

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

CASE NO: 66778/20

In the intervention application of:

e.tv (PTY) LTD

Intervening Applicant

In the matter between

TELKOM SA SOC LIMITED

Applicant

And

**THE INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

First Respondent

AND 11 OTHERS

Second Respondent

INTERVENING APPLICANT'S CONCISE HEADS OF ARGUMENT:

INTERDICT APPLICATION (PART B)

1. These are e.tv's concise heads of argument. They are failed simultaneously with e.tv's full heads of argument, which set out in greater detail e.tv's submissions.
2. This matter concerns an application for interim relief against the Independent Communications Authority of South Africa ("*ICASA*"). At issue is ICASA's publication of an Invitation to Apply ("*ITA*") for the licensing and auctioning of spectrum in the IMT700; IMT800; IMT2600 and IMT3500 bands issued by ICASA on 2 October 2020. The relief in part B is aimed at interdicting ICASA from

assessing or adjudicating any applications pursuant to the ITA pending the outcome of a review of ICASA's decision in part C.¹

E.TV'S INTERVENTION

3. e.tv seeks leave to intervene in this application on the basis that it has a direct and substantial interest in the subject matter of the case.² The intervention application is unopposed.³

THE INTERIM INTERDICT

4. e.tv supports the interdictory relief sought by Telkom in Part B.

5. We assert that the matter is simple for three reasons.

5.1. First, effectively the same issues have already served before Sutherland J, in the urgent court, for an interdict to stop a similar ITA auction from proceeding. The similarities are striking, where in that case: "*[t]he 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.*"⁴ His Lordship gave a detailed judgment explaining the regulatory

¹ Telkom's Notice of Motion, para 8; Caselines Record, p. B3.

² ***United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*** 1972 (4) SA 409 (C) at 416, citing ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** 1953 (2) SA 151 (O) at 167.

³ e.tv's Replying Affidavit, para 3; Caselines Record, p. G9.

⁴ ***Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa and Others; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa and Others and Others*** (2016/59722, 2016/68096) [2016] ZAGPPHC 883 (30 September 2016), para 4.

environment, setting out the principles involved for urgent interim relief in this context, and holding that ICASA's process and reasoning in respect of the ITA auction was irrational and reckless. Sutherland J found that the process was so flawed that it would be inappropriate to expect the parties to bid in the auction. He stopped the auction from proceeding, pending the review. That judgment issued in Pretoria, was not appealed by ICASA, and stands as both a helpful and binding precedent. It appears not to have been reported, and for the benefit of this Court we attach a copy to the expanded heads of argument.

5.2. Second, ICASA's answering affidavit has confirmed that there was no consultation on material issues with e.tv (or other parties too) in respect of the ITA auction process, and none whatsoever in relation to ICASA's midstream change in policy in relation to a critical component of the ITA. ICASA's about-turn in its answering affidavit – in which it suggested for the first time that e.tv would be required to “*share*” spectrum and “*coordinate*” with the winning bidder – constitutes a fundamental departure from the ITA and the previous position. This was not discussed with or even disclosed to e.tv, the incumbent occupant of the spectrum, and a party which ICASA itself concedes is an interested party. This “killer point”,⁵ in the words of Justice Cameron, is fatal to the legality of ICASA's auction. On this point alone the process must immediately be stopped.

⁵ *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* (CCCT248/16) [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017) at para 91.

5.3. Third, none of the major commercial players, including MTN and Vodacom, oppose interim relief.

6. If the interdict is not granted, at least five irreparable harms will be suffered by e.tv and the public:

6.1. First, given the importance of radio frequency spectrum and its role in promoting fundamental rights, there is a serious risk of irreparable harm to these rights if ICASA is allowed to proceed with the ITA process. Frequency spectrum is a scarce national resource that plays a direct role in promoting a range of constitutional rights, including the right to freedom of expression – particularly pertinent in the context of e.tv's free-to-air broadcast services - and e.tv's property rights.⁶

6.2. Secondly, as ICASA itself admits, and e.tv and its expert have explained, the sale of the 700MHz and 800MHz frequency bands will give rise to an interference (or potential interference) in e.tv's offerings;

6.3. Thirdly, once the 700MHz and 800MHz frequency bands are sold at auction, this will send a message to the market (and advertisers in particular upon whom e.tv relies for its revenue) that e.tv's services are precarious — contrary to the digital migration policy and the regulations which aim to ensure security of operations to the analogue operators, including e.tv;⁷

⁶ e.tv's Founding Affidavit, para 93; Caselines Record, p. 139.

⁷ e.tv's founding affidavit, para 139.2; Caselines Record, p. 154.

6.4. Fourthly, any irrational and haphazard process has the very real potential to harm the ability for large number of the public to access free-to-air television, which is currently — and for the foreseeable future, given the government's failure to effect digital migration properly and timeously — the only means by which poorer members of society will access television;

6.5. Finally, once the sale is completed, bidders will have bid at the relevant reserve prices (of some R1 billion), and expectations will have been set. Once the auction is complete, and the spectrum purchased, the opportunity for engagement and negotiation with e.tv and prospective bidders will have passed and it will be too late to attempt at that stage to ensure that e.tv's rights are protected. The horse will have bolted.⁸

7. In contrast to these serious and irreparable harms, ICASA will suffer no conceivable prejudice if the licensing process is delayed pending the final determination of Part B of this application.

8. ICASA merely suggests that, if the auction does not go ahead, it will not be able to ensure the swift licensing of radio frequency spectrum. However, it is more important to ensure that this process unfolds lawfully. Acting with haste to conclude an unlawful process in the shadow of the pending review application only threatens to create further uncertainty and to further delay the goal of promoting mobile broadband services.

⁸ e.tv's founding affidavit, para 139.4; Caselines Record, p. 155.

9. There is, at worst for ICASA, then, a short delay and should it succeed in opposing the review proceedings, then it can proceed with the auction process following the finalisation of the review. Given the more than 15 years that have passed since government decided to roll out DTT, and the multiple failures by government during that process, a further short delay is far outweighed by the very real benefits to the public and all stakeholders to ensure that the auction process and its consequences are lawful, rational and fair.⁹

OVERALL CONCLUSION AND RELIEF SOUGHT

10. For these reasons we respectfully submit that:

- 10.1. e.tv has made out a case for joinder as a second applicant;
- 10.2. the interim interdict falls to be granted;
- 10.3. e.tv prays for its costs in respect of Part B, including the costs of two counsel.

GILBERT MARCUS SC

MAX DU PLESSIS SC

SARAH PUDIFIN-JONES

CELESTE MOODLEY

Chambers, Sandton and Durban

5 February 2021

⁹ e.tv's Founding Affidavit, para 141; Caselines Record, p. 156.