THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REPORTABLE

CASE NO 2016/59722

IN THE MATTER BETWEEN:

MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES

APPLICANT

AND

ACTING CHAIR, INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

FIRST RESPONDENT

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

SECOND RESPONDENT

VODACOM (PTY) LTD **THIRD RESPONDENT**

MTN (PTY) LTD **FOURTH RESPONDENT**

NEOTEL (PTY) LTD **FIFTH RESPONDENT**

TELKOM SOC LTD **SIXTH RESPONDENT**

CELL C (PTY) LTD **SEVENTH RESPONDENT**

CASE NO 2016/68096

IN THE MATTER BETWEEN:

CELL C (PTY) LTD **APPLICANT**

AND

ACTING CHAIR, INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

FIRST RESPONDENT

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

SECOND RESPONDENT

MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES

THIRD RESPONDENT

MINISTER OF COMMUNICATIONS **FOURTH RESPONDENT**

MOBILE TELEPHONE NETWORKS (PTY) LTD **SIXTH RESPONDENT**

TELKOM SA SOC LTD **SEVENTH RESPONDENT**

NEOTEL (PTY) LTD **EIGHTH RESPONDENT**

JUDGMENT

SUTHERLAND J:

INTRODUCTION

1. This judgment addresses two applications, both involving the same parties, save that the Minister of Communications is cited in one case but not the other. In the two applications

the parties are cited with different numbers assigned to them, and therefore to avoid confusion the parties are called only by their names or their familiar acronyms.

2. The applicants in each case, the Minister of Telecommunications (MOT) and Cell C, both desire certain decisions taken by the Independent Communications Authority of South Africa (ICASA) to be set aside. MOT has brought a bifurcated application in which it seeks in part B, a review of the decision, and in Part A, an interim interdict suspending implementation of the impugned decision pending that review. Only Part A is before this court. Cell C has brought an application for the identical interim relief, and intends to bring a review application in due course.

3. Not all the cited litigants have participated in the controversy about interim relief. The active parties are on the one side, ICASA, and arraigned on the other side in support of the interim interdict are MOT, Telkom and Cell C. The remaining parties abide the outcome of the application for interim relief but may participate in the review in due course.

4. The impugned decision of ICASA is the *invitation to apply* (ITA) published on 15 July 2016 to participate in an auction of rights to use certain bands of radio frequency spectrum which would be followed by a licensing by ICASA of such use to the successful bidders.

5. The critique of the ITA spans several grounds. The scope of the controversy includes whether ICASA is obliged to subordinate its discretion to certain policy making processes driven by MOT, and more broadly, by the processes of the cabinet of the South African Government, whether ICASA has acted in breach of its statutory obligations or certain

promulgated statutory policies and plans, in one or more of several ways and whether the decision exhibits irrationality in one or more of several ways. During the course of the run-up to the hearing, ICASA by way of amendments to the ITA, or clarifications of the ITA resolved certain criticisms about which no further comment is necessary.[1]

6. The immediate issue is limited to whether the requirements for an interim interdict have been shown: a prima facie right, albeit open to some doubt, a risk of irreparable harm if interim relief is not granted, an absence of an alternative suitable remedy and a balance of convenience in favour of the interdict. As regards interim relief pending reviews, in *Pikoli v President, RSA 2010 (1) SA 400 (GP) at 404* it was said by Du Plessis J:

> 'The requirements for an interim interdict are well established and I shall in due course deal with each of them. More in general, one of the aims of an interim interdict is to preserve the status quo pending the final determination of the rights of the parties to pending litigation. The interim interdict does not involve a final determination of the parties' rights and it does not affect such final determination. When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief. The court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party. For reasons that will appear in due course, the issues in the main application and also in this application are constitutional issues. In such cases the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to 'declare that any . . . conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. The court must also bear in mind that not only the parties but society as a whole have an interest in upholding the Constitution and that relief in cases of constitutional breaches must vindicate the Constitution. As a first requirement, the applicant had to show that he has at least a prima facie right, though it might be open to some doubt, to the relief he seeks in the main application, that is, to review and set aside the decision to remove him from office. In other words, the applicant had on a prima facie basis to prove facts

[1] These disposed of issues include: A complaint about a 30% BEE qualifying threshold, now to be changed by an amendment to the ITA, to a Level 4 BEE qualification which all the industry actors can satisfy; an abandonment of the requirement to be fully funded for 10 years, whatever that meant, now substituted with the need to submit a credible business plan to show how funding over a 10 year period can be procured; a tender to refund the entrance fee of R3m, which was initially non-refundable, if the review succeeds; and a deferment of the target date on achieving certain milestones in roll out of service until full unimpeded access can be delivered of the spectrum to be assigned to an operator.

that establish that his removal from office was unlawful and therefore subject to be reviewed and set aside.'

7. In addition, as regards the interdicting of a body exercising statutory authority, ever since *Gool v Minister of Justice 1955 (2) SA 682 (C) at 688F – 689C*[2], the approach of a court has been to require a higher threshold of a strong case and exceptional circumstances to be shown where the exercise of powers sought to be interdicted is not alleged to have been exercised in bad faith. Moreover, in *National Treasury v Opposition to Urban Tolling Alliance (OUTA) 2012 (6) SA 223 (CC) at [44]* it was held that sensitivity to the doctrine of separation of powers should be added to the scope of the factors that incline a court to acute circumspection before inhibiting a statutory body from fulfilling its role. I do not understand the judgment to materially affect the test, but rather it requires of a court to reflect consciously about the implications of judicial and executive powers clashing, a circumstance which although an occupational hazard of organs of state, is to minimised.

8. ICASA, a statutory body, and a Chapter 9 institution,[3] is such a body as contemplated by these authorities.

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[2] The decision in *Gool* related to the Minister applying the Suppression of Communism Act. The disposition to accord the State deference in that era is no longer one that earns admiration in post -1994 South Africa. Although not necessary to decide in this case, a better set of facts by which to illustrate the propriety of the dicta would, I expect, be welcomed by many.

[3] Section 192 of the Constitution is the source of the legislative obligation to create an independent authority. That section provides that: 'National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.' ICASA is that body.

THE CONTEXT OF THE CONTROVERSY

9. The parties have marshalled a substantial body of material relevant to the controversy. I offer a succinct account of what is pertinent to the decision about interim relief.

10. Our everyday experience of telecommunications in the form of radio, television, internet and cellular telephones, and so on, is made possible by the service providers utilising a portion of the radio frequency, which exists naturally, to transmit electronic signals. The radio frequency spectrum, like water and electricity is a crucial dimension of social life. Access to the utility of the frequency spectrum implicates the optimal achievement of several constitutional values and rights, including the freedom of trade, modern education and the dissemination of information pursuant to freedom of expression. Achieving effective access to its utility implicates equality too because of its role in facilitating these several rights.[4] The regulatory regime owes, as alluded to earlier, in part, its lineage to the Constitution. Accordingly, radio frequency spectrum is a highly regulated affair because of its scarcity and critical role in the communications industry and the importance, in turn, of that industry to modern economic and social activity.

11. This resource is optimally usable when a single provider has exclusivity over a band of the frequency spectrum; were it otherwise, transmissions would overlap and render the communications network incoherent and unreliable. Spectrum bandwidth is finite and is the object of keen competition by service providers. The spectrum is therefore 'allocated' to various uses in three regions world-wide by the International Telecommunications Authority (UTA) of which South Africa is a member and locally is allocated by MOT in

[4] See: Sections 9, 16, 22 and 29 of the Constitution. City of Tshwane Metropolitan Municipality v Link Africa Ltd 2015 (6) SA 440 (CC) at [120] – 122]

the radio frequency plan. ICASA is responsible for licensing its use and in that context assigning bandwidth.

12. Two statutes regulate the usage of radio frequency: the Independent Communications Authority Act 13 of 2000 (the ACASA Act), and the Electronic Communications Act 36 of 2005 (ECA). Each was most recently amended by Acts 1 and 2 of 2014. Together they are the statutory foundation for the regulatory regime.

13. Under the provisions of these statutes ICASA was created and both it and MOT are accorded roles in the regulation of telecommunications. Discerning their relationship and respective powers is among the controversies in this matter.

14. For several years, especially since from about 2010, when the initial ITA in draft form was published but withdrawn at the request of MOT, the potential expansion of access to bandwidth has been under consideration. For one or other reason, there have been delays in MOT expediting development, much to the irritation of all concerned, not excluding the consumers.

15. The immediate dispute was triggered on 15 July when ICASA issued the ITA. It had been preceded by an information memorandum on 9 September 2015, though the terms of each differ slightly. The opposing parties all criticise the decision to publish the ITA. Whether these criticisms are valid is the issue which the review court shall decide finally. The interim relief is aimed at holding up the process initiated by the ITA on the grounds that irreparable harm is likely to be suffered were the decision to be later set aside.

16. A careful examination of exactly what harm can arise and to whom, which can reasonably be characterised as 'irreparable', is necessary. The foundation for that idea is that, by its very terms, the ITA sets in motion a process of receiving applications from interested

service providers who must meet certain criteria to be eligible for selection to participate in an auction of 4 designated lots of spectrum bandwidth, after which, the successful bidders shall be issued licences by ICASA, to which are attached various conditions, some very onerous. The critical proposition is that should this process progress, as envisaged by the ITA, and the review court sets the ITA aside, immense prejudice shall eventuate to the industry actors who choose to participate or indeed, if the ITA is not set aside, the industry actors who choose not to participate shall suffer immense prejudice, constituting irreparable harm, thus, warranting the interim interdict. The peculiarity of these circumstances are pertinent to the application of the rule in *Gool,* referred to above.

17. What then is the culpable conduct ostensibly committed by ICASA and the consequences that might wreak such harm, is the issue for decision in these proceedings.

THE ESSENCE OF THE CONTROVERSIES

18. The principal allegations are:

    18.1. ICASA may not lawfully issue the ITA until it has considered MOT's policy, at present in the form of a white paper before the cabinet.

    18.2. The ITA contradicts the 2013 radio frequency plan which makes it unlawful.

    18.3. The ITA fails to meet statutory obligations to promote competition, and is indeed anti-competitive.

    18.4. The ITA is irrational in certain respects.

19. The principal defences advanced by ICASA to these criticisms are these:

    19.1. ICASA is independent and the MOT is out of order in demanding deference to a draft policy.

    19.2. The delays by MOT hitherto are no longer tolerable.

19.3. The ITA is not in violation of the radio frequency plan.

19.4. The few valid criticisms of the ITA can be (and have been) remedied by amendments or 'clarifications' to the ITA.

19.5. No irrationality is shown to afflict the ITA.

19.6. No irreparable harm is shown to exist, should an interdict be refused.

19.7. No strong case or exceptional circumstances have been shown to exist.

20. In my view, the case turns on the three major issues, ie, (1) the alleged pre-emption of the MOT's new national policy, (2) alleged non-compliance with the radio frequency plan, and (3) the risk of anti-competitive attributes contaminating the ITA. A fourth issue is founded on the criticism that the ITA consists in part of technological demands of industry actors that are irrational, an issue which is distinct in kind from the other issues.

A PRIMA FACIE RIGHT

Can ICASA lawfully issue the ITA before applying its mind to MOT's 'imminent' policy.

The legislative framework

21. It is necessary, at the outset, to traverse the statutory framework. ICASA is described in section 2 of the ICASA Act as an 'independent Authority' which, inter alia, is mandated to:

> 'regulate electronic communications in the public interest,'

Section 3(3) states that ICASA:

> 'is independent and subject only to the Constitution and the law and must be impartial and must perform its functions without fear, favour or prejudice'.

Section 3(4) states that ICASA:

'must function without any political or commercial interference'.[5]

22. There is a difference of opinion about the import of section 3(3) as regards the circumscription of ICASA's independence. The section provides:

> 'No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act.

Does this section relate to a given specific licence or does it apply generically? In other words is this simply a safeguard against a bill of attainder, or a restriction on the general powers of MOT, in effect cautioning MOT to keep a distance. Perhaps the point is to restrict MOT's section 3 power to formulate policy within the ambit of the statute? If so, why say something so obvious? Alternatively, it is argued the use of 'a' points to the aim being to eliminate the risk of victimisation. I am inclined to agree with the latter construction, although, in my view, it is unnecessary to decide that point definitively for the purposes of this case, because on either view, MOT is constrained in the use of section 3 powers.

23. Despite these sweeping provisions about independence, it is plain that the decisions that ICASA may make are, in certain important respects, circumscribed, *as to process,* although its substantive decisions are not subordinated to any other statutory authority. Section 4(1) of the ICASA Act, perhaps over-cautiously, (and reminiscent of section 3(3) of ECA about the limits of MOT's powers) articulates the self-evident constraint that ICASA is to:

> '....(a) exercise the powers and perform the duties conferred and imposed upon it by this act, the underlying statutes and any other applicable law',

and provides further that:

> '(c) subject to section 231 of the Constitution, [ICASA] must act in a manner that is consistent with the obligations of the Republic under any applicable international agreement'.

Within that ambit, in terms of section 4(3)(c) of the ICASA Act:

> '[ICASA] must 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.'

All of this, though significant, is fairly generalised. Indeed, the real meat of what is to be done and how it is to be done is in ECA.

24. Both the ICASA Act and ECA have provisions which state that the statute prevails over all other legislation; ie sections 24 and 94 respectively. Section 94 of ECA omits reference to postal services. ECA is a later enactment. In my view, it ought to trump the ICASA Act; *ergo*: ECA prevails over the ICASA Act in the case of any conflict or contradiction.

25. Section 2(j) of ECA includes the statement that among the primary objects of the statute is to 'provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector'. (Emphasis supplied)

26. There are several concrete examples of the process constraints on ICASA in the provisions of the ECA, in which statute the roles and powers of MOT and of ICASA are set out in some detail. This matter is concerned with the powers of ICASA and MOT respectively in respect of licensing radio frequency. The apportionment of their respective powers in this respect are not identical to their relationship in respect of other subject

matter regulated by ECA. For example, it is notable that section 3(1)(e), provides that it is within the remit of MOT to issue 'guidelines for the determination by [ICASA] of licence fees and spectrum fees associated with the award of the licences ....'Also section 5(6) reserves to MOT the power to circumscribe how ICASA deals with individual electronic network licences. These provisions assign to MOT, rather than to ICASA, a power to make a substantive decision in respect of the work ICASA is enjoined to perform, but they have nothing to do with radio frequency spectrum regulation.

27. In the field of radio spectrum regulation, MOT is, not surprisingly, pursuant to section 34(1) of ECA, the state's link to international agreements and obligations. This is quite important because the latitude to decide anything domestically cannot prudently be undertaken before looking over our shoulder to check whether it is compatible with what the rest of the world is doing. Moreover, section 231 of the Constitution compels compliance with our international agreements.

28. Domestically, section 3(1) of ECA empowers MOT to:

> 'make policies on matters of national policy applicable to the ICT sector consistent with the objects of [ECA] and of related legislation.'

Importantly, in section 3(1)(a) 'radio frequency spectrum' is first on the list of topics.

29. On the cardinal matter of the frequency spectrum plan, section 34 regulates how MOT and ICASA are to work with one another and has a lot to say about MOT's role in relation to ICASA and vice versa:

> 'Radio frequency plan
> (1) The Minister, in the exercise of his or her functions, represents the Republic in international fora, including the ITU, in respect of-
> (a) the international allocation of radio frequency spectrum;

(b) the international coordination of radio frequency spectrum usage; and
(c) the co-ordination and approval of any regional radio frequency spectrum plans applicable to the Republic,
in accordance with international treaties and multinational and bilateral agreements entered into by the Republic.

(2) The Minister must approve the national radio frequency plan developed by the Authority, which must set out the specific frequency bands designated for use by particular types of services, taking into account the radio frequency spectrum bands allocated to the security services.

3) The Authority 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.
(4) The Authority must, within 12 months of the coming into force of this Act, prepare the national radio frequency plan or make appropriate modification to any existing radio frequency plan to bring it into conformity with this Act.

(5) The national radio frequency plan must be updated and amended when necessary in order to keep the plan current. When updating and amending this plan due regard must be given to the current and future usage of the radio frequency spectrum.

(6) The national radio frequency plan must-
(a) designate the radio frequency bands to be used for particular types of services;
(b) ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner;
(c) aim at reducing congestion in the use of the radio frequency spectrum;
(d) aim at protecting radio frequency spectrum licensees from harmful interference;
(e) provide for flexibility and the rapid and efficient introduction of new technologies;
(f) aim at providing opportunities for the introduction of the widest of services and the maximum number of users thereof as is practically feasible.

(7) In preparing the national radio frequency plan as contemplated in subsection (4), the Authority must-
(a) take into account the ITU's international spectrum allocations for radio frequency spectrum use, in so far as ITU allocations have been adopted or agreed upon by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;

(b) take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and

(c) consult with the Minister to-

(i) incorporate the radio frequency spectrum allocated by the Minister for the exclusive use of the security services into the national radio frequency plan;

(ii) take account of the government's current and planned uses of the radio frequency spectrum, including but not limited to, civil aviation, aeronautical services and scientific research; and

(iii) co-ordinate a plan for migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the requirements of subsection (2) and the objects of this Act and of the related legislation.

(8) The Authority must give notice of its intention to prepare a national radio frequency plan in the Gazette and in such notice invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice.

(9) The Authority may, after the period referred to in subsection (8) has passed, hold a hearing in respect of the proposed national radio frequency plan.

(10) After the hearing, if any, and after due consideration of any written representations received in response to the notice mentioned in subsection (8) or tendered at the hearing, the Authority must forward the national radio frequency plan to the Minister for approval.

(11) The Minister must, within 30 days of receipt of the national radio frequency plan, either approve the plan, at which time the plan must become effective, or notify the Authority that further consultation is required.

(12) Upon approval of the national radio frequency plan by the Minister, the Authority must publish the plan in the Gazette.

(13) Any radio frequency plan approved in terms of this section and all the comments, representations and other documents received in response to the notice contemplated in subsection (8) or tendered at the hearing must be-

(a) kept at the offices of the Authority; and

(b) open for public inspection by interested persons during the normal office hours of the Authority.

(14) The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with a copy of the radio frequency plan.

(15) The provisions of subsections (6) to (14) apply, with the necessary changes, in relation to any amendment made by the Authority to the radio frequency plan.

(16) The Authority may, where the national radio frequency plan identifies radio frequency spectrum that is occupied and requires the migration of the users of such radio frequency spectrum to other radio frequency bands, migrate the users to such other radio frequency bands in accordance with the national radio frequency plan, except where such migration involves governmental entities or organisations, in which case the Authority-

(a) must refer the matter to the Minister; and

(b) may migrate the users after consultation with the Minister.'

(Emphasis added)

30. In my view, section 34 of ECA demonstrates amply that ICASA is bound to important *process-bound constraints* before it can make its decisions about frequency spectrum, and must, as is plain, procure from MOT an approval of the plan. Similarly, MOT can only approve a plan put forward by ICASA. There is no room to contemplate a free hand has given to either MOT or ICASA in any aspect of the policy making on this topic. MOT is the ultimate gatekeeper on policy, but cannot *formally* initiate any proposal, a task reserved for ICASA.

31. By contrast, section 3, to which reference was earlier made when introducing the topic of regulation of frequency spectrum, deals with the composition by MOT, after soliciting views from the public and after a compulsory consultation with ICASA, of *national policy*. However, ICASA in regard to this policy, has merely *a duty to take it into account* when considering its own decisions.

'(1A) The Minister may, after having obtained Cabinet approval, issue a policy direction in order to-

(a) initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and

(b) provide for a framework for the licensing of a public entity by the Authority in terms of Chapter 3.

(2) The Minister may, subject to subsections (3) and (5), issue to the Authority or, subject to subsection (5), issue to the Agency policy directions consistent with the objects of this Act, national policies and of the related legislation in relation to-

(a) the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority's jurisdiction and the submission of reports to the Minister in respect of such matter;
(b) the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3;
(c) the consideration of any matter within the Authority's or Agency's jurisdiction reasonably placed before it by the Minister for urgent consideration;
(d) guidelines for the determination by the Authority of spectrum fees; and
(e) any other matter which may be necessary for the application of this Act or the related legislation.

(3) No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act.

(4) The Authority or the Agency, as the case may be, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2).

(5) When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister-

(a) must consult the Authority or the Agency, as the case may be; and
(b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the Gazette-
    (i) declaring his or her intention to issue the policy or policy direction;
    (ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than 30 days from the date of the notice;
(c) must publish a final version of the policy or policy direction in the Gazette.

(6) The provisions of subsection (5) do not apply in respect of any amendment by the Minister of a policy direction contemplated in subsection (2) as a result of representations received and reviewed by him or her after consultation or publication in terms of subsection (5).

(7) Subject to subsection (8), a policy direction issued under subsection (2) may be amended, withdrawn or substituted by the Minister.

(8) Except in the case of an amendment contemplated in subsection (6), the provisions of subsection (3) and (5) apply, with the necessary changes, in relation to any such amendment or substitution of a policy direction under subsection (7).

(9) The Authority may make recommendations to the Minister on policy matters in accordance with the objects of this Act.

(10) If it is reasonable and justifiable in the circumstances, as contemplated under the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), the Minister may depart from the time period specified in subsection (5) (b) (ii).'
(Emphasis supplied)

32. There is no room to doubt that pursuant to these provisions ICASA must 'consider' whatever MOT puts up whether in the form of national policy or a policy direction, an obligation repeated in section 4(3A) of the ICASA ACT. In addition, in terms of section 4(2)(a) of the ICASA Act, ICASA is authorised to make policy recommendations to MOT. Failure by ICASA to consider MOT's proposals or policies is plainly at odds with the statute. Nonetheless, MOT's substantive ideas in such a policy plainly do not bind ICASA, who owes them no deference. In addition to MOT formulating national policy it may also issue policy directions in terms of section 3(2) including the conducting of an enquiry as contemplated by section 4B of the ICASA Act in which ICASA 'may' (not must, in this example) conduct enquiries consistent with the statute. In such instances too, ICASA is not bound to act on the direction but must merely consider it. It seems to me that the effect of these provisions is simply to compel each party to be open to the ideas of the other.

33. ICASA is allotted the 'task' of licensing radio frequency spectrum in section 31 of ECA. In that realm it operates on its own without reference to MOT. Section 31(3) and (4) make that plain:

'(3) The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for-

(a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;
(b) the amendment, transfer, transfer of control, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences; and
(c) permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection (2A).

(4) The Authority may amend a radio frequency spectrum licence-
(a) to implement a change in the radio frequency plan;
(b) in the interest of orderly radio frequency spectrum management;
(c) to effect the migration of licensees in accordance with a revised radio frequency plan or the transition from analogue to digital broadcasting;
(d) if requested by the licensee concerned to the extent that the request is fair and does not prejudice other licensees; or
(e) with the agreement of the licensee.'

34. Among other obligations on ICASA, of importance in this case, is section 67 which addresses the duty on ICASA to promote competition in the ICT sector. Its provisions are the subject of later examination in relation to whether ICASA has complied with its duties. The relevant point to be made at this juncture is that ICASA is directed to perform this function without reference to MOT.

The controversy

35. If a plausible basis exists to claim that ICASA is in breach of any of these process-bound injunctions, ICASA has, prima facie, acted unlawfully. I turn to the allegations of breach.

36. MOT's main grievance is that a new national policy is imminent, a fact of which ICASA is well aware having given input to the development thereof. MOT claims that it is unlawful to issue an ITA which shall be overtaken by the new national policy and which shall risk incongruence. The related grievance is that on two occasions MOT issued a

policy directive to ICASA to conduct enquiries into the competition attributes of the ICT sector which has been ignored by ICASA.

37. ICASA's answer is not to deny incongruity may result from a later policy publication. Rather ICASA says it does not affect its legal obligations, because it is not obliged to subordinate itself to the substance of any such policy anyway; and moreover, its duty is to consider policy that actually exists, not wait upon a promised policy which may be years in the making.

38. The point to answer is that by ignoring the 'imminent' publication of a new national policy, ICASA cannot apply its mind thereto because pre-empting the publication of the policy with full knowledge that it is imminent is tantamount to circumventing the obligation to give attention to what that policy has to say. This conduct has been described as a 'disabling' of itself to comply with future duties. ICASA's riposte is to say that the obligation is limited to applying its mind only to policy that has been published *at the time a decision is made.* Can this be correct? Moreover, on such a view, immediately the new policy is published, ICASA must, in any event, consider it and must face the prospect of concluding, on prudent grounds, to make material alterations which may upset the plans to which industry actors might have already become committed.

39. As to the policy directive, as I understand ICASA's stance, its view is that it was superfluous to suggest to it to perform what section 67(4) requires it to do anyway, but independently of that formality, the policy direction was noted and MOT was informed that such enquiries were taking place.

40. Can a purposive construction of the statutes yield an understanding that there is an implied duty on ICASA of co-operation with MOT and *vice versa*? If so, can that imply that a draft policy which MOT says is imminent, obliges deference to that process? Deference to the process does not necessarily imply deference to MOT. MOT and ICASA have, at most, a co-governance relationship, not a hierarchical one. [6]

41. Moreover, as to the alleged 'imminence' of MOT's new national policy, there is no suggestion MOT is untruthful, even though scepticism, based on past performance of protracted delay and unfulfilled promises is understandable. ICASA states it has been waiting since 2010, six years ago, for the plethora of incumbents of the office of MOT to produce a policy to consider, whilst the need to licence more bandwidth has become ever more pressing. MOT suggests the wait has not been that long, but this is an irrelevant quibble. MOT makes no attempt to explain or justify the delay or hint as to the likely substance that might make further delay justifiable, nor can MOT offer a likely date for publication. At what point is a responsible body whose functions are to be discharged in the public interest to say that no further waiting is tolerable?

42. Moreover, paradoxically, on the facts as deposed to by MOT, ICASA is fully versed in the contents of the White Paper which is said to soon be before the cabinet for consideration. In giving its views to MOT, it has indeed considered what is proposed. If the policy truly is imminent, the likelihood of material change is slim. If the 'imminence' is another chimera as, in the past, it has been so many times, ICASA shall have nothing to consider within a reasonable time, by anyone's standards.

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[6] Section 41(1) of the constitution does not apply to ICASA, as a chapter 9 Institution, it not being within one of the three spheres of government. Nor does the Intergovernmental Relations Framework Act 13 of 2005; section 2(2)(e) expressly excludes all chapter 9 Institutions.

43. This traverse of the these various factors yields the conclusion that the interpreter has to work quite hard to read into the statutes a set of reciprocal obligations to set up a relationship of *co-dependence*. Further, in my view, a duty to wait for MOT's policy is tenable only in a relationship of co-dependence.

44. The provisions of the statutes can indeed support a construction that implies a duty to co-operate as part of a rational approach to the duty to consider any of MOT's policies, and vice versa, a duty on MOT to co-operate to facilitate ICASA fulfilling its mandate. But that interpretation does not, necessarily, lead on to a compulsion to defer to each other's preferences; were it to be so, the references to the independence of ICASA would be waffle.

45. Moreover, Industry Actors are subject to the occupational hazard of policy changes and they enjoy the opportunity to make submissions at the formulation stages. Plainly, their rights vest in accordance with any existing policy at the time they acquire any such rights, and if better opportunities only emerge after a later policy change or strategic advantages are perceived only after policy changes, those outcomes seem to me to be simply the obvious facts of life in respect of which there is no substance to a complaint.

46. A simpler and more obvious interpretation is that ICASA must function within *existing* policy, consider *existing* national policy and *existing* policy directives. Whenever a new policy is published by MOT the duty arises *then* to consider what adaptations, from then onwards, if any, are appropriate, and whenever an amendment is made, then again, so on and on, forever. Married to that, is the point emphasised in the argument on behalf of ICASA that the statutes compel action on the part of ICASA, eg, the word 'must' appears in respect of injunctions to act and that must mean more than a discretion to act or not.

The failure to act in this way shall result in a paralysis of action, well evidenced by the 6 years of dithering by MOT, which ICASA has hitherto indulged. I agree.

47. Of course, there may be many sound reasons to have adopted a more accommodating stance to MOT's preferences, but a refusal cannot be elevated to a reviewable irregularity. The most prominent example addressed in the debate is the expectation that the White Paper, that is to say, the proto-policy, shall be profound and heralds significant innovations for the future of the Information and Communications Sector (ICT sector). That prognostication is unsubstantiated by anything concrete in these papers, but it is unquestionable that such expectations have been deliberately cultivated by MOT, and moreover, objectively there is a crying need for these expectations to be fulfilled. However, the merits of the white Paper are, in truth, beside the point. It is ICASA's judgment call to make whether or not to wait or to proceed.

48. In addition to the several considerations already mentioned is the further fact of ICASA's status as a chapter 9 Institution. The appropriateness of all such bodies being able to enjoy the power to choose to defy the executive government in defence of their independence is no small matter, and warrants endorsement as a necessary condition of diffused power in the democratic order founded on our Constitution. Such bodies are entitled not to be second-guessed by a court on the wisdom of any such defiance, provided they stick to the limits of their statutory powers.

Conclusion

49. In summary therefore, ICASA's duty to co-operate with MOT, whatever the reach of that duty may be, is confined to existing policies and the law. In my view, no cogent argument

is shown why a court should trump ICASA's choice not to wait indefinitely for a MOT policy to see the light of day.

IS THE 2013 NATIONAL RADIO FREQUENCY PLAN VIOLATED BY THE ITA?

50. The radio frequency plan of 2013, prepared by ICASA and approved by MOT, presently in force, regulates the allocation of various spectra to various uses. The uses include mobile telecommunications, broadcasting, security communications and so forth. The spectra in issue, the ranges described as 700mhz, 800mhz, and 2.6ghz are allocated to several different usages of which one is mobile use.

51. The complaint, in simple terms, is that the bandwidth in issue, is not available for *exclusive assignment* to mobile networks under the current terms of the radio frequency plan, and the radio frequency plan must be amended to allow exclusive allocation. Moreover, independently of the validity of such an exclusive assignment, such assignment cannot occur until after the migration out of those bandwidths of present non-mobile network operators, which exercise has yet to be costed and needs a MOT decision for the switch-over date. Therefore, the notion of ICASA that it can lawfully assign the whole of this bandwidth to mobile networks is wrong, but even if it could do so lawfully, it cannot give access to the bandwidth because broadcasters are still occupying parts of the spectrum.

52. ICASA says that no amendment to the plan is necessary to facilitate the immediate assignment of bandwidth in these frequency ranges exclusively to mobile operators. Both the allocation of spectrum by UTA, and the allocation in the South African frequency

spectrum plan, permit multiple uses, including mobile. [7]The jargon in use is that some spectra are allocated 'exclusively' for one particular kind of usage and other spectra are allocated for multiple uses on a 'co-primary' basis. In a spectrum where the allocation is a number of co-primary usages, it is ICASA's stance that it can assign bandwidth to one or more operators for one or more usages, and that it may also choose to assign spectrum only to one type of operator, eg mobile, to the exclusion of other types of operators The fact of allocation of spectrum for non-mobile usage does not mean that non-mobile operators have a right to demand an assignment.

53. As cited above, section 31 (3) and (4) of ECA empowers ICASA to migrate operators out of a spectrum by changing the terms of the licence. Moreover, ICASA is further empowered to effect such migrations in terms of the Frequency Migration Regulations.[8] Obviously there are process protections for the affected parties.

54. MOT's apparent view is that the co-primary allocations inhibit the assignment *exclusively* to mobile users. The suggestion by MOT that ICASA concedes that it cannot assign 100% of the spectrum *now* to mobile users is a misreading of the allegation in ICASA's affidavit.

55. ICASA's view is that the fact that a revision of the radio frequency plan is appropriate to make it impermissible, in future, to assign any part of this spectrum to any user other than mobile is not a reason to regard assignments exclusively to mobile operators, before that

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[7] The allocations of permissible usage is performed by MOT. ICASA performs the assignments; section 1, definitions: *'allocation'*, in relation to a frequency band, means the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or radio astronomy service under specified conditions; *'assignment'*, in relation to a radio frequency or radio frequency channel, means authorisation given by the Authority for a radio station to use a radio frequency or radio frequency channel under specified conditions, and 'assign' must be interpreted accordingly;

[8] GenN 352, of 3 April 2015, GG 36334

time, as irregular. The World Radio Conference 2012 has decided to allocate the 700 Mhz exclusively to mobile. South Africa shall have to consider an amendment to our plan correspond with that decision. Section 34(7) regulates that and prescribes a process involving public participation. As to the other bands, ICASA's view is that it is consistent with international decisions to amend the plan to reserve all of it for mobile. This view seems to be correct.

56. In my view, the true locus of the controversy is confined to the implications flowing from the presence of non-mobile operators, at present assigned space in the spectrum. Whether those parts of the spectrum already assigned to non-mobile services can be assigned, or perhaps, 're-assigned' to mobile operators before and until the current non-mobile operators are migrated out of the spectrum, even though, in the interim deferring effective access to the 'new' mobile assignees, is problematic. According to ICASA, the current non-mobile users occupy a small space in the spectrum and, thus, a significant amount of space can be accessed right now and the remaining space, presently occupied bandwidth by non-mobile operators can, after the migration, then be accessed at an unknown future date, the mobile operators using the interim to gear up for a total roll out.

57. Even though such a conditional assignment, as ICASA envisages, shall not (on present information) ostensibly, impact adversely, on the present non-mobile operators who have been assigned the spectrum and who will continue to enjoy effective access for the time being, is it appropriate or indeed valid to re-assign on such a basis? In my view, although, practically, it could be done, the validity is indeed suspect. It is uncontroversial that the

exercise of a public power must adhere loyally to the prescripts under which the power is conferred. [9]

58. First, the concern is a matter of interpretation of the plan and its enabling legislation. Is a 're-allocation' implicated? Should the 'allocation' by MOT, for exclusive use by mobile operators, not precede a decision by ICASA to 'assign' a licence, 'exclusively' for only one of the eligible usages? Should the assignments ICASA contemplates be restricted only to unassigned spectrum? Is such an assignment out of kilter with the prescribed 'allocations'? Second, should MOT not defer such an amendment until a secure harbour is found for the operators who are to exit this spectrum, especially given the uncertainty as to when that can be effected? On the facts at a practical level, does it make sense to assign space in the spectrum that is, at present, inaccessible on the basis that at a future unknown date, access will be made available when two other happenings have to take place to give effective access to the newcomers, ie, first, the migrated operators need to have another spot assigned to it they have to make do with a reduced bandwidth and, second, in terms of the amended Broadcasting Digital Migration Policy of 18 March 2015,[10] the analogue-to- digital migration process is subject to a switch off date which is to be determined by MOT in consultation with the cabinet, a decision which shall be made after a process of engagement with the affected parties has been concluded and is not expected to be soon. Accordingly, ICASA cannot migrate the current non-mobile users without MOT's participation and an orderly process requires co-ordination between them. This gives rise to a highly problematic set of circumstances not capable of being managed by ICASA on its own.

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[9] Pharmaceutical Manufacturers of SA In Re President, RSA 2000 (2) SA 674 (CC) at [85] ff.
[10] R232 of 18 March 2015, GG 38583.

59. In summary I conclude that, first, the assignment of spectrum already assigned to other operators is of questionable validity and secondly, to assign now and defer access to an unknown future date, which is dependent on a host of process-dependent happenings has the look of a reckless decision and for that reason an irrational decision.

60. In my view there is a real prospect that the review court could reach these conclusions. A prima facie case is made out.

HAS ICASA HAS COMPLIED WITH ITS DUTY TO PROMOTE COMPETITION

61. The fount of the duty to promote competition is section 2(f) of ECA which provides:

> 'The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose....promote competition in the ICT sector'.

Other provisions of section 2 enjoin the promotion of investment, and consumer interests. Section 67 of ECA addresses extensively the particular steps that ICASA must take to promote competition, in particular, by imposing conditions in the licences. The obligations on ICASA involve, among other steps, a continual monitoring of the market relations and effecting modifications to sustain a competitive environment. ICASA does not dispute the duty to consider the competition dynamics that its decisions can precipitate. The duty of ICASA pursuant to section 2(f) has been commented upon in *Telkom SA SOC v Mncube NO & others [2016] ZAGPHC 93 (26/02/2016)* thus:

> '[72] Following a consultation process that was conducted by Acacia, ICASA received a report from Acacia which indicated that the proposed transaction may raise a number of potential anti-competitive effects and it recommended various possible remedies that could be undertaken by ICASA. It was also pointed out by MTN in its founding affidavit (par 144) that Counsellor Pillay has admitted in her affidavit in proceedings before the Competition Tribunal that "if Vodacom is assigned Neotel's spectrum, it will gain an irrevocable advantage in the market and

further delay the full benefits that would result from there being a competitive market for information and communication technology services in South Africa".

[73] Section 4B(8)(b) of the ICASA Act specifically refers to the Competition Commission which has primary authority to detect and investigate past or current commissions "of alleged prohibited practices within any industry or sector" and also to review mergers. In terms of section 1 of that Act "prohibited practice" means a practice prohibited in terms of Chapter 2 of the Competition Act which is primarily concerned with restrictive practices in terms of an agreement between parties and the abuse of a dominant position by a particular firm. The purpose of this Act is to promote and maintain competition "in the Republic" in order to, *inter alia*, promote the efficiency, adaptability and development of the economy. The purpose of the EC Act is, on the other hand, much more defined and focused when it refers "to promote competition within the ICT sector". It therefore appears that the Competition Act does not deprive ICASA of jurisdiction over competition matters relevant to the communications sector or that ICASA is exempted from its duty to properly consider the competition issue.

[74] Having regard to all these considerations, I have to conclude that competition within the ICT sector was a relevant consideration with regard to the Neotel/Vodacom application. Facts placed before ICASA also demonstrated that the Neotel/Vodacom application raised various competition concerns. Furthermore, having regard to the statutory provisions referred to above, I am of the view that ICASA had a statutory duty to also consider the issue of competition in order to promote the objects of the EC Act before a decision was taken. Put differently, the statutory obligation to promote competition within the ICT sector implies an obligation to also consider and take into account competition which is part of the decision making process and cannot be delegated or deferred to another organ of state. ICASA's failure to do so and its decision to defer to the Competition Commission were both, in my view, wrong in law. I therefore find that ICASA's failure to also consider competition and to defer to the Competition Commission in this regard was materially influenced by an error of law within the meaning of section 6(2) of PAJA.' (Emphasis supplied)

62. The contention advanced is that the ITA is anti-competitive. Several criticisms are advanced.

63. One line of argument can be disposed of at once. The idea that ICASA is obliged to acquiesce in MOT's policy directive of 4 March to conduct an enquiry into the competition implications is incorrect, as a reading of the statutes has already revealed. In any event, contemporaneous correspondence reflects a positive stance to carrying out

such an enquiry. On 22 June 2016 ICASA informed MOT that it was embarking on a market review, sought to identify 'priority markets' and insofar significant for this case, stated that it was looking keenly at broadband developments including in the two spectra at issue.

64. Of course, Section 67(4) independently of MOT's directions says 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 markets or market segments. The regulations must, among other things-
>
> (a) define relevant wholesale and retail markets or market segments;
> (b) determine whether there is effective competition in those relevant markets and market segments;
> (c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;
> (d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;
> (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and
> (f) provide for monitoring and investigation of anti-competitive in the relevant market and market segments.'

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 though license conditions rather than assignment of spectrum.

65. Second, the criticism that ICASA has not applied its mind to the question of competition, because it got an expert report from Aetha two years earlier and another from Acacia after

the publication of the ITA is unfounded because that inference cannot be made from those facts. On the contrary neither the timing nor the content of the commissioned reports suggests that to be the case. In addition, an expert report from Acacia on competition matters that came to light in the course of the litigation about a merger between Vodacom and Neotel (the very litigation that resulted in the *Mncube* judgment cited above) prior to the ITA being composed, which self-evidently ICASA had regard to, points to ICASA being abreast of available recent data.

66. The provisions of the statute, in my view, do not compel *an ad hoc study* to be made of the intended decisions of ICASA and the dicta in *Mncube* cited above, should not be read to imply that is a requirement; rather the duty is to develop a general awareness and expertise about the market dynamics and its changing character so that adaptations can be made to sustain a pro-competitive market. Obviously such awareness is necessary prior to making relevant competition-implicated decisions, such as the ITA, but *Mncube* is no authority for an *ad hoc* link. It must be borne in mind that the ITA follows on a much delayed decision to issue it. Moreover, the ongoing attention given to competition aspects, even after the ITA was issued, as evidenced in the Acacia report which addresses the ITA, points in the opposite direction suggested by the criticism. If this impression is to be dented by closer examination in the forthcoming review, it is not apparent on these papers. ICASA is criticised for offering chapter and verse on its thinking about competition matters. A reading of the answering Affidavit does not justify that level of criticism. The Fact that they could say more, and chose not to, may not dispel a suspicion about the quality of ICASA's thinking, but the information on record is simply inconsistent with the notion that they were derelict in relation to their section 2(f) or 67(4) duties.

67. A more cogent criticism flows from the allegation of an un-level playing field laid out in the ITA. Both Telkom and Cell C point to several attributes which supposedly substantiate that perspective. The model of the ITA is to divide up the 700 mhz , 800 mhz and 2.6 ghz spectra into five lots, A –E. Lot "A" is not on the auction, but is reserved. The four remaining lots are deliberately composed of segments which combine the more and less attractive bandwidths. These packages are not of equal utility. The reserve price for each is R3billion. Lastly, onerous licence conditions are envisaged including coverage and speed targets by 2020, albeit slightly ameliorated to accommodate lack of access to the full spectrum prior to migrating the non-mobile operators.

68. Telkom's principal criticism is that by auctioning 'unequal' lots, the bigger networks with most money will outbid the smaller rivals for the plums and obtain 'first mover' advantages, thereby entrenching the 'duopoly' at present constituted by the market dominance of MTN and Vodacom. ICASA's answer is that it has reserved lot 'A' for a manifest public purpose, a wholesale open access network (WOAN), which shall facilitate small retail operators and be attractive to consortia. Moreover, the four lots up for auction to the commercial operators must all be sold or none are sold. Thus, the idea is that bidders will want to bid for what will suit their business plan; if any lot is so unattractive that it cannot attract a bidder, the auction will fail entirely.

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 a 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.

71. The chief difficulty, at this stage of the proceedings, is how a view can be adopted one way or another. If the reviewable irregularity is said to be ICASA failing to apply its mind to competition matters, in the manner the statute compels, it seems to me a case is absent. If the irregularity is said to be that the ITA fails to promote competition, ie it is anti-competitive, I an uncertain such an inference can be drawn. If the ITA has a combination of attributes which are, on the one hand, pro-competitive (ie the vision for lot 'A' to be used for a WOAN) and, on the other hand, attributes which seem indifferent to competition (ie inherent bidding advantages to the 'big two'), can it be said ICASA breached its statutory duties? Indeed, how the duopoly is to be diluted, assuming the public interest is served by doing so (an aim taken for granted, but not really addressed) and whether this model, or any other model for the ITA, can be used effectively to advance that objective (assuming the duopoly is capable of dilution over any short or medium period of time, or ever) is not a question capable of being answered on these papers.

72. In my view, ICASA has not been shown to have breached any positive duty imposed on it to promote competition.

DOES THE ITA EXHIBIT IRRATIONAL ATTRIBUTES?

73. Several examples of supposed irrationality were initially offered but were resolved by ICASA's amendments to the ITA. I address the sole issue pressed in argument by Cell C.

74. It is contended that the composition of Lot 'B' is irrational because the utility of the spectrum packaged therein, for technological reasons, lacks the capacity to achieve the speeds of data processing demanded by the proposed licence conditions. The critical controversy is not about the technological challenge per se but rather about the technology necessary to exploit the package.

75. In succinct terms, the package of different spectra would require the operator to put in place technology that would enable an aggregation of two bandwidths. This can be done and is called 'carrier aggregation'. The mischief is the absence, at present, of handsets capable of reading the aggregated signal. The present absence is common cause. However experts on both sides predict different scenarios. ICASA's expert says the relevant equipment will soon be 'ubiquitous'. Cell C's experts deny this and suggest that there shall be a lag in supply, in part, because manufacturers need to gear up to supply the market with the capacitated equipment.

76. The difficulty with this controversy is that it is irresolvable on paper. The onus to show an irregularity by ICASA is not satisfied.

IRREPARABLE HARM AND BALANCE OF CONVENIENCE

77. A distinction must be made between the harm that the review court might find would follow from proceeding with the ITA process and what harm might befall anyone in the interim period who participates and the ITA is set aside, or who does not participate and the ITA is not set aside.

78. The potential for harm in the interim period is said to be that if the industry actors participate in the process initiated by the ITA they must put up R3m entrance fees and R100m guarantees, prepare detailed presentations and expend funds to get ready to bid. This exercise would involve raising capital from investors against an uncertain prospect, engaging experts to advise on an uncertain set of possibilities, and drawing up business plans of great complexity. Cell C alludes to the cost to maintain a R100m guarantee over the relevant period as R3m alone. It estimates that costs of R16m will be consumed in participating. These are onerous commitments and much is put at risk. To go into such a process when uncertainty overshadows the process is unwelcome and unfair on participants. The risks of a total setting aside and of a partial setting aside are both spectres which can result in great wastage of resources and moreover implies the need to make strategic choices which might backfire in a changed scheme. ICASA has tendered to refund the entrance fee if the ITA is set aside which is small change in this scheme of things.

79. No less significant is the risk of not participating. If an industry actor chooses to stay out, and the ITA is not set aside, the opportunity to participate is forfeited. That is probably enough danger to compel the industry actors to participate, come what may.

80. The *Gool* approach to interdicting a statutory body, as alluded to, requires exceptional circumstances. The ITA process is, for all intents and purposes, a commercial transaction driven by a statutory body and the affected parties have Hobson's choice to participate. This is not an instance of inhibiting a public institution from rendering a service to the people. In my view, the circumstances are indeed exceptional.

81. The case in support of ICASA breaching the frequency plan or acting irrationally by assigning spectrum without access and indifferent to the time delay in giving effective access, is not one I would describe as strong. However, in line with the sort of balancing approach which the decision in *Olympic Passenger Services v Ramlagan 1957 (2) SA 382 (D) at 383F* had in mind, in my view, the degree of exceptionality is so great that a less than strong case may properly not be insisted upon. The concern about the violation of the rule of law by not complying with the frequency spectrum plan, in my view, does not require interim relief as the review court can put that right and no irreparable harm can occur in the interim.

82. One response offered by ICASA on the balance of convenience is that, at worst, if the ITA is set aside, a court can fashion appropriate remedial relief for the industry actors. This is not a good answer. In my view, to throw the responsibility onto a court to craft a pragmatic solution to ameliorate the fall-out from an irregularity is simply wrong; a court cannot be likened to a proto-team sent into a colliery to rescue miners trapped by a collapsed hanging. The better approach is to examine the hanging before initially entering the mine. That approach, in this matter, is to look coldly at the alleged risks and the strength of the facts adduced to substantiate the alleged risk.

83. In my view, as regards the industry actors, the peril in which they stand is substantial. If the review succeeds, industry actors who participate will suffer irreparable harm in the ways described. Moreover, the risk of knock-on litigation about the vesting of legitimate expectations, and the like, are to be avoided.

84. ICASA *qua* regulator suffers no irreparable harm, but of course, as guardian of the public interest is entitled to advance that concern. The critical contention on that score is the justifiable impatience of consumers to get access to better services. Can the envisaged delay undermine this interest? In my view it cannot. First, a messy process is undesirable. Second, ICASA itself has twice since publishing the ITA, postponed the deadlines to apply, the most recent being to February 2017. This points in the direction of an absence of prejudice by the delay. The deadline for 2020 is, in any event, a specious target given the deferment of a need to achieve full roll out until access to 100% of the assigned spectrum is made available. The balance of convenience favours a grant of the relief sought.

THE COSTS

85. Various submissions have been made that a costs order be made in favour of the protagonists for relief against ICASA. In my view, the appropriate order is that the costs, including the costs of counsel employed, be costs in the review. Cell C has no pending review as yet. It has already had some substantial success in the form of the amelioration of the terms of the ITA already mentioned.[11] Whether it chooses to bring a further substantive review application, or ventilate its case as a cited party in the other application, its costs shall be costs in whatever matter comes before the review court.

[11] See footnote 1.

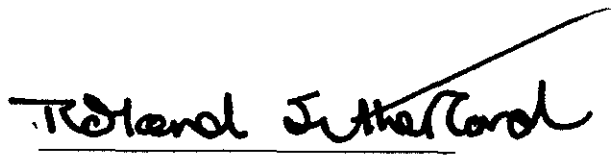
THE ORDER

89. Both the applications are granted in these terms:

89.1. ICASA is interdicted and prevented from implementing the licensing steps and processes referred to or contemplated in the invitation to apply in notice 438 of 2016, in GG 40145, pending the determination of part B in case no 2016/59722.

89.2. ICASA is interdicted from accepting bids in terms of the said invitation to apply and from taking any of the steps set out in the invitation to apply to advance the invitation to apply or any similar steps, pending an application by Cell C to launch review proceedings in respect the invitation to apply, provided the review application is served by 14 October 2016.

89.3. Costs, including the costs of two counsel, are to be costs in one or other review.



Roland Sutherland
Judge of the High Court,
Gauteng Division, Pretoria

Hearing: 27-28 September 2016.
Judgment: 30 September 2016.

MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES

Adv Vincent Maleka SC, with him,

Adv Nicole Mayet-Beukes and Adv Mawande Seti-Bata

TELKOM

Adv Gilbert Marcus SC, with him

Adv Muzi Sikhakhane SC and Adv Chris McConnachie

CELL C

Adv Johnny Blou SC, with him,

Adv Mark Wesley and Adv Sha'ista Kazee

ICASA:

Adv Wim Trengrove SC, with him,

Adv Carol Steinberg Adv Mkhululi Stubbs and Adv Cingashe Tabata (Pupil)