders Forum and others v City of Johannesburg* 2014 (4) SA 371 (CC)

28. *Nelson Mandela Metropolitan Municipality v Greyvenouw* 2004 (2) SA 81 (SE)

29. *Transnet Limited v Rubenstein* 2006 (1) SA 591 (SCA)