**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 38332/18**

In the matter between:

**TELKOM SA SOC LIMITED** Applicant

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

and

**CHAIRPERSON, INDEPENDENT COMMUNICATIONS**

**AUTHORITY OF SOUTH AFRICA** First Respondent

**INDEPENDENT COMMUNICATIONS**

**AUTHORITY OF SOUTH AFRICA** Second Respondent

**VODACOM (PTY) LIMITED** Third Respondent

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**JUDGMENT**

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Tuchten J:

1 Because of the current pandemic, I heard argument in this case through video-conferencing technologies. Counsel appeared at a virtual hearing. This judgment will be signed by me and distributed

electronically to the parties. In due course I shall lodge the judgment with the registrar of the High Court.

2 In this application, the applicant (Telkom) seeks to review and set aside a decision made by the second respondent (ICASA). ICASA had determined under s 43 of the Electronic Communications Act (the ECA)[1] that a request by the third respondent (Vodacom) that Telkom lease to Vodacom space in its duct systems in fifteen named townships in the Western Cape was reasonable. Telkom further asks that certain procedural directions be given to ICASA to be applied, if the review is successful, when ICASA once again considers the matter. The parties to this review were all represented before me by counsel; Icasa and its chairperson were represented by the same counsel.

3 For many years, Telkom enjoyed a statutory and factual monopoly in the telecommunications industry. This statutory monopoly came to an end with the coming into law of the ECA. The ECA was signed into law in 2006. Its objects were identified in s 2. They included the promotion and convergence of interoperable and interconnected electronic networks (which at the risk of oversimplification I shall sometimes call the internet), the creation of a neutral licensing

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[1] 36 of 2005

system, the universal provision of internet access for all, the promotion of efficient use of applicable resources, competition within the sector, the provision of a variety of internet directed services at reasonable prices and the promotion of the interests of consumers. This short exposition does not purport to be an exhaustive categorisation of the objects of the measure but I think it will suffice for present purposes.

4 One of the problems confronting the industry and the achievement of many of the objects of the ECA was that while Telkom's statutory monopoly had been abolished, its factual monopoly remained pretty much intact. All the users of telecommunications services whether voice (phone calls) or data (messaging, accessing online resources through the internet and the like) were sourced through Telkom's infrastructures.

5 The policy of the ECA was not to expropriate Telkom's infrastructural resources but to facilitate a compulsory leasing system. A licensee would on request be compelled to lease its electronic communications facilities to other persons with the requisite licenses, except where such requests were unreasonable. For this purpose, s 43 provided as follows:[2]

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[2] Except where I state otherwise, all statutory references are to the ECA. I shall quote only those provisions of s 43 relevant for present purposes.

(1) ... [A]n electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44

(3) The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.

(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities—

(a) is technically and financially feasible; and

(b) will promote the efficient use of electronic communication networks and services.

(5) In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of an electronic communications facilities leasing agreement, either party may notify the Authority in writing and the Authority may—

(a) impose terms and conditions consistent with this Chapter;

(b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, must be agreed to by the parties within such period as the Authority may specify; or

(c) refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46

(6) For the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if a facilities leasing agreement is not concluded within the time frames prescribed.

(7) The lease of electronic communications facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the leasing party, be non-discriminatory as among comparable types of electronic communications facilities being leased and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate.

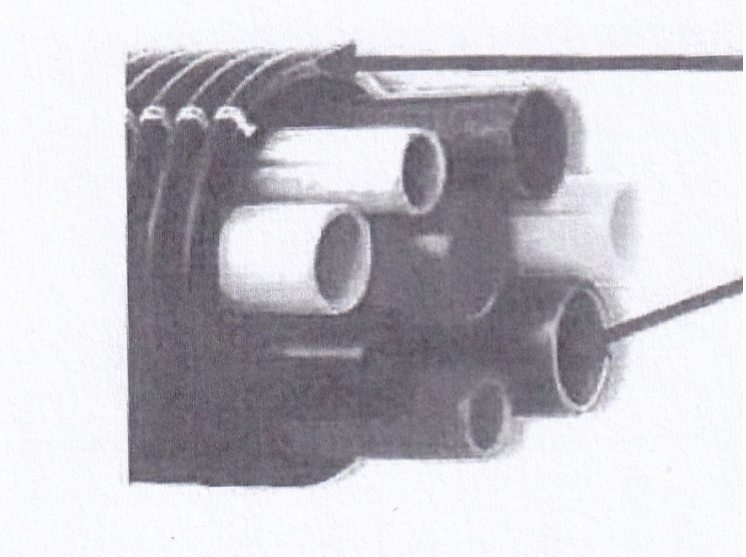
6 It will be seen from the provisions that I have quoted that the measure envisaged a speedy two stage process: first a determination of whether a lease ought in principal to be given (the reasonableness phase or stage); and then, once that were established, what the terms and conditions of the lease ought to be (the negotiation phase or stage). The process was to be speedy firstly because there was a

need for additional services identified in the ECA and secondly because technology in the industry develops very fast. It would make no sense to force a prospective lessee to spend years struggling to compel a reluctant lessor to come to terms. If that were to happen, in many instances the plan of the requesting party, the would-be lessee, would be overtaken by new developments in the industry.

7 Thus it came about that, by letter dated 6 August 2015, Vodacom, another giant of the industry, asked Telkom to lease to it space in certain ducts owned by Telkom in fifteen residential estates in the Western Cape so that Vodacom could run its own fibre optic cabling through those ducts to connect to the internet and provide data to residents in those estates. I shall explain what Vodacom had in mind.

8 The cabling needed for this purpose is run though pipes. At an earlier stage of the development of the industry, the only cables used to connect consumers to the internet had cores of copper, a metal which thieves prized highly. Indeed a species of theft of copper cables came to be known in this country as cable theft and is presently severely punished. For this reason, and no doubt for other reasons as well including aesthetics and efficient use of surface space, Telkom buried its cabling in pipes within trenches. These pipes are known as ducts. Within such ducts there are often smaller pipes called subducts. I

reproduce below what counsel agreed was the best picture of a duct with subducts in the papers.



9 Once the ducts have been laid in their trenches, the trenches are backfilled, with care taken to ensure that the ducts themselves are not damaged.

10 Now, as I have said, at first Telkom ran copper cabling through their ducts. At that time, copper cabling was all that the industry had. But later, there was a great technological leap. Optic fibre was developed. Optic fibre allows for electronic communications services (which I shall, again at the risk of oversimplification call data) to be delivered to its end users, in this case domestic users, at much greater speeds than was earlier the case. High volumes of data, travelling at high speeds, are needed to operate the huge variety of applications

available over the internet and used routinely at every level of society, throughout the world. Optic fibre technology, at the present stage of development within the industry, is the only available technology that will deliver the volume of data needed to supply demand.

11 So Telkom began to run optic fibre through its ducts as well. It is common cause that there is still space in the ducts within which to run more such cabling. The precise amount of exploitable space available is in dispute but in the view I take of the case, that is of no consequence. A substantial amount of space is available.

12 The regulations contemplated by the ECA were promulgated as the Electronic Communications Facilities Leasing Regulations.[3] Reg 3 requires an aspirant lessee to set out the technological requirements and physical parameters which it proposes to instal pursuant to any lease granted to it. Vodacom set this out as follows:

> The electronic communications facilities seeker's technical requirements and physical parameters: Ducts located within the estates listed below, including but not limited to the main feeder ducts typically of 110mm in diameter, ducts to each home, manholes, handholds and access ducts to the estate including meet me rooms, common rooms and closes manhole to the estate in each of the estates listed below.

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[3] In GG no. 33252 of 31 May 2010

> The type of electronic communications facilities that are requested: ducts required for the deployment of electronic communications systems at the estates listed below.

13 The purpose of the information which reg 3 says an aspirant lessee is required to give to a person in the position of Telkom is to require the requesting party to provide enough information to enable the recipient of the request for a lease (and ultimately the Authority if the request is refused) enough material to enable it to understand what the aspirant lessee proposes to do with and within what it asks be leased to it. I need to mention at this point that all those concerned are highly technically skilled and at no stage were under any misapprehensions about what Vodacom wanted to do if it were given lease access to Telkom's ducts. I mention this because Telkom now argues that despite the profusion of technical evidence and opinion, all of which points to no doubt on this score, the initial descriptions given by Vodacom in 2015 are not sufficient to meet the requirements of reg 3. In my view, this complaint is without merit.

14 This point is reinforced by Telkom's response to the request for a lease. In a letter dated 28 September 2015, Telkom disputed firstly that s 43 was applicable at all and, secondly, asserted that the “simple factual situation” was that the ducts in question were “fully utilized”. Both these assertions were incorrect. But despite its factual

inaccuracy, the reply shows that Telkom right from the start knew perfectly well what Vodacom wanted from it.

15 Vodacom then accordingly invited Telkom to a joint inspection to establish whether or not there was space available in the ducts. The response, in a letter dated 30 November 2015, was to refuse to attend an inspection.

16 Vodacom then approached the Authority, ICASA, for a decision whether Vodacom's request had been reasonable. Telkom's reaction to the approach to ICASA was to turn a matter which it had initially dismissed as having no merit for two (unmeritorious) reasons into a case of huge apparent complexity. I say apparent complexity because it emerged from Telkom's responses to the request that there was indeed space in the ducts for additional cabling and that it, Telkom, wanted to do exactly what Vodacom wanted to do: fill the ducts with additional optic fibre cabling. Indeed, what Telkom wanted to do in the ducts was potentially more technically complex than the scheme proposed by Vodacom. This is because Vodacom proposes to instal cabling that will not link in any way with Telkom's existing cable system. This means that under Vodacom's plan there are no compatibility issues requiring technical solutions to ensure that any new cabling could “talk to” the existing system.

17 Be that as it may, ICASA received all the technical evidence that Telkom, and in response Vodacom, wished to adduce on the matter. ICASA consulted the Competition Commission for advice on matters within the Commission's competence. The Commission responded that Telkom might be engaging in anti-competitive conduct in contravention of s 8(b) of the Competition Act,[4] but would have to conduct its own investigation. ICASA did not provide Telkom with the letter in which the Commission expressed this view although it was disclosed in the record on review produced by the ICASA chair under rule 63. It appears that ICASA and the Commission have an agreement in terms of which they are entitled to consult each other on common matters within their respective jurisdictions. Although Telkom made an issue of the fact that the Competition Commission letter had not initially been made available to it, Telkom did not put the letter up in its review affidavits.

18 ICASA conducted an inspection of what it regarded as a representative sample of the ducts and their surface access structures (manholes and handholes). In all it inspected 90 such access structures in all the estates identified by Vodacom. ICASA was accompanied by a Telkom official for the sole purpose of facilitating access to the ducts. Telkom does not suggest that it used the

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[4] 89 of 1998

opportunity presented by the inspection to point out actual problems on or under the ground relating to additional cabling.

19 In a preliminary report dated October 2017 made available to the parties, ICASA concluded that there was “sufficient space in most of the existing ducts” for additional installations, while keeping a 25% spare capacity for “cable kinks and crossovers”. ICASA assessed the additional capacity at 43%. It noted that in some instances there was a “challenge in regards to available space in the chambers or handholes which are generally too small to accommodate multiple service providers”.

20 ICASA identified in each of the fifteen estates inspected what the position was and concluded that in thirteen of the fifteen estates further rollout of fibre services was technically feasible. It concluded that it was “generally technically feasible” for Telkom to lease out space in the ducts where excess space was established.

21 In the draft report, ICASA proceeded to assess the economic feasibility of Vodacom's request. It had regard to the “appetites” for further access to data and the impacts likely to be brought about by the granting of access to Vodacom. It also assessed, because Telkom asked it to do so, whether Vodacom's request was economically not

feasible on the ground that Vodacom could rent capacity from one of Telkom's associated companies and then supply it to end consumers. In this regard, Telkom stated that it had plans to expand its broadband offering to the estates to cater for projected demand. Telkom stated that it would incur costs if it were obliged to lease its unused capacity rather than use the capacity itself (when and if it decided to do so).

22 ICASA concluded in its preliminary report that it would be more cost effective to require Telkom to lease out space in its ducts rather than, in effect, require Vodacom to lay its own ducts in the estates concerned. It concluded that infrastructure sharing, where feasible, was preferable to a situation where a new service provider had to incur the additional costs of laying down ducts. Those additional costs would inevitably have to be passed on to the consumer.

23 ICASA devoted an entire section in the draft report to what it called Telkom's anti-competitive practices and what I might call Telkom's historical market dominance and its efforts to preserve that dominance after it lost its statutory monopoly. But it did not conclude or even refer to a possible contravention by Telkom of any provision of the Competition Act.

24 Ultimately, ICASA concluded in the draft report that economic feasibility had been established and that duct sharing would promote an efficient use of electronic communications infrastructure.

25 Further evidence and submissions were made by the parties to ICASA pursuant to the draft report. In March 2018, ICASA published its final report. ICASA's conclusions in the final report substantially conformed to its preliminary conclusions in the preliminary report but there was added material pursuant to the representations made in response to the preliminary report.

26 Upon receipt of the draft report, Telkom complained about ICASA's site inspection methodology. The parties were agreed that even if there were duct sharing, there should be separate inspection structures.

27 One of the purposes of the site inspection was to determine the available capacity for additional cabling. Although Telkom complained about the methodology used by ICASA, Telkom produced no evidence to show that the methodology used produced an incorrect result. ICASA adhered to its view regarding the methodology which it used.

28 In coming to its preliminary conclusion that duct sharing was economically feasible, ICASA contrasted the position where ducts were shared with the position (the counterfactual) which would obtain if Vodacom were required to dig its own duct infrastructure. Telkom argued that this was the wrong counterfactual and that the contrasting position should be where Telkom's associated company supplied data to Vodacom for sale in the retail market. Again, ICASA adhered to its preliminary view.

29 In the final report, ICASA noted the advice that it had received from the Competition Commission. While the actual document in which the Commission's advice was not provided to the parties, the tenor of the advice itself was conveyed in the final report.

30 In the result, ICASA adhered to the conclusions it had reached in the preliminary report. Its decision was that it was both technically and economically feasible for Telkom to grant access to Vodacom to instal its fibre optic cables in Telkom's ducts in the estates in question and that the grant of such access would promote the efficient use of the electronic communications facilities.

31 ICASA framed its conclusions thus[5] in a letter to the partes dated 13 April 2018:

> The Authority's Council resolved that:
> Technically Vodacom can still install additional ducts in the abovementioned Estates.
> The non-usage of the excess space would not promote the efficient use of the electronic communications facilities;
> Telkom's leasing the excess space to Vodacom is both technically and economically feasible and will promote the efficient use of the electronic communications facilities;
> The parties must negotiate and agree terms and conditions for the leasing of te electronic communications facilities within 20 working days of this letter; and
> In the event the parties fail to reach an agreement, the Authority will exercise the powers vested in it in terms of section 43(8A)(d) of the ECA.

32 Telkom was aggrieved by ICASA's decision. Thus the present review. The review itself was preceded by an application to suspend the effect of the decision pending this review. On 4 June 2019, an order suspending ICASA's decision was granted upon an urgent application by Telkom to this court.

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5 I omit paragraph numbers.

33 Much argument was directed at the true inwardness of the relevant provisions of s 43. Following *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] and other cases bearing on the topic, it is clear that interpretation of documents is a unitary exercise that requires the consideration of text, context and purpose.

34 In the present case, s 2 provides the key to the purpose of the measure: to move away from the historically monopolist industry dominated by Telkom; to promote and facilitate the convergence of the technologies and services affected by the ECA; to promote access for all to the internet; to promote competition and open, fair and non-discriminatory access to networks and electronic services within the industry; to ensure the provision of a variety of quality services which are responsive to the needs of the public at reasonable prices; and to promote the interests of consumers with regard to price, quality and variety of services.

35 Section 43 is a radical departure from the common law. Before the enactment of the measure, an industry participant might hug its infrastructure to its corporate breast and deploy it solely for its own selfish benefit. Not any longer. Section 43 provides for the promotion of fair competition, equitable access to the industry and the benefit of

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6 2012 4 SA 593 SCA

the public generally, something akin to the use it or lose it principle one encounters in the regime imposed by the Mineral and Petroleum Resources Development Act[7] in regard to minerals to which a mineral rights holder formerly had exclusive rights. If it is reasonable to do so and terms and conditions can be determined, an industry participant in the position of Telkom must lease out its electronic communications facilities even to its competitors and aspirant competitors. It must do this because, thus the policy of the measure, doing so would be good for the country.

36 Section 43(1) makes it mandatory for any licensee to lease electronic communications facilities to any other person who qualifies under s 43(1) and requests such a lease *unless such request is unreasonable*. The default position is therefore that a licensee asked for a lease must in principle, ie subject to agreement on the terms and conditions, conclude a lease with a qualified person. Only where the request is unreasonable may the licensee which is asked for a lease refuse to proceed to the negotiation phase.

37 Where the reasonableness of the request for a lease is disputed, ss 43(2)-(7) provide how the dispute about the reasonableness of the request can be resolved. In the first instance, the requesting party may

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[7] 28 of 2002

notify ICASA under s 43(2). The notification must set out details of the alleged dispute and provide ICASA with sufficient information to allow it to make its decision.[8] ICASA must give provide the other party to the dispute with a copy of the complaint, afford the other party a reasonable opportunity to respond and then afford the complaining party an opportunity to reply.[9] ICASA is afforded a wide procedural discretion as to how it goes about resolving the dispute; it may call for oral representations; it may determine the matter on the basis of the papers submitted.[10] In the present case, ICASA decided to hold a site inspection and decided against hearing oral evidence. The parties, correctly in my view, approached the case on the basis that ICASA did indeed have in principle discretions to hold an inspection and hear oral evidence.

38 The ECA and the Regulations contemplate that a dispute of the kind contemplated in s 43(2) will be decided in a matter of days. To the great detriment of potential consumers, this dispute has however stretched into years.

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8 Regs 14(2) and 14(3)

9 Reg 14(4)

10 Regs 14(5) and (6).

39 Section 43(4) provides when a request is reasonable: where ICASA *determines* that the request is feasible, technically and economically, and where ICASA *determines* that the requested lease will promote the efficient use of networks and services. So where, as in the present case, ICASA has so decided, the question on review is not whether ICASA was right or wrong in determining as it did but whether the determinations were based on reasonable grounds. *Walele v City of Cape Town and Others* 2008 6 SA 129 CC para 60.

40 A determination that the request for a lease is reasonable triggers the second phase of the s 43 process: the negotiations toward an ultimate agreement of lease. In this context I think that the provisions of s 43(5) bear repeating:

> In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of an electronic communications facilities leasing agreement, either party may notify the Authority in writing and the Authority may—
>
> (a) impose terms and conditions consistent with this Chapter;
>
> (b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, must be agreed to by the parties within such period as the Authority may specify; or
>
> (c) refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in

> accordance with the procedures prescribed in terms of section 46.

41 The provisions of s 43(5) tell us that the formulation of the terms and conditions of the lease are part of the second phase, the negotiation phase, of the process. So, for example, the determination of the rental and other amounts to be paid under the lease and the precise extent of the goods to be leased or the identity of the specific duct lines which should form the subject of the lease are to be determined in the negotiation phase. This is all relevant to the resolution of one of the issues between counsel: what is the *content* of the notions of technical and economic feasibility?

42 I approach these questions on the footing that the measure contemplates that a determination of the reasonableness issue does not of itself result in the imposition of an obligation to negotiate. Indeed, given a determination of reasonableness, there may not even be an obligation upon the requested party to negotiate. The requested party may possibly be within its rights to refuse to negotiate. Of course, a refusal to negotiate will carry its own consequences. This was not addressed in argument and I come to no conclusions in this regard. And the negotiation process itself does not inevitably require that it should culminate in a lease. As in many cases in commerce, the negotiations might not result in an agreement. Of course, in the

present case, the provisions of s 43(5) make it clear that a lease may be imposed on an unwilling party. When and to what extent that will happen is not before me but I should think that the realisation of the objects of the ECA and reasonableness will play a part in the decision making process.

43 But all of this points to a purpose that the reasonableness criterion should operate as a high level, threshold marker, imposed to weed out clearly unmeritorious requests for leases, something akin (although one must not stretch the analogy too far) to the exception process in litigation in our courts.

44 Now, as to feasibility: in the first place, the enquiry is not whether the requested lease is optimal, only whether it is feasible; secondly, each case must be decided on its own facts. A feasibility analysis applicable to case A may not necessarily resolve a dispute in case B. Technical feasibility means, on the facts of this case: given the state of the art, can what Vodacom proposes be put into operation? In other words, will it work? Economic feasibility means: Do Vodacom and Telkom have sufficient economic resources to make the proposal work? Will the consuming public buy the product proposed or will it be a white elephant?

45 As to the efficient use requirement in s 43(4)(b): here the question is, in the present case: Is there anything in the proposal that will lead to inefficient or wasteful uses of networks or resources? Again, to demand that the proposal will achieve the optimal use of networks or resources is not what the measure requires. The measure does not demand perfection, merely efficiency. This in turn will require a cost/benefit analysis.

46 I turn now to the specific facts of the case. The attack of counsel for Telkom on the decision of ICASA falls into two broad categories: firstly, whether the decision can be impugned on the facts in the sense I have described above; secondly whether the process is affected by reviewable irregularity.

47 I do not overlook that the function of the court in these review proceedings is not concerned with the correctness of the decision of ICASA but whether it performed the function with which it was entrusted. The appropriate weight to be attached to any consideration going to make up a decision is for the decision maker to determine. *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] 3 All SA 491 SCA paras 18-23. In this case, Telkom was given the fullest opportunity to make its submissions. Whether ICASA was right or wrong in relation to any consideration is

largely immaterial. There is no reason to conclude that ICASA failed to take any submission or any evidence before it into account.

48 I think that the submissions of counsel for Telkom are largely undercut by the evidence of Telkom itself that it wants to do precisely what Vodacom asked for a lease to do: utilise the available space in the ducts to instal further fibre optic cable to the extent possible. If anything, the cabling that Telkom proposes to instal in the available duct space would involve an additional potentially complicating factor: if Telkom wants to integrate this new cabling with its existing system, questions of compatibility would arise.

49 But what Vodacom wants to do involves no such complexity. There is nothing technically complex in what Vodacom proposes. It simply wants to put cabling inside pipes which are buried underground, and build additional structures linking the new cabling with the surface to enable Vodacom to inspect and carry out maintenance on its cabling when necessary.

50 To my mind, once Telkom asserts that it, Telkom, wants to lay cabling where Vodacom wants to lay cabling, Telkom admits, by implication, that what Vodacom wants to do is both technically and economically feasible and would promote the efficient use of networks and services.

How can you argue that what your competitor wants to do is not technically and economically feasible and contributes to the efficient use of networks and services when you are planning to do the very same thing?

51 As to efficient use: ICASA found that it would be a duplication of resources to require Vodacom to lay its own ducts rather than make use of subducts within Telkom's ducts. I think ICASA is correct in this regard. But right or wrong, there is certainly no evidence to suggest that its conclusion is unreasonable in the *Walele* sense.

52 There can be no doubt that these two industry giants dispose of sufficient economic resources to lay additional cabling in Telkom's ducts. No suggestion to the contrary was made. Nor is there any suggestion that technically the proposed scheme is not feasible. The fact that Telkom wants to do so proves technical feasibility. Nor does the need for additional inspection structures point to a lack of feasibility at any level. That additional permissions from third parties might be required to bring the proposal to fruition does not detract from the fact that the proposal is feasible.

53 The fact that both parties want to use the ducts for additional cabling demonstrates that the residents of the estates in question would like to buy additional fibre optic connectivity if it becomes available. The probability is that both Telkom and Vodacom have done appropriate market research in this regard. There is no reason at all to believe that ICASA came to an unreasonable conclusion in identifying this need for more connectivity.

54 I therefore find that Telkom has failed to establish that ICASA came to its conclusions on other than reasonable grounds. To this extent the review must fail.

55 I turn to the specific complaints of irregularity advanced by counsel for Telkom.

56 Counsel for Telkom submit that ICASA failed to consider the recommendation of its “own expert”. This expert, recommended that ICASA find that fibre sharing rather than duct sharing was the appropriate course to follow. This would have required that Vodacom accept data from one of Telkom's associated companies and sell it on the retail market.

57 But, entirely understandably, Vodacom did not want to become one of Telkom's (associate's) customers. That would have put Vodacom in the position of competing with its own supplier, which would then enabled Telkom to set the price for and exercise measures of control over both quality and quantity of product. It was in my view entirely reasonable for ICASA to determine, in effect, that Vodacom should be empowered to enter the market upstream of Telkom's wholesale supply arm. That route was more competition enhancing, and thus more advantageous to consumers, than the alternative.

58 Telkom argues that the determination was made without any clear information about the technical parameters and design of Vodacom's intended fibre network.

59 In my view, all ICASA needed to know at this stage was that Vodacom intended to install fibre rather than copper wiring. Fibre is vastly superior to copper. The precise nature of the fibre, eg whether it should be of a quality which would enable Vodacom to share data with wholesale customers downstream of Vodacom is a matter which can be assessed at the negotiation stage but need not be considered at the reasonableness stage. There was no need for Vodacom's cabling to “meet the requirements” of Telkom's network because it was not intended to have any interconnection with it. There was no suggestion

that any cabling which VOdacom might instal would impact in any way upon the operation of Telkom's systems.

60 Telkom complains that ICASA's inspection methodology was irrational and unreasonable. The methodology employed enabled ICASA to achieve an overview of the space available and action needed for Vodacom to instal cabling in the ducts. One of the anticipated problems is congestion. But at this stage it is unnecessary, even otiose, to map out precisely where in the many metres of ducting new cabling can feasibly be installed. ICASA concluded that this would be feasible in a substantial percentage of the ducting. ICASA followed the guidance of its expert, Mr Kvelva, who was present at the inspection, in this regard and explained in its report why it considered its inspection methodology appropriate. There is no suggestion by Telkom that ICASA's assessment in this regard is wrong, in the sense that a different methodology would have produced a different result.

61 Telkom submits that ICASA's technological feasibility assessment was contingent in the sense that Vodacom would have to obtain authorisation from local authorities and homeowners' associations to construct further inspection structures. I have some difficulty understanding how Vodacom could have obtained, years in advance, these permissions. Section 43(5) leaves the terms and conditions of

the proposed lease over for determination at the negotiation stage. It is permissible, indeed appropriate, to reason that the permissions required would be the subject of appropriate conditions in the lease. Once the question can be adequately addressed by way of term or condition in the lease, it would be inappropriate for ICASA to make rulings on the subject at the reasonableness stage. The evidence before ICASA was that the provision of further fibre data would be welcomed by the residents of the estates. There was no reason to believe that the permissions in question would be an insurmountable obstacle.

62 Telkom complains that ICASA did not consider the adverse financial consequences of the lease sought by Vodacom. But this enquiry is more appropriately conducted during the negotiation phase when, if all else fails, a reasonable rental must be determined and imposed upon the parties.[11] Contrary to Telkom's submission, this is not part of the enquiry into economic feasibility under s 43(4)(a). That would only be the case if there had been a suggestion that Telkom would not be adequately compensated for financial consequences adverse to Telkom. The argument that a lease would deprive Telkom of the opportunity to exploit its own infrastructure is in my view equally

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[11] I need not consider what the position would be if Vodacom were to decide that the rental determined was too high and sought to abandon its plans to lease the capacity from Telkom.

unavailing. The very purpose of the measure is to deprive a licensee with capacity as yet unused in favour of a requesting party. Inevitably, in such a case, the measure contemplates that such licensees will be deprived of the ability to exploit their own resources. I emphasise that Telkom does not suggest that it had any imminent plans to develop the unused ducting capacity. The evidence shows that a full year after Vodacom requested a lease, Telkom had only begun providing fibre to two of the fifteen estates. Telkom was otherwise only able to point to its plans to develop at some unspecified and indeterminable time in the future; obviously when it suits Telkom to do so. If Telkom's approach if sustained, would defeat many of the objects of the ECA which I described earlier und promote under-utilisation.

63 Telkom complains that ICASA's assessment of efficient use was flawed, that it conflated the notions of efficient use and technical feasibility and that the counterfactual used by ICASA was inappropriate. I disagree, for reasons already given.

64 Telkom argues that ICASA ought to have convened an oral hearing to resolve disputes of fact. I disagree. A resolution of the disputes of fact was not necessary for the purposes of the reasonableness enquiry. Telkom's complaint that it was not given adequate reasons for the refusal to take oral evidence is similarly without merit. ICASA

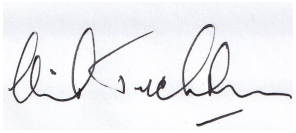
properly appreciated that it had a discretion in this regard. Its reports show that ICASA similarly properly appreciated that no purpose would be served by hearing oral evidence to resolve disputes on matters which were not required to be resolved for the purpose of the reasonableness enquiry.

65 During argument before me, counsel for Telkom submitted that ICASA was required for purposes of the reasonableness enquiry to determine a proper rental if a lease were to be concluded. I disagree. Rental is a term of a lease agreement. Section 43(5) makes plain that the determination of terms and conditions is to be dealt with in the negotiation phase.

66 Counsel for Telkom further argued that the conduct of Vodacom in installing fibre in certain of the ducts, which Telkom characterised as unlawful, ought to have been considered by ICASA and sanctioned appropriately before ICASA considered the reasonableness issue. I disagree. No specific complaint was made to ICASA in this regard, as opposed to the reactive complaint made by Telkom in its resistance to the request under s 43(1). There is nothing in the legislation that compelled ICASA to defer the reasonableness enquiry until it had dealt with the alleged unlawful conduct of Vodacom. Indeed, given the time frames in the legislation, the opposite would seem to be the case.

Further, even assuming the illegality, its existence would not impact upon the reasonableness enquiry.

67 In the result, in my view, there is no merit in any of the grounds of review advanced. The application is dismissed. Telkom must pay the costs of all the respondents, including the costs consequent upon the employment of two counsel.



NB Tuchten
Judge of the High Court
15 August 2020

TelkomVodacom38332.18