IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

In the matter between: **Case No.: 2020/66778**

TELKOM SA SOC LIMITED	**1ST APPLICANT**
E.TV (PTY) LTD	**2ND APPLICANT**

And

ICASA	**FIRST RESPONDENT**
CHAIRPERSON: ICASA	**SECOND RESPONDENT**
VODACOM (PTY) LTD	**THIRD RESPONDENT**
MOBILE TELEPHONE NETWORKS (PTY) LTD	**FOURTH RESPONDENT**
CELL C (PTY) LTD	**FIFTH RESPONDENT**
WIRELESS BUSINESS SOLUTIONS (PTY) LTD	**SIXTH RESPONDENT**
LIQUID TELECOMMUNICATIONS SA (PTY) LTD	**SEVENTH RESPONDENT**
MINISTER OF COMMUNICATIONS	**EIGHTH RESPONDENT**
COMPETITION COMMISSION OF SOUTH AFRICA	**NINTH RESPONDENT**
SOUTH AFRICAN COMMUNICATIONS FORUM	**TENTH RESPONDENT**
SABC LTD	**ELEVENTH RESPONDENT**
SENTECH SOC LTD	**TWELFTH RESPONDENT**
NATIONAL ASSOCIATION OF BROADCASTERS	**THIRTEENTH RESPONDENT**

ICASA'S HEADS OF ARGUMENT

1 INTRODUCTION

1.1 This application consists of three parts, Part A, Part B and Part C. Part A of the application has been resolved between the parties.

1.2 This Court is now invited to deal with Part B of the application and it is called upon to do so on an urgent basis in circumstances where Telkom has created the urgency upon which it seeks to rely.

1.3 Part C of the application is not yet before this Court. The relief sought in Part C of the application will be determined in the normal course.

1.4 In Part B of its application, Telkom seeks an interim interdict pending the final determination of Part C of the application. The interim interdict which Telkom seeks is one in terms of which:

1.4.1 ICASA is interdicted and restrained from assessing and adjudicating any applications received by it pursuant to the Auction ITA; and

1.4.2 the closing date for the submission of applications for the license to operate a Wireless Open Access Network ("**WOAN**") as stated in the WOAN ITA is suspended.

1.5 In Part C of the application, Telkom seeks, amongst others, an order in terms of which ICASA's decisions to publish the Auction ITA and the WOAN ITA are reviewed and set aside.

1.6 ICASA opposes all of the relief which is sought by Telkom in both Part B and Part C.

2 URGENCY

2.1 Telkom has failed to justify the hearing of this application on an urgent basis.

2.2 The ITAs were published on 2 October 2020. The publication of the ITAs in the manner in which they were indicated the manner in which ICASA intended to conduct the licensing process. It is from that date that Telkom became aware of the basis on which it now seeks the relief which it seeks. Despite that, it waited for two months before launching its application and enrolled it for hearing two months after launching it.

2.3 In order to obtain an interim interdict, Telkom only needs to satisfy the four requirements for such relief. For this to happen, Telkom did not require all the information which it says it was still looking for until December 2020 when it launched its application. On its version, it knew what was wrong with the ITAs as far back as 12 October 2020 but it did not come to Court at that stage.

2.4 In order to establish a *prima facie* to which irreparable harm would ensue if an interim interdict is not granted, Telkom did not require ICASA's reasons for its decisions. In addition, Telkom did not require ICASA to clarify issues raised with it by interested parties. Telkom only needed to show that the ITAs are going to irreparably harm its rights because it is the ITA process which is sought to be interdicted at this stage – it is not the review relief which is sought.

2.5 Rule 53 is designed to enable an applicant to bring a review application even without the record of the decision sought to be reviewed and set aside. It is for this reason that the notice of motion calls the author of the decision in issue to file a record of the decision and the reasons for it. Accordingly, Telkom's suggestion that it did not bring its application in October and in November is not adequate and does not justify the hearing of this application on an urgent basis because it could have brought an application for an interdict without the record and without the reasons.

2.6 In its letter dated 12 October 2020, Telkom said[1]:

"*4. Telkom's assessment of the ITAs is that in the formulation of these ITAs, ICASA failed to take into account the skewed market structure and the lack of effective competition in the mobile market, disregarded or failed to give effect to the material injunction from national policy to address the skewed market structure in the formulation of the ITAs,*

[1] Page B434.

failed to take into account or give due weight to the Ministerial Policy Directions on the licensing of spectrum, failed to heed or give sufficient weight to, the advice of the Competition Commission, and disregarded the impact of the spectrum trading transactions on the ITAs. In Telkom's view, the ITAs appear to be designed in a manner that will consolidate the skewed market structure and grant Vodacom and MTN another first mover advantage in the rollout of 5G. This, if proven to be true, amounts not only to a reviewable irregularity in terms of s6 of PAJA but a subversion of public interest that ICASA is meant to uphold in terms of s2 of the Electronic Communications Act …"

2.7 Telkom's application is founded on the grounds set out in the above quoted paragraph. Accordingly, Telkom could and should have brought its application in October 2020 because it had sufficient information to do so. There is no reasonable explanation why it did not do so.

2.8 There is also no reason why Telkom did not have this application set down for hearing before the closing date for the submission of applications on 28 December 2020. It allowed the auction process to start and for interested parties including itself to incur significant costs to prepare their applications and then set the matter down for hearing seven (7) weeks

thereafter when it could have had the application enrolled for hearing before the closing date of 28 December 2020[2].

2.9 In any event, Telkom says that the reasons were published on 4 December 2020. There was enough time for Telkom to bring an urgent application for an interim interdict and have it heard before the closing date of 28 December 2020. But it waited until 22 December 2020 to file its application and then set the matter down for hearing more than a full month thereafter.

2.10 If the matter was so urgent, Telkom could have asked for an order temporarily postponing the closing date of 28 December 2020 until the hearing of Part B of its application. Instead, it allowed interested parties and ICASA to commence the auction process, at a cost on both sides.

2.11 In the light of the above, Telkom clearly created its own urgency. In Valerie Collins t/a Waterkloof Farm v Bernickow NO And Another [2001] ZALC 223 (7 December 2001) it was said that:

> "*[8] Furthermore, if the applicant seeks this Court to come to its assistance it must come to the Court at the very first opportunity it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency*."

[2] See paragraph 223 of Telkom's founding affidavit.

2.12 Telkom did not "*come to the Court at the very first opportunity*" which first opportunity arose in October 2020 when it formulated the grounds on which the application is founded as set out in its letter dated 12 October 2020.

2.13 Whilst it is correct that urgency must be determined with reference to the relief which is sought and the facts relied upon, Telkom's facts do not justify a hearing on an urgent basis. Telkom did not only allow the auction process to start after the publication of the ITAs, in particular, on the closing date, it participated and continues to participate in that process. It does not matter that Telkom says that it submitted its application under protest – that protest is what ought to have moved it to bring the application in October 2020 and had it enrolled for hearing in October, November or December 2020, not some four months after the publication of the ITAs.

2.14 Telkom has also not established that it could not obtain substantial redress at a hearing in due course. It says[3] that the application must "*be heard and determined as soon as possible before the licensing process contemplated in the ITAs commence and the Authority makes any decisions about the licensing and awarding of the IMT spectrum*." But no case is made as to why substantial redress could not be obtained in due course if the auction process were to commence and decisions taken. The Auction ITA has commenced insofar as interested parties have already submitted applications and ICASA has also taken the necessary steps to process such

[3] Paragraph 228 of Telkom's founding affidavit.

applications, such appointing people to assist it with the auction process. This cannot be undone at this late stage, four months after the ITAs were published.

2.15 Telkom could still obtain substantial redress in due course because the review Court will always be competent to grant it adequate and substantial redress if it is successful. It cannot be that the Constitution is incapable of providing adequate relief when it has been violated as alleged by Telkom. if Telkom's rights have been violated, there is no Court which will refuse to grant it adequate relief. A Court is obliged to grant adequate and effective relief and there is no reason to suspect that Telkom is going to be treated differently.

2.16 In East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd [2011] ZAGPJHC 196 (23 September 2011) the Court said the following about the requirements of Rule 6(12):

"*[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules*

allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] *It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard*." (own emphasis).

2.17 Despite the requirements of Rule 6(12), Telkom has not explained why it could not obtain substantial redress at a hearing in due course. Failure to allege and substantiate that substantial redress could not be obtained at a hearing in due course is fatal to any claim for urgency. Substantial redress for purposes of Rule 6(12) is said to be different from irreparable harm which must be established in order to obtain an interim interdict and Telkom has not made such a case either.

2.18 There is another reason why this matter must be struck-off the roll. It is the volume of papers filed of record and the duration required to properly dispose of the matter. The papers filed of record are over 900 pages and ICASA is not prepared to be constrained in presenting its argument.

ICASA has to demonstrate that on both Telkom's and e.tv's contentions, the relief sought is not competent. For this reason, ICASA is entitled to be given more time than Telkom and e.tv to present its case. For this reason, a special allocation is necessary. A similar matter was heard by Justice Sutherland over a period of two days. Telkom insists that a hearing in the urgent Court is good enough. ICASA does not agree. A special allocation is required as it is what is done in this Court with matters of this magnitude.

2.19 In the premises, Telkom created the urgency upon which it seeks to rely and it is accordingly not entitled to be heard on an urgent basis.

2.20 ICASA contends that the application be struck-off the roll with costs of two counsel.

3 THE CONTEXT OF THE DISPUTE

ICASA

3.1 ICASA is an organ of the State whose establishment is provided for in section 192 of the Constitution. Section 192 is located in Chapter 9 of the Constitution.

3.2 Section 192 of the Constitution says that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society.

3.3 ICASA was established in terms of the ICASA Act, which is the national legislation envisaged in section 192 of the Constitution. As contemplated in section 192 of the Constitution, ICASA was established to regulate broadcasting and electronic communications in the public interest.

3.4 Section 3(3) of the ICASA Act provides that ICASA is independent and subject only to the Constitution and the law and it must be impartial in the performance of its functions, which functions it must perform without fear, favour or prejudice.

3.5 Of relevance for purposes of this application, ICASA must:

3.5.1 control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic of South Africa;

3.5.2 consider policy made and policy directions issued by the Minister.

3.6 There is no dispute that this application relates to the performance of ICASA's function to control, plan, administer and manage the use and licensing of the radio frequency spectrum. The effect of the interdict which is sought is to prevent ICASA from performing its statutory function – a function for which the Constitution said ICASA must be established and for which it was established.

3.7 ICASA also performs other functions vested upon it in terms of the ECA. These functions are consistent with what ICASA was established to do as contemplated in section 192 of the Constitution.

3.8 The object of the ECA is to regulate electronic communication and for that purpose, amongst others, to:

3.8.1 promote competition in the ICT sector;

3.8.2 ensure efficient use of the radio frequency spectrum;

3.8.3 promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;

3.8.4 promote the universal provision of electronic communications networks and electronic communications services and connectivity for all; and

3.8.5 encourage investment, including strategic infrastructure investment, and innovation in the communications sector.

3.9 In relevant parts, the ECA provides that:

3.9.1 ICASA must ensure that in the use of the radio frequency spectrum harmful interference to authorized or licensed users is eliminated or reduced to the extent reasonably possible[4];

3.9.2 ICASA must investigate and resolve all instances of harmful interference to licensed services that are reported to it[5];

3.9.3 ICASA may prescribe the procedures and criteria for radio frequency spectrum licenses in instances where there is insufficient spectrum available to accommodate demand[6];

3.9.4 holders of a radio frequency spectrum licence must, in good faith, co-ordinate their respective frequency usage with other such licensees to avoid harmful interference and to ensure efficient use of any applicable frequency band[7];

3.9.5 ICASA must assign radio frequencies consistent with the national radio frequency plan for the use of radio frequency spectrum by licence holders and other services that may be provided pursuant to a licence exemption[8];

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[4] Section 30(3).

[5] Section 30(4).

[6] Section 31(3)(a).

[7] Section 33(1). When licensees are unable or unwilling to co-ordinate in good faith, section 33(2) says that ICASA must intervene and resolve the dispute.

[8] Section 34(3).

3.9.6 the national radio frequency plan must, amongst others, designate the radio frequency bands to be used for particular type of services and ensure that the radio frequency spectrum is utilized and managed in an orderly, efficient and effective manner[9];

3.9.7 ICASA must, following an inquiry, "*prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such market and market segments*[10]."

3.10 What is clear from the Constitution, the ICASA Act and the ECA is the following:

3.10.1 ICASA is an independent organ of the State which must perform its functions without fear or favour. Other organs of the State must treat ICASA as an independent organ of the State and to the extent which is necessary support it in the performance of its functions.

3.10.2 In performing its functions, ICASA is only required to consider policies made by the Minister and the policy directions issued by the Minister. ICASA cannot be criticized for and does not act unlawfully if it does not do that which is prescribed in policies made by the

[9] Section 36(6). In addition, the national radio frequency plan must aim at protecting radio frequency spectrum licensees from harmful interferences.

[10] Section 67(4).

Minister or in the policy directions issued by the Minister provided that it has considered them.

3.10.3 The object of the ECA is to provide for the regulation of electronic communications and for that purpose, amongst others, to promote competition; promote universal access to electronic communication services for all; and to ensure efficient use of the radio frequency spectrum.

3.10.4 ICASA is obliged to eliminate or reduce harmful interference in the use of radio frequencies.

3.10.5 Licensees such as Telkom and e.tv are in law obliged to co-ordinate their usage of radio frequency spectrum to avoid harmful interference amongst themselves and to ensure efficient use of any applicable frequency band.

3.10.6 In the event that an inquiry is conducted in terms of section 67 of the ECA, "*following an inquiry*" ICASA must "*prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive license conditions on licensees where there is ineffective competition*."

3.10.7 The process contemplated in section 67 of the ECA, referred to in the papers as the Chapter 10 inquiry or the MBSI, is not a licensing process and must be distinguished from the auction process. It is a

process to address "*ineffective competition*." But even then, the process of addressing ineffective competition is preceded by prescribing "*regulations defining the relevant markets and market segments*" and not by issuing licenses.

3.10.8 The management and assignment of radio frequency spectrum is a constitutional function vested upon ICASA.

3.10.9 There is nothing in the ICASA Act and the ECA to suggest that the licensing of radio frequency spectrum such as what is intended to be done in the process in issue must wait for the conclusion of the Chapter 10 inquiry. ICASA is fully aware of what is going on in that inquiry and has accordingly decided that the current licensing process is not subject to the conclusion of the Chapter 10 inquiry.

3.11 Telkom is currently using the IMT700 and IMT800 spectrum understands how coordination between frequency users work. The relevant provisions of its IMT700 and IMT800 spectrum license are dealt with in the answering affidavit. In addition, Telkom also seeks an order that its use of the temporary IMT700 and IMT800 temporarily assigned to it be extended and it does not say that this extension be done only after the digital migration process has been concluded. This means that, contrary to its evidence in its founding affidavit, the IMT700 and IMT800 spectrum is available for use. The fact that broadcasters have not yet been migrated out of that spectrum does not mean that it cannot be used by mobile operators –

they have been using it since April 2020. In fact, sharing is envisaged in all the relevant regulatory instruments.

3.12 Telkom's complaint about the unavailability of the IMT700 and IMT800 spectrum would have been well-made if it had produced evidence to demonstrate that it is unable to use the IMT700 and IMT800 spectrum temporarily assigned to it due to the fact that broadcasters have not yet been migrated out of that spectrum. There is no such evidence attached to the founding affidavit. Even e.tv does not say that mobile operators have made it impossible for it to use the IMT700 and IMT800 spectrum or that there are unresolved harmful interference issues since mobile operators started using that spectrum.

3.13 In the premises, this application must be determined on the basis that the IMT700 and IMT800 MHz spectrum is available for licensing and that ICASA will do that which the law requires it to do if there is harmful interference which can only be experienced if the relevant users have themselves failed to coordinate their usage to avoid harmful interference.

The Auction and WOAN ITAs

3.14 The Auction ITA is a process in terms of which ICASA intends to auction and release much needed high demand radio frequency spectrum. The WOAN ITA relates to the licensing of a Wireless Open Access Network.

3.15 There is no dispute that:

3.15.1 there is a very urgent need to release the high demand spectrum for the benefit of all, which is what is sought to be achieved by the processes which are sought to be interdicted;

3.15.2 the release of high demand spectrum has been delayed unnecessarily and that it is very long overdue;

3.15.3 the release of high demand is for the benefit of the whole of the Republic and that it will benefit the economy of the Republic;

3.15.4 the long delay in releasing high demand spectrum has negatively affected investment decision-making processes, job creation, access to electronic communication services in the rural areas.

3.16 Telkom, e.tv and other mobile operators are not the only entities which are intended to benefit from the high demand spectrum which is sought to be released. Telkom says that the current environment favours Vodacom and MTN because they are in a better position to compete than it and Cell C. Telkom further says that it in fact requires more spectrum itself, presumably because more spectrum would place it in a better position to compete with Vodacom and MTN but at the same time want to stop the process intended to achieve that.

3.17 ICASA agrees that Telkom would benefit from the release of high demand spectrum and that any further delay in releasing high demand spectrum will only serve to entrench Vodacom and MTN's alleged duopoly. Accordingly,

even on Telkom's version, there should not be another delay in releasing high demand spectrum.

3.18 The decision to auction the high demand spectrum in issue and to publish the Auction ITA was preceded by the promulgation of a long list of regulatory instruments by the Minister and by ICASA. A few of such instruments are dealt with below.

SA Connect

3.19 SA Connect[11] is South Africa's Broadband Policy. Insofar as it is relevant for purposes of this application, the purpose of SA Connect[12] is to identify mechanisms to release high demand spectrum for broadband extension. This is what the ITAs seeks to do. As it can be seen from SA Connect, there is a vision to have a seamless information infrastructure by 2030. The release of high demand spectrum through the Auction ITA will go a long way to achieve that. Any delay in releasing high demand spectrum will negatively affect the country's ability to achieve its 2030 vision.

3.20 SA Connect correctly records that the lack of always-available, "*high-speed and high quality bandwith required by business, public institutions and citizens has impacted negatively on the country's development and global*

[11] Page F128.

[12] SA Connect gives expression to South Africa's vision of a seamless information infrastructure by 2030 that will underpin a dynamic and connected vibrant information society and a knowledge economy that is more inclusive, equitable and prosperous.

competitiveness." This negative impact affects the whole of the Republic and it is not disputed by Telkom. The release of high demand spectrum is intended to address this negative impact.

3.21 In addition, SA Connect records that:

3.21.1 there is more demand than ever for radio spectrum because of the increasing reliance on mobile or wireless communications the effect of which is that increased competition and potential job opportunities have not been realized;

3.21.2 the immediate priorities with respect to spectrum are, amongst others, the identification of unused spectrum and its reassignment and the re-allocation and assignment of broadband spectrum taking into consideration job creation, small business development, national empowerment and the promotion of national development plan goals; and

3.21.3 the licensing of broadband spectrum should contribute to the achievement of universal access to broadband and effective and efficient use of high demand spectrum.

3.22 Telkom does not dispute the correctness of the problems identified in SA Connect. In particular, Telkom does not say and cannot say that it is incorrect for SA Connect to say that the delay in releasing high demand spectrum has had the negative impact stated therein, in particular, that

increased competition and potential job opportunities have not been realized as a result of such negative impact. In deciding whether or not to interdict the process intended to solve these problems, this Court must consider whether there is any justifiable basis to continue to prejudice the whole of the Republic in order to serve the commercial interests of Telkom and e.tv, which are not in any event going to be served by the interdict which it seeks.

The 2019 Policy

3.23 This is South Africa's Policy on High Demand Spectrum and Policy Direction of the Licensing of a Wireless Open Access Network[13].

3.24 In relevant parts, the 2019 Policy says that:

3.24.1 there are over 400 players who hold electronic communications network service licenses "*but cannot access spectrum, due to its scarcity*" and that this has "*an adverse effect [on] competition, contributes to the high costs to communicate and serves as a barrier to entry for new entrants and SMMEs*" (paragraph 2.1.1);

3.24.2 the deployment of a WOAN will encourage licensees to work together as far as it is practicable and that will result in the more effective use of spectrum;

[13] Page F190.

3.24.3 high demand spectrum may be assigned to a WOAN and the remaining high demand spectrum to other licensees "*which spectrum assignment processes must commence simultaneously*" (paragraph 2.1.3);

3.24.4 the assignment of high demand spectrum not reserved for assignment to the WOAN "*must ensure that, amongst others, the following policy objectives are achieved*":

3.24.4.1 universal access and universal service obligations to ensure high quality network availability in rural and under-serviced areas;

3.24.4.2 leasing of electronic communications networks and electronic communications facilities and provision of wholesale capacity to other licensees.

3.25 Furthermore, in paragraph 3.1 of the 2019 Policy, the Minister directed ICASA "*to issue an Invitation to Apply (ITA) and accept and consider applications for an individual electronic communications network service license of a WOAN.*" In issuing this direction, the Minister did not say that ICASA must first wait for the Minister to complete the digital migration process.

3.26 The Minister is the organ of the State responsible for digital migration and is fully aware that such process has not yet been completed but issued the aforesaid direction because the Minister is aware of the fact that the

completion of the digital migration process is not an impediment to the Auction ITA and the WOAN ITA process. It is indeed so that there is no suggestion that the Minister did not apply her mind to this issue.

3.27 If Telkom and e.tv were of the view that it was unlawful or irrational for the Minister to issue a direction that ICASA must issue the Auction ITA and the WOAN ITA before the completion of the digital migration process, they ought to have challenged the Minister in judicial review proceedings. Telkom and e.tv cannot challenge the implementation of the Minister's direction without first setting it aside. But in any event, ICASA has independently demonstrated that the fact that the digital migration process has not yet been completed is not an impediment to the licensing of the IMT700 and IMT800 spectrum.

3.28 The Minister also directed ICASA "*to investigate and report to the Minister on the spectrum requirements of 5G in bands lower than 6GHz and the millimeter wave (mmW) bands.*" Telkom says that ICASA has not conducted this investigation and has not reported to the Minister and that as a result, ICASA is in law precluded from embarking on the Auction ITA and the WOAN ITA process. Telkom is wrong in this regard. In addition, the Minister did not say this investigation and the report must be concluded as a condition to embark on the Auction ITA and the WOAN ITA processes.

3.29 ICASA conducted the investigation which the Minister directed it to conduct and it has also reported to the Minister on that investigation. Its

report is attached to its answering affidavit[14]. The relevant objectives of ICASA's report are the following:

"*3.1 Research on an overview of the Fifth Generation Technology Systems (5G) as the key enabler for national ICT transformation and global 5G deployment progress and further reviews the individual frequency bands for the deployment of 5G, including the requirements for Global Harmonization, a prerequisite for the development of the matured eco-system for the success deployment of affordable 5G Systems, in terms devices and applications, in accordance with international Standardization Development Bodies.*

3.2 Research on the Spectrum Planning and Management Regulatory Mechanisms and Processes as well as Roadmap for the release of International Mobile Telecommunications (IMT) Spectrum to stimulate the uptake of Mobile Broadband Services, taking into considering South Africa's Goals to achieve Universal Access to Broadband and Stimulate Economic Growth, in accordance with Government Policies the Electronics Communications Act, the International Regulatory Framework in line with the ITU Radio Regulations, WRC Resolutions, ITU-R Recommendations and ITUR Reports in force, and

[14] Page F202.

3.3 Research on the impact of competition from a spectrum perspective and the need to assign Mobile Broadband Spectrum in a pro-competitive manner, including the future possibilities of making Mobile Broadband Spectrum for Intermediaries, based on International best practice."

3.30 When regard is had to the relevant objectives of the investigation and the report, there is no basis to suggest that the investigation and the report or the Minister's reaction thereto are a condition without which the Auction ITA and the WOAN ITA cannot be conducted.

3.31 Paragraph 13 of the report says that[15]:

"*As already alluded to by the Authority in its mobile broadband services market inquiry Discussion Document, in paragraph 93, "... the main issue impacting competition from a spectrum perspective is that more spectrum needs to be assigned for mobile spectrum in a pro-competitive manner."*

In addition, as discussed earlier, for a mobile operator to compete effectively and provide a full bouquet of 5G services, it will require access to spectrum ranges from sub 1GHz, mid-band (1-6GHz) and high band (above 6GHz). Operators have also publicly stated that true 5G requires an operator to have access to at least 80MHz-100MHz of 5G spectrum bands.

[15] Page F240.

In order to avail sufficient 5G spectrum for public networks in a competitive manner, the following considerations should be taken into account when assigning 5G spectrum:

(a) Setting aside of spectrum for new entrants (such as the WOAN) – this will ensure that new entrants can compete effectively.

(b) Spectrum caps and floors – according to OFCOM, in a market of four operators, an operator may be too small to be credible if it holds less than 10% to 15% of available spectrum. In addition, to ensure companies compete fairly, no operator should hold more than 37% of the available spectrum. This prevents consolidation of spectrum holdings and abuse of market power.

(c) Spectrum sharing – roaming and spectrum trading – this encourages sufficient use of spectrum and allows for increased channel sized and carrier aggregation."

3.32 ICASA's report was submitted to the Minister in May 2020 and the Minister acknowledged receipt[16]. There is no factual basis to suspect that the Minister has not considered the report. If the Minister was of the view that ICASA has not satisfied all the conditions for the issuing of the Auction ITA and the WOAN ITA, the Minister would have taken the

[16] Page F270.

necessary steps to interdict the Auction ITA and the WOAN ITA process just like the Minister did in 2016.

3.33 In the light of the above, there is no merit in Telkom's contention that the review relief ought to be granted on the basis that ICASA failed to conduct the investigation which the Minister directed it to conduct or because the digital migration process has not yet been concluded.

The Information Memorandum

3.34 It is in the Information Memorandum[17] where ICASA outlined its "*intentions with regard to the licensing process for International Mobile Telecommunication (IMT) spectrum pursuant to consideration of the Policy on High Demand Spectrum and Policy Direction on the Licensing of a Wireless Open Access Network dated 26 July 2019.*" In this regard, ICASA said that the aim of licensing IMT700, IMT800, IMT2300, IMT2600 and IMT3500 is to ensure nationwide broadband access to all citizens by 2020 and that this will be achieved by:

"*3.1.1 promoting the empowerment of historically disadvantaged groups …*

3.1.2 increasing universal service and universal access through prioritizing rural connectivity and inclusivity;

[17] Page F272.

3.1.3 *promoting the interest of consumers with regard to the price, quality and variety of electronic communications services;*

3.1.4 *making provision for wireless open access network …;*

3.1.5 *promoting investment in the sector and economic growth;*

3.1.6 *encouraging infrastructure sharing;*

3.1.7 *promoting competition and innovation by licensing spectrum on a technology neutral basis; and*

3.1.8 *Reducing cost to communicate specifically data cost.*" (Own emphasis).

3.35 ICASA invited interested parties to submit written representations "*on the views expressed in the Information Memorandum*" and also sets out the procedure which ICASA intended to follow in order to achieve that which is now sought to be achieved by the Auction ITA and the WOAN ITA. This is what ICASA said in this regard:

"*2.2. There is a need to assign a minimum of 1011MHZ and a maximum of 1036MHZ for use by IMT … to achieve SA Connect targets. It is the Authority's position that the licensing of IMT700, IMT800, IMT2300, IMT2600 and IMT3500 will contribute a significant bandwidth towards achieving the SA Connect targets.*

2.3. The IMT700, IMT800, IMT2300, IMT2600 and IMT3500 bands have been identified worldwide for IMT services. These bands complement each other in the sense that they fulfil the requirements for capacity and coverage which make them suitable for rural and urban areas and for bridging the digital divide.

2.4. It is for these reasons that the Authority has decided on the simultaneous licensing of the IMT700, IMT800, IMT2300, IMT2600 and IMT3500 bands, in order to enhance competition and to increase broadband coverage, and in so doing bridge the digital divide and the disparities between urban and rural access to broadband networks.

2.5. The Authority has considered the Policy on High Demand spectrum and Policy Direction of the Licensing of Wireless Open Access Network in accordance with section 3(4) of the ECA and intends to embark on the licensing process as outlined in Annexure …

2.6. It is important to adopt global harmonization channel arrangements and alignment with other regional agreements on the appropriate channel plans for the IMT700, IMT800, IMT2300, IMT2600 and IMT3500 frequency bands for the International Telecommunications Union (ITU) Region 1 in order to achieve economies of scale, enable global roaming and benefit from the maturity of the ecosystem."

3.36 It is clear from the above quoted paragraphs that ICASA told interested parties what it intended to do and the procedure which it intended to follow in doing that. ICASA did not deviate from the procedure set out in the Information Memorandum.

3.37 The Information Memorandum further shows that ICASA was fully aware and mindful of the fact that the IMT700 and IMT800 bands are still subject to the digital migration process. It said:

"*Terrestrial Broadcasting Frequency Plan*

4.18 The Authority acknowledges that the frequency bands 703-790MHZ and 790-862MHZ are still subject to digital migration process.

…

4.21 The Digital Terrestrial Network is being rolled out nationally by Signal Distributors in accordance with the published plan in Annexure G of the TBFP.

4.22 In rolling out the network, there had to be mitigation techniques applied to ensure that existing analogue services co-exist with the design of Digital Terrestrial Television … thus resulting in Digital Services being catered above 694MHZ as indicated in Annexure G of the TBFP.

4.23 Furthermore, the final DTT Single Frequency Plan in Annexure J of the TBFP, had to be coordinated with the Six (6) neighboring Countries in line with the Geneva 2006 Agreement (GE-06).

4.24 The Coordinated plan had to be notified to the International Telecommunications Unions Radio communications ... Master Frequency International Register ... in compliance with the GE-06.

4.25 The plan has successfully met conformance requirements set out in the GE-06 agreement.

...

4.27 The Authority is to develop the radio frequency Spectrum Assignment Plan for DTT in an effort to expedite the Analogue Switch-Off. The obligation set for IMT700 and IMT800 are to be synchronized with the Analogue Switch-Off."

3.38 Paragraph 5 of the Information Memorandum deals with the spectrum available for assignment and which ICASA intends to award on a national basis covering the entire territory of the Republic of South Africa. Paragraph 5.3 of the Information Memorandum says that applicants "*are eligible to bid for any of the LOTS.*" In addition, paragraph 5.5 says that radio frequency spectrum caps "*will be introduced for the licensing process and will be determined by the Authority.*"

3.39 In paragraph 8.6 of the Information Memorandum, ICASA informed interested parties that it has taken note of auction formats which have been used worldwide when licensing spectrum were demand exceeded supply and that it was "*considering using the Simultaneous Multi Round Auction … with generic lots.*"

3.40 Telkom made written submissions to ICASA and criticized various aspects of the contents of the Information Memorandum. Telkom is not the only entity which made submissions not supportive of everything contained in the Information Memorandum. It is important to note that various parties made different submissions even in respect of the same topics. This goes to show that ICASA cannot be criticized for not adopting all of Telkom's submissions because its submissions competed with a long list of other submissions and ICASA had to arrive at a decision which is in the public interest, having taken into account all the submissions made to it.

3.41 e.tv must have become aware of the publication of the Information Memorandum and the contents thereof. The Information Memorandum made it clear that the IMT700 and IMT800 spectrum is going to be auctioned. The Information Memorandum invited interested parties to make representations on this issue and it would appear that e.tv did not. If e.tv did not make representations at that time, it cannot now contend that it ought to have been given another round of consultation before the ITAs were published.

3.42 Whilst this Court[18] criticized ICASA for seeking to auction the IMT700 and IMT800 spectrum when it was not available, that was in September 2016 when its judgment was delivered. ICASA has now demonstrated that the IMT700 and IMT800 spectrum is available and mobile operators have been using it since April 2020 without switching-off broadcasters such as e.tv or taking away any of their spectrum.

3.43 ICASA also indicated its changed position in the Information Memorandum, i.e., that there was no longer a need to wait for the completion of the digital migration process before the IMT700 and IMT800 spectrum could be auctioned. e.tv was aware of this position and did not become entitled to another round of consultation on this very issue.

3.44 Whilst it is desirable not to change government policy, change is inevitable and when things change, government is only required to ensure that there is no threat or harm to citizens' rights or legitimate expectations without reasonable notice. In this case, the Information Memorandum reasonably notified ICASA's intention to auction the IMT700 and IMT800 spectrum[19] and to the extent that this constituted a change of a policy position, interested parties given notice thereof and were invited to make representations and they did.

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[18] Judgment of Sutherland J in Minister of Telecommunications v ICASA.

[19] See Premier, Mpumalanga v Executive Committee 1999 (2) SA 91 (CC). The Court also said that Courts must be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. This is more relevant in this case where another round of consultation would only have served to cause another delay in releasing much needed spectrum for the benefit of all.

3.45 It is also not correct for e.tv to seek to contend now that it ought to have been consulted about having to share the IMT700 and IMT800 spectrum with mobile operators. The obligation to share spectrum has always been upon all licensees. The obligation to coordinate the usage of spectrum has always been upon licensees. There was no obligation upon ICASA to conduct another round of consultation or a hearing with e.tv on this issue.

3.46 e.tv's letter of 29 September 2020 did not entitle it to a hearing on issues which had already been the subject of the consultation processes conducted when the Information Memorandum was published. But in any event, e.tv's spectrum is not going to be taken away from it and there is no adverse effect which justified the hearing of e.tv.

3.47 The ECA makes it clear that licensees must coordinate their usage of spectrum to ensure that there is no harmful interference. e.tv did not at any stage challenge the constitutional validity of the ECA on this issue and cannot now complain about its implementation at this stage. Whatever difficulties e.tv may suggest are going to be experienced with sharing do not constitute harmful interference and do not mean that the IMT700 and IMT800 spectrum is not available. No harmful interference has been reported to ICASA since e.tv started sharing the IMT700 and IMT800 spectrum with mobile operators in April 2020[20].

[20] In any event, if there is harmful interference, ICASA is in law obliged to eliminate or reduce the harmful interference. Quite clearly, the legislature envisaged sharing and harmful interference and no one challenged the ECA on this issue.

3.48 As far as the digital migration process is concerned, e.tv has already been consulted[21] about that process and ought not to create an unnecessary link between that process and the auction process which is the subject of this application.

3.49 The fact that ICASA arrived at a different conclusion from that preferred by Telkom and e.tv does not mean that its decisions in issue are unlawful or irrational. Some other entity would have complained if all of Telkom's submissions were adopted. It is for this reason that the Court has to consider whether ICASA arrived at a decision which a reasonable decision-maker could have arrived at taking into account the public interest and all the negative impact on the economy, job creation, investment, competition caused by the delay in releasing high demand spectrum. When all of these issues are taken into account, it becomes clear that they cannot be considered only with reference to Telkom's narrow commercial interests.

3.50 In order to illustrate the above point, it is necessary to have regard to the submissions made by other interested parties in order to appreciate the different views expressed by different parties, all of which ICASA had to take into account to determine what would best serve the public interest. These representations show that the issues in dispute are such that even reasonable men disagree on them and that ICASA cannot be faulted for arriving at a different conclusion.

[21] Electronic Media Network Limited And Others v E.TV (Pty) Ltd 2017 (9) BCLR 1108 (CC).

Broadband Infraco

3.51 In its written submissions[22], Broadband Infraco said the following:

3.51.1 It endorsed ICASA's decision "*to simultaneously license IMT700, IMT800, IMT2300, IMT2600 and IMT3500 bands … to stimulate competition and to expand Broadband coverage, and in doing so, bridge the digital divide and the disparities between rural and urban access to broadband networks and services.*"

3.51.2 In paragraph 2.2, Broadband Infraco said the following about the digital migration process:

> "*2.2 Broadband Infraco draws to the Authority's attention that due to the Analogue Switch-off having not occurred yet, actual operation of wireless broadband services in the IMT700 and IMT800 MHZ frequency bands will not happen until the ASO concludes. <u>This structural hurdle, however, does not need to prevent or delay the Authority from licensing these bands though</u>.*"

3.51.3 In addition, Broadband Infraco said the following:

> "*2.5 If Broadband Infraco were to be assigned high-demand spectrum, local SMME partners could use it to expand the SA*

Connect network from schools, hospitals, clinics and government offices to provide wireless broadband connectivity to more and more South Africans residing in rural communities. …

3.3 In addition, the IM states that The IMT700, IMT800, IMT2300, IMT2600 and IMT3500 bands have been identified worldwide for IMT services. These bands complement each other in the sense that they fulfill the requirements for capacity and coverage which make them suitable for rural and urban areas and for bridging the digital divide.

3.4 Such policy trade-offs could be incorporated into operators license terms and conditions; similar to how Universal Access Obligations and their respective Implementation Plans are made part of operator's license conditions."

3.52 In its written submissions, Broadband Infraco made it clear that the fact that the digital migration process has not yet been completed does not prevent ICASA from licensing the IMT700 and IMT800 MHz frequency bands. This is consistent with ICASA's position.

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[22] Page F303.

Cell C

3.53 Cell C said[23], amongst others, the following:

"*ICASA will be aware that Cell C has been a challenger operator since its launch in 2001 but has faced many hurdles in attempting to keep pace with its competitors and gain market share. We believe the award of high-demand spectrum (HDS) and introduction of a WOAN can transform the market and in particular, enhance competition, bringing down costs to the benefit of the consumer.*

Coming at a time when ICASA has published its preliminary findings following a broadband market inquiry, and the Competition Commission has published its own findings pursuant to a data market inquiry, Cell C believes that the IM could be a critical instrument of change by incorporating many of the proposed remedies from the two reports, as license obligations or rights, as the case may be." (Own emphasis).

3.54 ICASA took into account the contents of "*the two reports*" referred to in Cell C's submission, being ICASA's own discussion document produced as part of the Mobile Broadband Market Inquiry and the Competition Commission's findings pursuant to its Data Services Market Inquiry. The law did not oblige ICASA to slavishly follow what is contained in these reports – ICASA only had to consider them and it did.

[23] Page F315.

3.55 In paragraph 5.7, Cell C commented on what it considered to be the appropriate spectrum which must be set aside for the WOAN to enable it to be viable and competitive. It said:

> "*5.7 As it stands in the present IM, Cell C believes that Option 1 will provide the WOAN with enough bandwidth to be competitive. The Analysis Mason report concluded that 80MHz (DL) is required for to enable at least a 20% market share, therefore Option 1 which indicates a potential allocation of 115MHz (70MHz DL) to the WOAN would be the best option in that it would substantially improve the sustainability of the WOAN in the long run.*"

3.56 Telkom's views are different from Cell C's views. They are also different from ICASA's views. Even if ICASA had adopted all of Cell C's views, Telkom would still have been saying that ICASA's decisions are irrational simply because its views were not adopted.

Vodacom

3.57 Vodacom commented[24] on a long list of relevant issues which ICASA took into account for purposes of arriving at the decisions which are sought to be reviewed and set aside.

[24] Page F357.

3.58 Vodacom did not say that the IMT700 and IMT800 spectrum is not available as contended for by Telkom. In fact, Vodacom proposed that the spectrum to be reserved for the WOAN should be in the 800MHz band because the IMT800 ecosystem is well developed and South Africa has a high device penetration of IMT800 capable devices. This is another clear example of interested parties arriving at different conclusions about the same issues. Telkom and e.tv say that this spectrum is not available at all and cannot be lawfully licensed until such time that the digital migration process has been concluded. They are wrong in saying this. But as stated above, Telkom says that its license to use that very spectrum must be extended.

3.59 In respect of spectrum caps, Vodacom submitted that ICASA should ensure that any spectrum caps offer sufficient flexibility to allow diverse participants to express individual preferences, ensuring there can be vigorous competition during the auction and the assignment of the entire spectrum band. Vodacom accordingly did not see the proposed spectrum caps as constituting a total impediment to competition. On the other hand, Telkom sees spectrum caps on their own as an impediment to competition and the whole of the ITA process.

3.60 Vodacom stated that it supports the SMRA auction format with named lots that bidders are free to move between as the auction progresses and recorded that "*we endorse the Authority's recommendations to use a*

simultaneous auction format (e.g., SMRA) for the award of new mobile spectrum." Telkom does not support this format.

3.61 Vodacom expressed its views about ICASA's compliance with the ECA. In particular, it correctly submitted that ICASA ought not to impose remedies by way of license conditions without a Chapter 10 process having been followed. ICASA accepts that it cannot act in terms of section 67(4) of the ECA to address competition problems without having completed the Chapter 10 inquiry. Telkom says that ICASA ought not to have published the two ITAs before concluding the Chapter 10 process. ICASA took these different views into account and the decisions at which it arrived are in the public interest.

3.62 Telkom's complaints are founded on its own narrow commercial interests and it has not produced any evidence to demonstrate that the public interest is going to be negatively affected if the two auctions are proceeded with. But ICASA cannot be expected to only look out for Telkom. Telkom has no such entitlement.

MTN

3.63 MTN made comments on various topics, the relevant of which are set out below:

3.63.1 In respect of the IMT700 band, MTN submitted that such band can only be deployed in "*clear spectrum*" and that is heavily dependent on

clearing the band from the TV terrestrial broadcast service including cross-border TV broadcast in international border areas such as Botswana. MTN did not say that the IMT700 frequency band is not available for use as suggested by Telkom. All that is required is coordination of the usage of that spectrum and that is what licensees have been doing without any difficulties and it is provided for in the ECA. What is important is that the concern raised by MTN in this regard is not raised as an impediment to the current licensing process.

3.63.2 MTN requested ICASA to clarify how any delay in the availability of spectrum will be addressed in terms of license expiry, the price of spectrum and coverage obligations. ICASA has done this in that it has indicated that the licence period will be extended from 15 years to 20 years to cater for any delays which may be experienced.

3.63.3 In respect of spectrum caps, MTN did not consider them to be a total impediment to competition. In fact, it recommended that specific spectrum caps be adopted.

SABC

3.64 In its written submissions[25], the SABC did not object to the licensing of the IMT700 and IMT800 spectrum as e.tv seeks to do. It said the following in paragraph 4:

[25] Page F418.

"*The SABC proposes that the process of licensing the 700MHz and 800MHz frequency bands can begin and be finalized. However, bringing into use of the spectrum should only be done after the successful migration of the SABC as part of the BDM process.*

If these bands are licensed and brought into use before the successful completion of the BDM process, it will result in an uncontrollable interference that will have serious and prejudicial financial impact on the Corporation.

…

If geographic sharing of the spectrum will be embarked then a transitional arrangement plan be discussed, agreed upon and Gazetted. Geographic sharing of spectrum without a proper mechanism of dealing with interference can be harmful to SABC's current television operations in the digital dividend bands."

3.65 The SABC does not see the licensing of the IMT700 and IMT800 spectrum as unlawful at this stage. It is, however, correctly concerned about interference. There is a remedy for this inconvenience, if and when it arises.

3.65.1 In terms of section 33 of the ECA, licensees are obliged to co-ordinate their usage of spectrum to avoid harmful interference and to ensure efficient use of the available spectrum.

3.65.2 Section 30(3) of the ECA requires ICASA to eliminate or reduce harmful interference to the extent which is reasonable. If ICASA cannot eliminate harmful interference, it must reduce it.

3.65.3 In addition, ICASA is in law entitled to license spectrum on the condition that the relevant licensees take the necessary steps to coordinate their usage on a site-by-site basis as Telkom is currently obliged to do so in respect of the very same spectrum which it says is not available.

3.65.4 In the light of the above, there is no impediment to the licensing of the IMT700 and IMT800 spectrum.

3.66 It is clear that different industry players made different submissions to ICASA on the very same issues which are in dispute in this application. ICASA considered such submissions. The mere fact that ICASA arrived at a conclusion which is different from that which Telkom and e.tv would have preferred does not mean that ICASA's decisions are unlawful or that they are irrational. It in fact shows that the decisions sought to be reviewed and set aside required ICASA to consider different policy objectives and balance competing interests.

Public Statement

3.67 In its statement attached to Telkom's founding affidavit[26] as FA13, ICASA said:

"*In the finalization of the ITAs, the Authority has duly considered the contents of the Policy Directives/Direction as required by section 3(4) of the Electronic Communications Act … and subsequently published an Information Memorandum … for IMT spectrum Assignment on 1 November 2019.*

In finalizing the ITA, the Authority considered and analyzed all representations received in response to the IM. The key considerations emanating from the representations into the IM include the following:

- *the development of various empowerment obligations to be imposed on the successful bidders in the auction process including a requirement to support Mobile Virtual Network Operators …;*

- *the requirement for successful bidders to support the WOAN through Procurement of a minimum 30% national capacity; and*

- *the imposition of empowerment obligations on the WOAN in order to ensure that it is a credible empowerment tool that will assist the*

[26] Page B556.

Authority to achieve the sectors transformation agenda." (Own emphasis).

3.68 It is clear from the above that ICASA considered competition issues and that it conducted an assessment in respect of market conditions pre- and post-the auction to inform the licensing process; and conducted an intensive spectrum fair valuation study. ICASA said the following in respect of competition matters:

"*The main objective from the competition assessment is that the Authority, through the awarding of this spectrum, is to ensure that the Authority expands the market. This means that the national and sub-national wholesalers are taken into consideration in terms of the spectrum to be awarded and the new players are able to partake in this process.*

The Authority has noted with concern the wholesale and the Retail competition issues in South Africa. However, this licensing process is not expected to solve the wholesale and retail competition concerns. The Authority is keenly aware of the need to prevent the spectrum award from worsening the competition concerns in mobile markets identified by the Authority through other processes. This will be done by imposing appropriate obligations and spectrum caps.

The Authority is imposing spectrum floors for the new players to ensure that they become credible players in the market, the spectrum cap of 2X21MHz (including existing sub 1-GHz spectrum holdings) has been

imposed on the sub 1-GHz spectrum bands and the overall spectrum cap of 184MHz (including existing assigned spectrum holdings) has been imposed.

The Authority has further unbundled the spectrum as it was proposed in the IM and taking into account the written representations received during the consultative process of the IM. The unbundling of the spectrum supports the notion that ICASA will encourage the market to dictate its course, in a way, promoting competition in the market." (Own emphasis).

3.69 ICASA clearly made an informed choice as to how the competition concerns would be addressed in the future. This is a choice which ICASA is legislatively empowered to make and has made and it is not competent for this Court to review and set aside ICASA's decision to make that choice. ICASA made this choice fully "*aware of the need to prevent the spectrum award from worsening the competition concerns in mobile market identified by the Authority through other processes*" and has deliberately decided that such competition concerns will be addressed "*by imposing appropriate obligations and spectrum caps.*" This Court is not called upon to decide whether this choice is correct. It is sufficient for present purposes that ICASA considered competition issues and the manner of addressing them.

3.70 There is no case made to justify the conclusion that ICASA will not be able to invoke section 67(4) of the ECA to address existing and future competition concerns which may not be addressed by the present ITAs

process. For as long as it remains open and competent for ICASA to act in terms of section 67(4) of the ECA, Telkom and e.tv's complaints do not justify the relief which is sought. This Court cannot tell ICASA what choice it ought to have made in these circumstances – that is for ICASA to decide taking into account the public interest and other regulatory options available to it.

3.71 The mere fact that Telkom does not consider it to be convenient for ICASA to address the remaining competition concerns outside the auction process does not necessarily mean that the decisions made by ICASA are fatally flawed and that they are liable to be reviewed and set aside. They are not.

3.72 The ITA processes in issue are licensing processes the purpose of which it to license high demand spectrum and the WOAN. It is not the purpose of the ITA processes to resolve all competition problems which exist in the market.

3.73 Telkom and e.tv have not made out a case that the Chapter 10 inquiry, which is designed to address competition problems, is not good enough to address their competition concerns. At best, their case is that "*it would have been nice*" to complete the Chapter 10 inquiry before embarking on the current ITA. That, however, is not what the law says.

Consideration of competition issues

3.74 Telkom says that ICASA did not take into account competition matters into account when taking the decisions which are sought to be reviewed and set aside. This, however, is not correct because ICASA took into account competition issues before arriving at the decisions in issue.

3.75 Telkom's case must be considered on the basis of what it said in its founding affidavit on this issue. It said ICASA did not consider competition issues and that it did not take advice from experts like it did in the past etc. That is Telkom's case.

3.76 In its answering affidavit, ICASA has attached evidence to demonstrate that it went as far as appointing three firms of experts to advise it not only on competition issues, but also on the design of the auction processes. The report produced by these experts is attached to ICASA's answering affidavit[27].

3.77 The relevant paragraphs of the report prepared for ICASA and which ICASA considered before arriving at the decisions in issue are also highlighted in ICASA's answering affidavit.

3.77.1 Paragraph 4 deals with the methodology employed for purposes of producing the report.

[27] Page F425.

3.77.2 Paragraph 4.2.3 deals with a competition analysis of the state of competition in South Africa. Therein, it is stated that:

"*75 One of the top five risks we identified as part of our work is the lack of a comprehensive analysis of the state of competition in the mobile sector South Africa.*

76 It would have been neglectful and unprofessional to proceed to any draft rules without such a comprehensive analysis. Indeed, several responses to the 1st Nov 2019 Information Memorandum (IM) consultation criticized ICASA for not having carried out such a competition analysis to thoroughly inform the IM in the first place. For example, ICASA proposed, in the Information Memorandum (IM) open access obligations in the current spectrum auction rules, without considering competition. We have therefore mitigated this key risk with the competition analysis in Appendix A. Given that the mobile broadband inquiry ("MBI") is ongoing, this competition assessment is subject to change, and the Authority should ensure that its competition assessment in the MBI too is concluded prior to issuing the final ITA."

3.77.3 ICASA's position has always been that the Chapter 10 inquiry is a separate process from the ITA process. There was, therefore, no need for ICASA to wait for that process to be completed before publishing the ITAs.

3.77.4 Paragraph 7 deals with mobile competition assessment and proposed measures.

3.77.4.1 Paragraph 97 shows that ICASA considered the current state of competition and competition in mobile markets in South Africa in the future – that is after the auction processes.

3.77.4.2 Paragraph 7.2 deals with competition pre-auction. In this regard, paragraph 103 records that ICASA's Discussion Document on its Mobile Broadband Service Inquiry and the Competition Commission's Data Services Market Inquiry's final report were considered before the finalization and publication of the auction ITA. Consideration was also given to barriers to entry, retail and wholesale market shares and market power and spectrum assignments pre-auction.

3.77.4.3 The mere fact that ICASA considered the contents of the Discussion Document on the Chapter 10 inquiry and the Competition Commission's report on the Data Services Market Inquiry shows that the choice to address other competition matters after the Chapter 10 inquiry was properly made after having taken into account all relevant considerations. These two documents clearly contain sufficient information to enable ICASA to identify the problems which must be addressed.

3.77.4.4 Paragraph 7.3 deals with competition post-auction and it is stated therein that the proposed set aside spectrum of 80MHz for the WOAN is considered to be enough for the WOAN to be a credible new wholesale national entrant into the mobile market alongside the existing 4 national wholesalers. It is also stated that the minimum 80MHz of total spectrum is similar to the amount of spectrum the top 3 wholesalers currently hold prior to the 2020 auction, without taking into account the roaming arrangements in place. In addition, it is said that the minimum 80MHz for the WOAN is also consistent with all the options in the 1st of November 2019 WOAN IM bar option 1. The fact that Telkom has a different view on this issue does not mean that ICASA is guilty of not having considered competition issues.

3.77.4.5 Paragraph 7.3.2 deals with credibility of operators. Therein, it is stated, amongst others, that:

"*149 The Authority recognizes that the intensity of competition overall will depend on a range of factors including the relative strength of national wholesaler's competitors and barriers to entry, and not simply on the number of competitors. However, as a matter of policy, our basic proposition is that competition is likely to be more intense, and hence more beneficial for citizens*

and consumers, to more rather than less competitors, provided the credible competitors to each other.

150 *As in the Ofcom 2012 UK Competition Assessment of Mobile Markets, by "credible", we mean that a competitor should be capable of exerting an effective constraint on its rivals, in terms of factors such as the provision of high quality services, competitive prices, choice and innovation, and as such contribute to the overall competitiveness of the mobile market. Given the complex and multi-faceted nature of mobile services, consumer demand, technology, and the characteristics of different spectrum holdings, there is in our view no single way to determine whether a national wholesaler, including the proposed new WOAN entrant, may be capable of being a credible competitor.*

151 *A national wholesaler could be a credible competitor even through it is not in a strong position in some dimensions of services (e.g. quality of coverage), or in delivering particular services (e.g. voice) or to particular customers (e.g. enterprise customers). For a national wholesaler might be credible if it were able to provide good quality of service (such as high data rates and latency) in most indoor locations, even if it could*

not compete as strongly for customers that particularly valued having a connection in the most difficult to serve locations."

3.77.4.6 Paragraph 7.3.4 sets out an overview of the approach followed to analyzing ICASA's potential competition concerns. An analysis of the paragraphs thereunder shows the extent to which ICASA took into account competition issues to ensure that competition is promoted.

3.78 In the premises, Telkom's suggestion that ICASA did not consider competition issues is factually incorrect and cannot constitute a ground for any of the relief which it seeks in this application.

4 TELKOM DOES NOT HAVE A *PRIMA FACIE* RIGHT

4.1 The requirements for an interim interdict are settled and it is not necessary to restate them. Telkom has not satisfied such requirements.

4.2 Whilst this Court has a discretion to grant an interim interdict, it does not have such a discretion where the requirements for an interim interdict have not been established such as in this case.

4.3 Telkom has failed to establish that it has a *prima facie* right to which irreparable harm would ensue during the litigation of its review application. Even if it may be contended that Telkom has established such a right, it has

not been established that such a right is one which deserves protection by way of an interim interdict *pendente lite*.

4.4 Telkom says that it "*has a prima facie right to have the impugned decision reviewed and set aside*." This is the right which it seeks to protect by way of the interim interdict which it seeks.

4.5 In a review application such as the present, it is not the right "*to have the impugned decision reviewed and set aside*" which must be protected *pendente lite* because that right vests in every person and will always be protected by the Court hearing the review application.

4.6 The fact that an interim interdict may not be granted does not mean that the right "*to have the impugned decision reviewed and set aside*" is going to be violated *pendente lite*. Such a right will not be vandalized *pendente lite*. The Court hearing Part C of this application will always be obliged by the Constitution to review and set aside the impugned decisions if a case for it has been made. For this reason alone, Telkom does not have a *prima facie* right to which irreparable harm would ensue and which deserves protection *pendente lite* to justify an interim interdict.

4.7 In a case such as the present, the fact that Telkom may have good grounds of review is not what constitutes a *prima facie* right to which irreparable harm would ensue *pendente lite* if an interim interdict is not granted because the right itself will not be violated or rendered nugatory *pendente lite*.

4.8 In its founding affidavit, Telkom says that the grounds of review upon which it relies "*amply demonstrate that Telkom has a prima facie right to have the impugned decision reviewed and set aside*." That may be so. But that is not what Telkom is required to prove in order to obtain an interim interdict. Telkom will get its review relief in Part C if its grounds of review are good enough to entitle it to that relief regardless of whether or not an interim interdict has been granted. At that stage, the review Court will be obliged to formulate adequate relief to remedy the injury complained of by Telkom.

4.9 In fact, the fact that Telkom says that it has demonstrated entitlement to the review relief disentitles it to the interim interdict purportedly to protect its right to have the impugned decision reviewed and set aside because if Telkom is right and it has a right to have the impugned decision reviewed and set aside because it has good grounds to do so, such a right will be vindicated by the review Court granting it the review relief which it seeks because that right will remain intact for the entire duration of the review application.

4.10 Accordingly, the right to have the impugned decision reviewed and set aside does not deserve protection pending the final determination of a review application because such a right:

4.10.1 does not get vandalized during the litigation of the review application;

4.10.2 is in fact not the right which has to be established for purposes of obtaining an interim interdict pending the final determination of a review application;

4.10.3 cannot be infringed or irreparably harmed pending the final determination of a review application because a Court is constitutionally obliged to grant review relief at any time, if the requirements for such relief have been satisfied; and

4.10.4 will always be protected by the Court hearing the review application due to the fact that a Court is in law constitutionally obliged to set aside unlawful decisions, which is what Telkom seeks to do in Part C of this application.

4.11 Of importance, ICASA will not conduct itself in such a manner that Telkom's right to have the impugned decisions reviewed and set aside will be violated. There is, therefore no need for the interdict which Telkom seeks because there is no future conduct which is going to violate that right.

4.12 In *National Treasury*, the Constitutional Court restated the law relating to the granting of an interim interdict *pendente lite*.

4.12.1 An interdict is always intended to prevent future conduct which would cause irreparable harm. In this case, there is no future conduct which is going to irreparably harm Telkom's right to have the impugned decision reviewed and set aside.

4.12.2 In paragraph 50 of the *National Treasury* judgment, the Court said:

> "*[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative action. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. **The right to review the impugned decisions did not require any preservation pendente lite***." (Own emphasis).

4.13 Telkom has not established the existence of a right which is threatened by ICASA and the auction process to which irreparable harm would ensue if an interim interdict is not granted and which deserves protection *pendente lite*.

4.14 In Cochrane Projects (Pty) Ltd v Airports Company South Africa SOC Ltd[28] Davis J concluded that:

[28] Unreported judgment of Davis J in the Gauteng Local Division under case number 2017/19573

"*[16]* *The prima facie right which the applicant seeks to assert is to have its review application heard and decided. Some public interest issues are also at stake therein for if the applicant is successful and the tender is awarded to the applicant, it would result in a cost-saving for the first respondent.*

[17] *The prima facie right also includes the right not to have a process continued to such an extent that might also prejudice or negatively impact on even the considerations applicable at the hearing of a review application. I therefore find that the applicant has reached the minimum threshold of establishing a prima facie right.*" (Own emphasis).

4.15 On appeal to the Full Bench, the Full Bench correctly rejected Justice Davis' conclusions as follows:

"*[13]* *It is trite that the prima facie right that must be established in casu is not merely the right to approach the Court for the review of an administrative decision, but a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Apart from the right to review and to set aside impugned decisions the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.*

Therefore, the finding of the Court below that the first respondent has established a prima facie right is incorrect.

[14] *The Court a quo further misdirected itself in finding that because the tender may have been partially or completely executed was a factor "that might also prejudice or negatively impact on even the considerations applicable at the hearing of a review application. Counsel for the appellant, Mr. Tsatsawane SC, in my view, correctly contends that it would render the whole review procedure irrelevant and would necessarily mean that an interim interdict must be granted every time that there is a review application simply because a review application would become redundant if an interim interdict is not granted. <u>If the respondent makes out a case and establishes that its tender was wrongly disqualified, then the review Court has no discretion but to review and set aside the decision to disqualify its tender, regardless of the stage of implementation of the decision</u>.*

[15] *In AllPay Consolidated v CEO, SASSA the Constitutional Court held as follows:*

> *"[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. <u>The consequences of</u>*

the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b)"

[16] *This necessarily means that the fact that a tender may have been partially executed does not prevent a review Court to review and set aside the decision to award the tender and it also does not constitute a negative factor to be used against the first respondent in the review application.*

...

[19] *The first respondent alleged in its founding affidavit that it "has a clear right, (or at the very least a prima facie right) to have its tender application properly and fairly adjudicated on the correct facts." An interdict is always intended to prevent future conduct and not decisions already made. In National Treasury supra the Court stated the following:*

"[50] ... An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm."

[20] *The first respondent seeks to protect its right to a fair tender process. There is no longer a tender process and there is no future conduct which is going to irreparably harm that right pendente lite. The tender process came to an end when the tender was awarded to the second respondent. The first respondent did not establish the existence of a right which was threatened by the appellant and to which irreparable harm would ensue if an interim interdict was not granted pendente lite. Every person who submits a tender has the right to have their tenders adjudicated on the correct facts. If this is not done, it constitutes a ground of review not a separate right which requires protection by way of an interim interdict pendente lite*." (Own emphasis).

4.16 The above quoted paragraphs correctly reflect the legal position as far as the granting of interim interdicts in cases such as the present is concerned, where an applicant relies on a right to have the impugned decision reviewed and set aside.

4.17 Telkom also complains about competition problems and access to beneficial high demand spectrum. The Auction ITA process in which Telkom is a participant is intended to release high demand spectrum and no purpose would be served by interdicting that process which is designed and intended to increase available high demand spectrum in the IMT700 and IMT800 bands.

4.18 If the ITA processes are interdicted as contended for by Telkom, there is going to be a delay in making access thereto not only to Telkom, but to a long list of other interested parties. Even on Telkom's version, the current status *quo ante*, where there is shortage of high demand spectrum, ought not to be preserved because it is to the disadvantage of Telkom itself and the whole of the Republic, in particular, people in rural areas.

4.19 Without Telkom having established that it has a *prima facie* right to which irreparable harm would ensue if an interim interdict is not granted, Telkom is not entitled to the interim interdict which it seeks and this Court does not have discretion to grant such an interdict. The application for an interim interdict ought then to be dismissed.

4.20 In the very specific context of *SA Informal Traders Forum*, the Constitutional Court said that a *prima facie* right may be established by demonstrating prospects of success in the review[29]. In that case, the applicants sought to protect their right to trade in stalls which had been allocated to them and there was "*no dispute over the entitlement of the applicants to trade in the stalls the city had allocated to them*." In fact, the City had "*expressly submitted that the city acted unlawfully*" and the interim solution proposed by it required the traders to "*settle for relocation to yet unspecified areas or stalls*." The applicants were not seeking to protect the right to have the impugned decisions set aside – they were seeking to protect their right to trade "*in the stalls the city had allocated to*

[29] SA Informal Traders Forum And Others v City of Johannesburg And Others 2014 (4) SA 371 (CC).

them" pending the final determination of their review application. This is not what Telkom seeks to do.

4.21 This case is different from *SA Informal Traders Forum* – Telkom seeks to protect the right to review and set aside the impugned decision and the question which must be answered is whether or not that right deserves protection at this stage. Such a right would only deserve protection if it is going to be so vandalized in the interim that the review Court will not be able to grant any effective and adequate review relief. This is not so in this case, more so when regard is had to the long list of remedies provided for in section 8 of PAJA and the just and equitable jurisdiction which the review Court has in terms of section 172 of the Constitution. Telkom has not made out a case that each of the remedies available in terms of section 8 of PAJA and section 172 of the Constitution are not adequate to remedy the constitutional violation complained of.

4.22 In *SA Informal Traders Forum*, the Court correctly found that the right which the applicants sought to protect deserved protection *pendente lite* because "*the damage in the interim would be so severe that the applicants' ability to obtain relief from the high court in part B would substantially be rendered nugatory*" and that the "*order sought now is thus no more than a 'status quo order' granted in the interests of justice 'to prevent what might otherwise be substantial prejudice'*."

4.23 Telkom is not in the same position as that of the applicants in that case *SA Informal Traders Forum*. Telkom has also not made out a case in its

founding affidavit that the review Court will not be in a position to grant it adequate relief to the extent that any relief it could obtain in that Court "*would substantially be rendered nugatory*." In the context of this case, it would only be in the event of the review Court not being able to grant an order which is just and equitable to remedy the injury complained of by Telkom that its review relief could be rendered nugatory – but that would mean that the Constitution is not adequate to empower the Courts to formulate adequate remedies to remedy its violation and that is not the position.

4.24 It wrong for Telkom to suggest that ICASA ought to have slavishly adhered to the views of the Competition Commission and Acacia. In Telkom SA SOC Ltd v Mncube N.O And Others, this Court[30] found that it was wrong for ICASA not to take competition issues into account as part of its decision making process and that such a duty "*cannot be delegated or deferred to another organ of state*." The Court also concluded that ICASA's "*decision to defer to the Competition Commission*" was "*wrong in law*." Telkom is accordingly wrong to suggest that ICASA ought to have deferred to the Competition Commission.

4.25 In *Mncube* and in dealing with ICASA's duty to take into account competition issues in its decision-making processes, Fourie J said the correct approach was the following:

[30] Unreported judgment of Fourie J Case No.: 2015/55311.

"*[68] In considering this question I should remind myself of the principle that a review is not concerned with the correctness of a decision made by a functionary, but with whether it performed the function with which it was entrusted. When the law entrusts a functionary with a discretion the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted and it is not open to a court to second-guess this evaluation … I also have to take into account the constitutional principle of the separation of powers. In Bato Star … O'Reagan J sounded a warning … that a court should be careful "not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government". It was also pointed out that a court should therefore give due weight to findings of fact and policy decisions made by those with special expertise and experience in their field*."

4.26 In Minister of Telecommunications v ICASA And Others [2016] ZAGPPHC 883 this Court interdicted ICASA from accepting bids in terms of what is referred to in the papers as the 2016 ITA. This Court, however, did not find that the issuing of the 2016 ITA had to be preceded by the Chapter 10 inquiry. It said the following about section 67(4) of the ECA:

"*64. … This obligation, inserted by an amendment in 2014, cannot be understood to mean that the fruits of it had to precede the issue of the ITA, or any other decision of ICASA. Moreover, its*

terms point in the direction of regulation through license conditions rather than assignment of spectrum."

4.27 *Minister of Telecommunications* further supports ICASA insofar as it did not adhere to everything which its advisers put on the table. There ICASA was criticized for not adopting some advices given to it by its experts. This Court said:

"*69. That this approach is the appropriate or optimal model to promote competition is not obvious. ICASA invokes international best practice for the auction per se. As to the range of lots put up for auction, it justifies the scheme on a holistic assessment of what it is expected to bring about, and having taken advice from experts. There is criticism that the experts did not prescribe this exact model, but that view is misdirected because slavish adherence to advice is not a safe indicator of a proper application of mind.*

70. It is not obvious to me that the review court, in making a qualitative assessment about the pro-competition attributes of the ITA, shall conclude that ICASA has failed to consider competition aims or not tried to promote pro-competitive aims. It is rightly argued that the obligation of ICASA is not to present the very best pro-competitive model objectively possible. By its very nature, a policy choice of such a nature is not susceptible to nit-picking analysis precisely because it is a

qualitative assessment about which all too often reasonable people will disagree. Expert reports are paraded on both sides of the debate."

4.28 There is no basis for Telkom's contentions that ICASA's decisions are unreasonable, irrational and unlawful on the grounds upon which Telkom relies. Even if there was a room for such criticism, it does not necessarily follow that there is now a reasonable prospect of success in the review to justify the interim interdict which is sought.

5 THERE IS NO REASONABLE APPREHENSION OF HARM

5.1 The second requirement for an interim interdict is a reasonable apprehension of irreparable harm. The irreparable harm which must be established is irreparable harm to a *prima facie* right. But Telkom has not established a *prima facie* right to which irreparable harm would ensue if an interim interdict is not granted.

5.2 In paragraph 187 of its founding affidavit, Telkom alleges that "*enormous prejudice will be suffered by Telkom, the successful bidders, the consumer, the fiscus and the national economy*" if the interim interdict which it seeks is not granted. But this is not correct. Telkom does not seek an interim interdict in order to avoid prejudice to successful bidders, the consumers, the fiscus and the national economy – Telkom seeks an interim interdict in order to protect its right to have the impugned decision reviewed and set

aside – but as stated above, that right does not require protection *pendente lite*.

5.3 Telkom has not established that the alleged "*enormous prejudice*", if it were to ensue, would be irreparable. It is not sufficient for a litigant to simply allege "*enormous prejudice*" without making out a case that such prejudice would be irreparable if an interim interdict is not granted.

5.4 The right to have the impugned decision reviewed and set aside will always be vindicated by the review Court and cannot ever be irreparably harmed.

5.5 There is no merit in Telkom's contention that there would be an adverse irreparable impact if an interim interdict is not granted:

5.5.1 Telkom contends that it does not have sub 1GHz spectrum and that the licensing process contemplated in the ITA "*is the only opportunity available to it to secure sub 1GHZ.*" This is correct. Insofar as this is correct, there is no reason why this Court should interdict the very same process which is the only process in terms of which Telkom stands to secure the sub-1GHz spectrum. There is no basis to delay Telkom getting this spectrum.

5.5.2 Telkom has responded to the Auction ITA and there is no reason why it now wants the process to be interdicted due to the fact that the consequence of the interdict which it seeks is that "*the only opportunity available to it to secure sub 1GHZ*" is then going to be

delayed by a number of years. Such a delay would only serve to prejudice Telkom and others and entrench the very same alleged "*duopoly*" of MTN and Vodacom which it says must be eradicated.

5.5.3 If the Auction ITA is delayed, such a delay is not going to stop Vodacom and MTN from expanding their alleged dominant positions. If that were to happen, it is going to be very difficult for Telkom to catch up with them. It would result in Telkom complaining about the same thing every time that an auction of this nature is sought to be implemented because the auction is never going to be designed to protect Telkom's interests alone – it has to serve the public interest.

5.5.4 Telkom's complaint that it will incur the relevant costs "*without certainty about when Telkom can expect to enjoy the full commercial benefits of this sub 1GHZ spectrum*" is without any merit. The correct position is that as soon as the auction process is completed and the relevant licences are awarded, the successful bidders will then become entitled to enjoy the full commercial benefits of the spectrum that would have been awarded to them.

5.5.5 It is correct that "*the government has missed all deadlines for the analogue switch off to enable digital migration*" but this is not a basis to contend for irreparable harm or to justify the relief sought. ICASA will not invite people to participate in an auction process if it is not going to be able to give them what they are bidding for. ICASA has

already made out a case to demonstrate that the digital migration process is not an impediment to the current auction process.

5.6 Telkom's complaints about the impact of the process on other bidders, the fiscus, the public interest and on the ability of people to make investment decisions are unfounded. There is no evidence to substantiate any of these complaints and it does not lie in Telkom's mouth to speak for all the people that it purports to speak for. In any event, these are not exceptional risks in processes such as the present.

5.7 The alleged negative impacts and harm complained of by Telkom have nothing to do with the right which it says it seeks to protect, i.e., the right to have the impugned decision reviewed and set aside, which right does not in any event deserve protection by an interim interdict *pendente lite*.

6 THE BALANCE OF CONVENIENCE DOES NOT FAVOUR TELKOM

6.1 Telkom has not established that the balance of convenience favours the granting of the relief which it seeks.

6.2 The question whether the balance of convenience favours the granting of the interim interdict which Telkom seeks must be answered with reference to the nature of conduct which is sought to be interdicted.

6.3 It is common cause that what is sought to be interdicted is the performance of ICASA's constitutional functions. When a Court is asked to interdict the

performance of any statutory functions, more so constitutional functions, it is required to take very slow steps and to be satisfied that a very clear case has been made to grant such an interdict. Telkom's case is not a clear case to justify the interdict which it seeks when regard it had to the impact of a further delay in releasing high demand spectrum.

6.4 In assessing whether the balance of convenience favours Telkom, this Court must carefully consider whether the granting of the interim interdict would disrupt the performance of statutory and executive functions. There is no doubt that there is going to be a disruption in the performance of the constitutional and executive functions for which ICASA was established. This being the case, this Court ought not to grant the interim interdict which is sought because Telkom has not made out a strong and clear case to justify this Court interfering with the performance of ICASA's executive and constitutional functions.

6.5 In *National Treasury*, the Court said:

"*[65] When it evaluates where the balance of convenience rests, a Court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a Court has the power to grant a restraining order of*

that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] *A Court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus Courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matter pertaining to the best application, operation and dissemination of public resources. What this means is that a Court is obliged to ask itself not whether an interim interdict against an authorised State functionary is competent but rather whether it is constitutionally appropriate to grant the interdict*." (Own emphasis).

6.6 In this case, ICASA is in law (constitutionally) required to license high demand spectrum to operators such as Telkom. In addition:

6.6.1 there is an urgent demand to release the high demand spectrum which Telkom seeks to interdict;

6.6.2 the process of releasing high demand spectrum has been delayed by many years. This Court interdicted the 2016 auction in 2016 and it took four years for ICASA to restart the process;

6.6.3 the delay in releasing high demand spectrum is prejudicial to other mobile operators, the economy, the public interest and the country's ability to generate more job opportunities;

6.6.4 the country has already been prejudiced by the delays which have been occasioned in releasing high demand spectrum;

6.6.5 since Telkom has submitted an application for the very same high demand spectrum which it wants to be interdicted, it stands to be assigned the high demand spectrum it has applied for. As a result of this, there is no basis to conclude that whatever prejudice it alleges outweighs that which the whole country will suffer if the interim interdict which it seeks is granted because the spectrum which it stands to be assigned will enable it to compete with Vodacom and MTN;

6.6.6 whatever competition concerns Telkom alleges are not going to be addressed by the present process will be addressed pursuant to the Chapter 10 inquiry.

6.7 In *Pikoli*, the Court[31] correctly said that in proceedings such as the present, an interim interdict is granted "*to protect the integrity of the proceedings in the main case*" so that the successful party "*will receive adequate and effective relief*." Telkom will obtain adequate relief if it is successful in its

[31] Pikoli v President of the Republic of South Africa 2010 (1) SA 400 (GP).

review. The just and equitable remedy which a review Court is competent to grant ensures that the review relief is not rendered nugatory.

6.8 In Electoral Commission v Mhlope and Others 2016 (5) SA 1 (CC) the Constitutional Court said the following about section 172(1)(b) of the Constitution:

"*[132] Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "any order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in s 172(1)(b).*"

6.9 In State Information Technology Agency v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) the Court restated that "*a court deciding a constitutional matter has a wide remedial power*" and that:

"*[53] ... It is empowered to make 'any order that is just and equitable'. So wide is that power that it is bounded only by considerations of justice and equity ...*"

6.10 No case has been made that Telkom could not benefit from the just and equitable remedy contemplated in section 172 of the Constitution.

7 THERE ARE ALTERNATIVE AND ADEQUATE REMEDIES

7.1 An applicant for an interim interdict is required to establish that there is no alternative and adequate remedy for the harm alleged by it and that the interdict sought is the only remedy available to it.

7.2 Telkom has failed to demonstrate that there are no alternative and adequate remedies to remedy its alleged harm. Telkom's first failure is to establish a right to which irreparable harm would ensue if an interim interdict is not granted *pendente lite*.

7.3 Once there is a failure, as there is, to establish a right to which irreparable harm would ensue, it follows that no interdict is required and it is then not necessary to investigate whether there is an alternative and adequate remedy available than the interdict sought.

7.4 In addition, the question whether there is an alternative and adequate remedy available also does not arise if the alleged harm is not irreparable. This is so because an interdict is not competent if the alleged harm is reparable.

7.5 In this case, Telkom has not established a right to which irreparable harm would ensue if an interdict is not granted and it has not established

irreparable harm. For this reason, it is not competent to grant an interim interdict.

7.6 In its founding affidavit, Telkom complains about not having been successful in its attempt to engage with ICASA on the issues upon which its review application is founded. This, however, is not a basis to justify a conclusion that there is no alternative and adequate remedy available other than the interim interdict which it seeks.

7.7 Telkom further complains[32] that the interim interdict which it seeks "*is the only manner in which to ensure that the ITA process is not concluded and Telkom does not suffer material harm for the duration of the license period for the high demand spectrum.*" This is irrelevant. The need for an interdictory relief can only be assessed and granted for the duration of the review application. The review Court will formulate such remedy as would be required and justified for the duration of the license period – and that is if a case for such a remedy is made in that Court. What this Court cannot do is to grant an interim order for purposes of protecting Telkom for the duration of the license period of 20 years. That is what the Court hearing the review application must do.

7.8 In the event that the review application is only heard and finalized after the high demand spectrum has been assigned, the Court hearing the review application must formulate an order which will protect Telkom for the

[32] Paragraph 210 of the founding affidavit.

duration of the license period – and that is in the event that Telkom is not awarded the spectrum for which it has applied and if it is also able to establish that it is entitled to more than an order in terms of which the impugned decisions are reviewed and set aside.

7.9 Telkom seeks relief in terms of PAJA and if the relief which it seeks is granted, then in that event, the review Court will be obliged to grant a remedy which is just and equitable to remedy whatever prejudice Telkom may prove to have suffered as a result of the impugned decisions. A review Court is obliged to do this in terms of section 172 of the Constitution.

7.10 Telkom has not even made out a case to suggest that none of the remedies listed in section 8 of PAJA and the remedy contemplated in section 172 of the Constitution are not available and adequate to address the alleged harm.

7.11 If the auction process is finalised and it is later found that it ought not to have been conducted in the first place, the impugned decisions are going to be reviewed and set aside. That is the relief which Telkom seeks. Once that is done, the review Court will then have to conduct an inquiry into what further just and equitable remedy must be granted to ensure that Telkom gets a remedy which addresses the injury complained of.

7.11.1 In Allpay Consolidated v CEO, SASSA 2014 (1) SA 604 (CC), the Constitutional Court said:

"*[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy*." (Own emphasis).

7.11.2 It follows then that the fact that the auction process may have been concluded does not mean that Telkom will not get the relief which it seeks.

7.11.3 In Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC), the Constitutional Court said:

"*A discretionary remedy?*

[81] Both the High Court and the majority judgment in the Supreme Court of Appeal stated that even if Bengwenyama Minerals and the Community were to succeed on the merits they would have refused relief in the exercise of their discretion to do so. Genorah supported this approach with reliance on a number of recent cases decided in the Supreme Court of Appeal, namely Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,[33]

[33] 2004 (6) SA 222 (SCA).

Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others[34] *and Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others.*[35] *The Community, on the other hand, submitted that this approach was based on incorrect legal principles. The starting point, the Community urged, was section 172(1) of the Constitution which declares that a court must declare any law or conduct that is inconsistent with the Constitution invalid. A court has no discretion to refuse to do that, it was submitted. A court does, however, have a discretion under section 172(1)(b) of the Constitution to suspend a declaration of invalidity where it is just and equitable to do so. In an administrative law context, the decision not to set aside an invalid administrative act amounts to a decision to suspend the declaration of invalidity, so the argument went.*

[82] In terms of the provisions of section 8 of PAJA a court may grant any order that is just and equitable. PAJA seeks to give expression to the right to just administrative action in terms of section 33 of the Constitution and its provisions must, of course, also be read in accordance with the Constitution where

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[34] 2008 (2) SA 638 (SCA).

[35] 2008 (2) SA 481 (SCA).

it is reasonably possible to do so.[36] *There is much merit in counsel's reminder that invalid administrative conduct must be declared unlawful, but it seems to me that it would be unnecessarily inflexible and difficult to explain further discretionary relief as a form of suspension of the invalidity of administrative action, in all cases. If the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity. In my view it is not necessary to place the just and equitable relief that may be granted under PAJA into this kind of conceptual straitjacket in order for that relief to be constitutionally acceptable.*

[83] In Steenkamp NO v Provincial Tender Board, Eastern Cape[37] *Moseneke DCJ stated:*

> *"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet*

[36] See Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-6.

[37] [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. . . . The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

[30] Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders

that are 'just and equitable'."[38] *(Footnotes omitted.)*

This 'generous jurisdiction' in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner and orders prohibiting him or her from acting in a particular manner.

[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative

[38] Id at paras 29-30.

action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.[39]" (Own emphasis).

7.11.4 In the premises, the suggestion that there would be irreparable harm and no remedy available if an interim interdict is not granted is wrong and ought to be rejected.

7.12 The just and equitable remedy contemplated in section 172(1)(b) of the Constitution depends on the circumstances of each case and it is for an applicant in a review application to make out a case for such an order so that the order is then appropriate to remedy the contravention complained of. For as long as Telkom has not established that this remedy is not available to it, it cannot succeed. This is more so because the right which Telkom says it seeks to protect is the right to have the impugned decisions reviewed and set aside and it says that it has reasonable prospects of obtaining the review relief.

7.13 It is for Telkom to tell the review Court what just and equitable remedy must be granted if it is successful and this Court cannot come to the conclusion that the review court will not be competent to formulate an appropriate order when its jurisdiction to do so is so wide that it is only bounded by considerations of justice and equity.

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[39] Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) at para 9.

7.14 In the premises, it is only if the just and equitable remedy contemplated in section 172 of the Constitution is not available that it could be contended that Telkom's success in the review application will not remedy the injury complained of.

7.15 For all the reasons stated above, the application ought to be dismissed with costs including the costs consequent upon the employment of two counsel.

Dated at Sandton on this 7th day of February 2021.

Kennedy Tsatsawane SC
Lesirela Letsebe
Nandi Makhaye
Wendy Isaaks

8 LIST OF AUTHORITIES

8.1 Valerie Collins t/a Waterkloof Farm v Bernickow NO And Another [2001] ZALC 223 (7 December 2001).

8.2 East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd [2011] ZAGPJHC 196 (23 September 2011).

8.3 SA Informal Traders Forum And Others v City of Johannesburg And Others 2014 (4) SA 371 (CC).

8.4 Cochrane Projects (Pty) Ltd v Airports Company South Africa SOC Ltd.

8.5 Unreported judgment of Davis J in the Gauteng Local Division under case number 2017/19573.

8.6 Telkom SA SOC Ltd v Mncube N.O And Others.

8.7 Unreported judgment of Fourie J Case No.: 2015/55311.

8.8 Minister of Telecommunications v ICASA And Others [2016] ZAGPPHC 883.

8.9 Electoral Commission v Mhlope and Others 2016 (5) SA 1 (CC).

8.10 Pikoli v President of the Republic of South Africa 2010 (1) SA 400 (GP).

8.11 Allpay Consolidated v CEO, SASSA 2014 (1) SA 604 (CC).

8.12 Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC).

8.13 Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

8.14 Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA).

8.15 State Information Technology Agency v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC).