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
CHAIRPERSON: INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	Second Respondent
VODACOM (PTY) LIMITED	Third Respondent
MOBILE TELEPHONE NETWORKS (PTY) LIMITED	Fourth Respondent
CELL C (PTY) LIMITED	Fifth Respondent
WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED	Sixth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Seventh Respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Eighth Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Ninth Respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	Tenth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelfth Respondent

INTERVENING APPLICANT'S HEADS OF ARGUMENT:

INTERDICT APPLICATION (PART B)

INTRODUCTION 2
e.tv's intervention 4
E.TV SUPPORTS TELKOM'S PART B RELIEF 6
THE "KILLER POINT" 8
ICASA's about-turn 10
This about-turn grounds the interim interdict 12
Conclusion on the "killer point" 15
FACTUAL MATRIX 19
THE LEGAL FRAMEWORK FOR THE LICENSING OF SPECTRUM 20
The ICASA Act 20
The ECA 21
Radio Frequency Spectrum Regulations 24
GENERAL PRINCIPLES ON INTERIM RELIEF 24
PRIMA FACIE RIGHT 31
First right: the right to know the rules of the game 31
Second prima facie right: The right to consultation as part of a fair administrative process 32
Third prima facie right: The right against interference 36
Fourth prima facie right – the right to audi 37
Conclusion on the prima facie right 39
IRREPARABLE HARM AND NO SUITABLE ALTERNATIVE REMEDY 40
BALANCE OF CONVENIENCE 42
URGENCY 47

INTRODUCTION

1. 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]

2. The matter is simple for three reasons.

2.1. 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*."[2] His Lordship gave a detailed judgment explaining the regulatory 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

---

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

[2] ***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.

the benefit of this Court we attach a copy to these heads of argument.

2.2. 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. This "killer point", 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.

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

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.[3] The intervention application is unopposed.[4]

4. e.tv is the first and only privately owned commercial free-to-air television station in South Africa.[5] It broadcasts in accordance with two licenses issued by ICASA, which authorise e.tv to transmit its analogue broadcast via 95 analogue transmitter site frequencies.[6] A total of 29 of e.tv's transmitter site frequencies

---

[3] ***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.

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

[5] e.tv's Founding Affidavit, para 27; Caselines Record, p. I16.

[6] e.tv's Founding Affidavit, para 32; Caselines Record, p. I17.

are above 694 MHz. These 29 sites form part of the "*digital dividend*" which ICASA seeks to auction to telecommunications companies in terms of the ITA in the IMC700 and IMT800 bands.[7]

5. As the incumbent licence holder of the IMT700 and IMT800 spectrum which forms part of the ITA:

5.1. e.tv has expended considerable resources to ensure not only that it receives a reasonable return from the use of the spectrum, but also that it meets its licence conditions, including by providing viewing on a free-to-air basis. e.tv thus has a constitutionally protected property interest in respect of the spectrum which is the subject of the ITA.[8]

5.2. As a free-to-air broadcaster, e.tv relies on advertising as the only form of revenue, as it is not entitled to charge licence fees or any other form of access fees. Its ability to generate advertising revenue is dependent on its ability to attract audiences to watch its programmes. Advertisers (or their agents) will only place advertisements with a broadcaster, if the broadcaster is able to offer them a substantial audience - "eyeballs".[9]

5.3. e.tv's rights are further vested in the digital migration process underway. In terms of the Digital Migration Regulations,[10] the digitisation process remains

---

[7] e.tv's Founding Affidavit, para 32; Caselines Record, p. I17.

[8] e.tv's Founding Affidavit, para 8, Caselines Record, p. I3-4.

[9] e.tv's Founding Affidavit, para 35; Caselines Record, p. I19.

[10] Government Notice 1070 in GG 36000 of 14 December 2012.

in the "*dual illumination period*" in terms of which e.tv broadcasts both digitally and analogue.[11] Currently, more than 60% of e.tv's viewers access e.tv's programmes through its analogue services.[12]

5.4. Moreover, e.tv's rights to administrative fairness, particularly the right to be consulted given its specialist knowledge and special interest in the spectrum which is the subject of the auction[13] provide it with a further direct and substantial interest in the matter.

6. e.tv will accordingly seek an order at the outset of the hearing of Part B of this application in accordance with prayer 1 of its notice of motion, that "*The Intervening Applicant is granted leave to intervene as the Second Applicant in relation to the principal relief sought in Part B and Part C of the above application*".[14]

E.TV SUPPORTS TELKOM'S PART B RELIEF

7. e.tv supports the relief sought by Telkom in Part B. Vodacom has withdrawn its opposition to the granting of the interim relief and none of the other respondents or any of the other parties which have submitted bids pursuant to the ITAs have opposed the grant of the Part B relief. So too, the Minister has not opposed the

---

[11] The process of digital migration is discussed in e.tv's founding affidavit, from para 39; Caselines Record, p. I20.

[12] e.tv's Founding Affidavit, para 62; Caselines Record, p. I27.

[13] See ***Minister of Home Affairs and Others v Scalabrini Centre and Others*** 2013 (6) SA 421 (SCA) at para 72 discussed further below.

[14] e.tv's Notice of Motion; Caselines Record, p. I2.

grant of the interim relief sought in Part B. MTN has launched self-standing review proceedings, challenging certain aspects of the auction process. As such, the processes which have been followed by ICASA relative to the ITA have been recognised as being flawed by representatives of three different constituencies – one of the large incumbent mobile operators (MTN), a broadcaster (e.tv) and a challenger mobile operator (Telkom). The only entity which defends its decision is ICASA itself.[15]

8. In what follows, we commence by addressing a "*killer point*" in this application which we submit on its own justifies the granting of the interim relief: namely ICASA's about turn in its answering affidavit on the availability of e.tv's spectrum. Thereafter, and with relevant references in particular to the judgment of Sutherland J in ***Minister of Telecommunications***, we address the following points in turn:

8.1. The factual and legal background;

8.2. The general principles pertaining to interim relief;

8.3. The *prima facie* right;

8.4. The well-founded apprehension of irreparable harm;

8.5. The balance of convenience;

---

[15] e.tv's Replying Affidavit; paras 5-6; Caselines Record, p. G9.

8.6. The question of urgency.

THE "KILLER POINT"

9. We submit that the interim interdict falls to be granted on the basis of one "*killer point*"[16] – as Justice Cameron described it – which arises for the first time on account of ICASA's answering affidavit, and that it is appropriate for this Court to consider this point at the outset.[17] We assert that this argument is so strong (and the unlawfulness of ICASA's process so apparent) that it justifies the granting of the interdict with little need for further consideration of the other interdict requirements.[18] (In any event, as set out below, those requirements support the granting of the interdict).

10. The "killer point" relates to the astonishing about-turn by ICASA during these proceedings in terms of which ICASA has fundamentally changed the approach which it has adopted in relation to the auctioning of the spectrum which is currently being used by broadcasters such as e.tv (in the IMT700 and IMT800 frequency bands).

11. It had previously consistently been made clear by ICASA that this "*occupied*" spectrum would *not* become available to successful bidders until the "*Analogue Switch-Off*" had taken place after the completion of the digital migration

---

[16] ***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.

[17] *Ibid*.

[18] ***Olympic Passenger Service (Pty) Ltd v Ramlagan*** 1957 (2) SA 382 (D) at 383F.

process.[19] This is clear from:

11.1. The 2019 Information Memorandum in which it was specifically recognised that "*the obligation set for IMT700 and IMT800 are to be synchronised with the Analogue Switch-Off*";[20] and that the three year period to comply with the conditions would only commence running "*from the date that the 700 MHz and 800 MHz spectrum becomes available to provide services*".[21]

11.2. The ITA itself, which recorded, at para 8.1 that: "*A Licence is valid for twenty (20) years from the date of issue* ***taking into consideration the residual analogue and digital television broadcasting migration below 694 MHz band timescales in South Africa***";[22]

11.3. In the ITA, ICASA sought requests for clarification. In this regard, ICASA was asked directly: "*Please confirm whether: a. The date of issue of the licence may be delayed as a consequence of the DTT Migration, or the duration of the licence may be extended beyond 20 years as a consequence of the DTT Migration.*" ICASA's response was that:

> *"The Authority extended the licence period of the Radio Frequency Spectrum Licence (RFSL) from fifteen (15) years, as it was stipulated on the IM, to twenty (20) years, in order to effectively facilitate the availability of the spectrum in IMT700 and IMT800 bands which are subject to the digital migration process underway. To this end, licensees may apply to*

---

[19] This process is set out in e.tv's Founding Affidavit from para 39; Caselines Record, p. I20.

[20] Para 4.18; 4.19; 4.26; 4.27 and 4.28 of the 2019 Information Memorandum; Caselines Record, p. B79.

[21] Para 6.2.5; 6.2.5; and 6.3.3 of the 2019 Information Memorandum; Caselines Record, p. B79.

[22] Clause 8.1 of the ITA.

the Authority in accordance with Section 11 of the ECA should they seek to align the period of the service licence to that of the radio frequency spectrum licence." [23]

11.4. Furthermore, ICASA in that same document stated that "*this spectrum is not available for use nationally due to current use for TV broadcasting services*".

11.5. ICASA's "*Reasons document*" published on 4 December 2020 repeats this response and specifically records that: "*The Authority extended the licence period of the RFSL from 15 years as it was stipulated on the IM to 20 years, in order to take accommodate the delays in the availability of the spectrum in IMT700 and IMT800 bands which are subject to digital migration process which is currently underway."* [24]

12. No reasonable reader of these documents, issued by ICASA, could understand anything other than that the IMT700 and IMT800 spectrum being used by broadcasters would only become available *after* the completion of the digital migration process.[25] Certainly this is how both Telkom and e.tv understood the position.[26]

ICASA's about-turn

13. Telkom pointed out in its founding affidavit that the auctioning of this spectrum

---

[23] The Clarification Document appears at FA6; Caselines Record, p. B127.

[24] The Reasons Document appears at FA7; Caselines Record, p. B194.

[25] e.tv's Replying Affidavit, para 32; Caselines Record, p. G21.

[26] Telkom's Founding Affidavit, para 39 and following; Caselines Record, p. B30 under the heading "*700MHz and 800MHz frequency bands are not available for use*".

was irrational for various reasons, one of which being that the spectrum is still being used by the broadcasters and would, therefore, not be available to a potential bidder until after the digital migration process had been completed. e.tv echoed Telkom's concerns in this regard and also pointed out that the digital migration process had stalled and was unlikely to occur at any stage in the near future.[27]

14. In response to this ground of review (and seemingly on account of the pinching of the shoe), ICASA made a bold new assertion in its answering affidavit: namely that successful bidders for the IMT700 and IMT800 spectrum bands would *immediately* following the auction become entitled to enjoy *the full commercial benefits* of that spectrum.

15. In other words, in stark contrast to the previous position that the IMT700 and IMT800 spectrum was to be auctioned at a "*discount*"[28] precisely because mobile operators would have to await the terrestrial television broadcasters' migration off the frequencies, the position now is that the spectrum in these bands will be auctioned and will immediately become available to be shared by the incumbent broadcasters with the telecommunication companies. Not only that, but they will have to "*co-ordinate*"[29] their use of the shared spectrum to avoid the inevitable interference which will arise as a result of the sharing, as opposed to the previously announced position that it would only become available for use after

---

[27] See for example, Telkom's Founding Affidavit, para 40; Caselines Record, p. B30.

[28] e.tv's Founding Affidavit, para 108; Caselines Record, p. I42; quoting ICASA's "Clarification document."

[29] ICASA's Answering Affidavit, para 7.6/8; Caselines Record, p. F71.

the completion of the digital migration process. What is more, this "sharing" will be inequitable by design and anti-competitive in effect: since the mobile operators, who would have paid ICASA vast sums of money in the auction, will be afforded "*full commercial benefits*" within the very spectrum in which they compete with the broadcasters. [30]

This about-turn grounds the interim interdict

16. This fundamental departure from the ITA and the preceding policy position 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. Nor does ICASA's affidavit suggest that ICASA consulted with (or notified) any other party. In other words, there was no consultation at all with affected parties in relation to this fundamental change to the approach of ICASA.

17. ICASA's belated sea-change in approach underscores the need and appropriateness of an interim interdict at this juncture. We say so for the following reasons:

17.1. First, the change in approach will interfere with e.tv's usage of its licensed spectrum (as it will cause degradation of and interference with its broadcast signal and dilute its commercial exclusivity and competitive strength in direct proportion to the "*full commercial benefits*"[31] that ICASA promises to the

[30] ICASA's Answering Affidavit (Telkom Application); para 5.17.3; Caselines Record, p. F55.

[31] ICASA's Answering Affidavit (Telkom Application); para 5.17.3; Caselines Record, p. F55.

mobile operators).

17.2. This is made clear in e.tv's Founding Affidavit, and ICASA admits that there will be "*interference constraints*" in the IMC700 and IMT800 frequency bands.[32] (It is for this reason that ICASA originally indicated that it would be auctioning this frequency at a "*discounted cost*").[33]

17.3. As e.tv's expert explains: "*It is simply factually impossible for a telecommunications company to "share" spectrum in any meaningful manner with a broadcaster as suggested by ICASA. A broadcast transmitter is very powerful and operates on a significant scale. A cellular transmitter, by contrast, is weak in comparison. The signal of the mobile operator will be obliterated by the strong broadcast signal, but it will also cause degrading to the broadcaster's signal.*"[34] In this regard, ICASA accordingly has perpetrated a material mistake of fact and demonstrated palpable unreasonableness.[35]

17.4. Secondly, the undesirability and unlawfulness of this approach has been upheld by this Court (per Sutherland J) in a previous interdict application in relation to a similar 2016 ITA process.[36] As Sutherland J explained: Spectrum

---

[32] ICASA's Answering Affidavit (e.tv's Application); Para 6.1.1; Caselines Record, p. F772.

[33] e.tv's Founding Affidavit; para 129.3; Caselines Record, p. I.49.

[34] e.tv's Replying Affidavit, para 24; Caselines Record, p. G15; Confirmatory Affidavit of SL Petzer; Caselines Record, p. G65.

[35] ***South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another*** (231/19) [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453 (SCA) (17 April 2020) at para 23.

[36] See ***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).

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.*" [37]

17.5. ICASA's new stance involves adding additional users onto e.tv's spectrum; resulting in overlapping transmissions and rendering the communications network incoherent and unreliable. As it did in the Sutherland J application, ICASA's impermissible and irrational conduct in this regard justifies the granting of the interim interdict.

17.6. Thirdly, this secret change in the stance of ICASA fundamentally "*changes the rules of the game*" for parties who have responded to the ITA as well as those who may have decided not to respond to the ITA (based on the published ITA and other documents) at a time after the processes envisaged in the ITA had already commenced. In tenders or processes which are tender-like in their application, the rules of the process can generally not be changed after the process has commenced as this is fundamentally unfair.[38]

17.7. Accordingly, in addition to the lack of proper consultation in relation to the ITA, this midway change by ICASA (which appeared in the Answering Affidavit) is

---

[37] ***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) at para 11.

[38] ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*** (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)

a compounding element of unfairness.

17.8. Fourthly, and relatedly, there is an irreconcilable tension in ICASA's position: on the one hand it stresses that bidders will, given the vast sums of money they will have to bid in the auction, then receive the ***"full commercial benefits for the amounts paid [by] them"***.[39] But it is impossible to know what that means in practice, given that the successful bidders will get spectrum which they will largely be unable to use until the completion of the digital migration process. This is both irrational and demonstrates the importance of proper consultation. Had stakeholders been told of this change by ICASA, they could have meaningfully explained the tension and helped ICASA avoid arriving, again, at what the High Court just four years ago described as a "reckless" process.[40] As Sutherland J held:

> *"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."*[41]

Conclusion on the "killer point"

18. For all of these reasons, ICASA's about-turn on the fate of the IMT700 and IMT800 spectrum following the auction fatally undermines the lawfulness and rationally of the decision, and vitiates its fairness both procedurally and

---

[39] ICASA's Answering Affidavit (Telkom Application); para 5.17.3; Caselines Record, p. F55.

[40] e.tv's Replying Affidavit, para 25; Caselines Record, p. G15.

[41] Para 59.

substantively.

19. Procedurally, before ICASA instituted such a radical change to the fundamental tenets of not only the ITA, but also to the digital migration process and the policy previously conveyed by ICASA, it was required to give notice of this intention and to engage in a public consultation.

19.1. As the Constitutional Court has stressed in ***AllPay***: "*Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair*".[42]

19.2. It is further well established that a departure from a policy, or a change of that policy, triggers the right to a hearing.[43] The Constitutional Court put it this way

---

[42] Para 40.

[43] See ***Tettey and Another v Minister of Home Affairs and Another*** 1999 (3) SA 715 (DCLD); ***Winckler v Minister of Correctional Services*** 2001 (2) SA 747 (C); ***Combrink and Another v Minister of Correctional Services and Another*** 2001 (3) SA 338 (DCLD) 343; ***Attorney-General of Hong Kong v Ng Yuen Shiu*** [1983] 2 AC 629 (PC); Hoexter *Administrative Law* 2nd Ed, 421 ("*[t]he expectations held have varied widely and have been engendered in a variety of ways: by an express assurance, a settled practice or an established policy…*"); HWR Wade and CF Forsyth *Administrative Law* 10th Edition (2009) at 457. See further ***Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*** 2010 (2) SA 415 (CC) (concerning the question whether the HoD may lawfully revoke the function of the governing body of a public school to determine its language policy and confer the function on an interim committee appointed by him). See para 92, by Moseneke DCJ:

in ***Premier, Province of Mpumalanga:***[44]

> *"[c]itizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker."*[45]

20. It was also required to ensure that it obtained the views of those parties with a peculiar interest in the decision, such as e.tv. e.tv's failure to do so renders the impugned decision subject to review as illustrated by the Supreme Court of Appeal's decision in ***Kouga***.[46]

21. In ***Kouga***, the SCA held that a bylaw determining liquor trading hours passed in 2006 was invalid because it had not been published as required by the Local Government: Municipal Systems Act 32 of 2000. The argument of the Municipality was that it had published the bylaw in 2004 for comment. The court rejected the argument since the version published for comment in 2004 was markedly different from that enacted in 2006. Cloete JA said (para 9) that the significant differences between the two versions:

"*[92] I must add, for the sake of completeness only, that even if the HoD had the power to set up the committee under section 25, his conduct would not have satisfied the procedural fairness requirements.* ***He did not hear out the governing body before concluding that it had ceased or failed to determine a language policy and that an interim committee should be appointed to exercise the function. The governing body had no part in identifying the members of the committee nor did they get the opportunity to make any submissions to it before it made the decision to alter the language policy****. It follows that their determination of a new language policy is afflicted not only by the lack of power of the HoD to appoint it, but also by the procedural lapses I have alluded to*."

[44] ***Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided School: Eastern Transvaal*** 1999 (2) SA 91 (CC):

[45] Para 41.

[46] ***Kouga Municipality v Bellingan & others*** [2011] ZASCA 222; 2012 (2) SA 95 (SCA).

> *"lead to the inevitable conclusion that the Municipality did not comply with the provisions of the Constitution or the Systems Act . . . . The Municipality contended that the 2004 and 2006 publications were part of one continuous process. But the changes to the bylaws made available pursuant to the first publication in 2004 were far-reaching. . . . [N]ot every change has to be advertised otherwise the legislative process would become difficult to implement; but here the two sets of proposed bylaws were* ***so markedly different that republication of the revised draft was necessary to meet the legislative requirements of the Constitution and the Systems Act. That did not happen****. The second publication in 2006 could not have served to alert the public that the Municipality intended to adopt an amended bylaw to regulate liquor trading hours."*

22. The same view was taken in relation to publication and consultation in ***Earthlife Africa***.[47] There Griesel J held that where a decision-maker is apprised of new information before making the decision, an interested party ought to be afforded a hearing in respect of that new fact.[48]

23. These principles apply with equal force to the present case: if ICASA wished to make such a fundamental change to the basis of its ITA, it was obliged to comply with the fundamental principles of *audi alteram partem* and to notify affected parties of the proposed change. That obligation was heightened for ICASA in respect of e.tv given its clear interest and its expertise in the field[49] and all the more so where ICASA's original position was changed so radically at the eleventh hour, as now reflected for the first time in its answer.

---

[47] ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & another*** [2005] ZAWCHC 7; 2005 (3) SA 156 (C) paras 62 and 63.

[48] See too ***Allpay 1*** at paras 90-92, where the Constitutional Court held that *ex post facto* changing of the rules of the game midway through an administrative process was constitutionally invalid.

[49] As explained by the Supreme Court of Appeal in ***Scalabrini***, discussed further below.

24. Substantively, the decision will harm e.tv's spectrum rights, degrading its signal and resulting in interference. It is irrational for the reasons enunciated by Sutherland J and based on a material mistake of fact.

25. For all of these reasons, the interdict falls to be granted on the basis of this "killer point" alone. In what follows, we turn to the factual and legal framework of the decision, and the further grounds for the relief sought.

FACTUAL MATRIX

26. The facts underlying this application are largely common cause.

27. ICASA published the impugned ITA on 2 October 2020 and called for submissions. In terms of the ITA, the lots for sale in the ITA include portions of spectrum in the 703 — 733MHz paired with 758-788MHz and the 791-821MHz paired with 832-862MHz frequency bands. (As set out above, 29 of e.tv's transmitter site frequencies are above 694 MHz and form part of the digital dividend that is planned to be auctioned for mobile services in terms of the ITA in the IMT700 and IMT800 bands.)[50]

28. e.tv addressed a letter to ICASA on 29 September 2020 in which it raised a number of concerns about the spectrum auction, which it was aware was about to be issued by ICASA, and its rights to broadcast its analogue services.[51] In this letter, e.tv highlighted its interest in the allocation process and the legal

---

[50] e.tv's Foundling Affidavit, para 97; Caselines Record, p. I40.

[51] e.tv's letter of 29 September 2020 appears at annexed AL6; Caselines Record, p. I139.

concerns it had raised. e.tv concluded the letter by indicating that it "*welcomes an opportunity expeditiously to consult with ICASA in relation to the above matters, prior to ICASA taking any further material steps in relation to the re-allocation of the analogue spectrum to telecommunications companies for broadband services*. *e.tv respectfully requests ICASA to provide its considered response, including in relation to whether ICASA would be amenable to consult with e.tv by no later than 20 October 2020.*".

29. ICASA failed to respond to e.tv's letter (other than to acknowledge response), and did not respond to e.tv's request for a consultation. On 19 October 2020, e.tv addressed a further letter to ICASA requesting that its letter of 29 September 2020 should be treated as a request for clarification in terms of the ITA.[52]

30. ICASA did not respond to any of e.tv's points in its Clarification document, published on 11 November 2020;[53] nor did it address the concerns raised in the reasons document which ICASA published on 4 December 2020.[54]

31. Telkom's review application was launched on 22 December 2020.

THE LEGAL FRAMEWORK FOR THE LICENSING OF SPECTRUM

The ICASA Act

[52] AL8; Caselines Record, p. I157.

[53] The Clarification Document appears at FA6; Caselines Record, p. B127.

[54] The Reasons Document appears at FA7; Caselines Record, p. B194.

32. ICASA is established under the ICASA Act. Section 4 of the ICASA Act requires ICASA to exercise its powers consistent with, and to perform the duties imposed upon it by the ICASA Act; the ECA; the Broadcasting Act 4 of 1999 and the Postal Services Act 124 of 1998.

The ECA

33. The ECA defines radio frequency spectrum as "*the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting.*" This is the portion of the electromagnetic spectrum having a frequency below 3000 GHz.

34. Radio frequency spectrum is a limited or finite resource because, given present technology, there is only a finite portion available for beneficial uses at any one time, and only one entity can utilise a given frequency at a time, otherwise there will be interference.[55]

35. Given its scarcity (and value) spectrum must be carefully managed in the public interest. Unrestricted use of radio frequency spectrum would result in chaos. Moreover, given that it is a finite resource, its use must be managed to ensure the greatest benefit for society. The US Supreme Court recognised these principles more than 50 years ago in its landmark decision in ***Red Lion***

[55] ***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) at para 11.

Broadcasting Co v FCC[56] and by Sutherland J in the 2016 ITA interdict application.[57]

36. Section 30 of the ECA vests control, planning, administration, licensing and management of the use of radio frequencies with ICASA.[58]

37. Section 31(3) of the ECA provides:

> *"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".*

38. In terms of section 34(3), 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*".

39. Section 67 of the ECA requires ICASA to promote competition in the ICT sector. 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

---

[56] ***Red Lion Broadcasting Co v FCC*** 395 U.S. 367 (1969) 375 – 376, 387 – 389.

[57] ***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) at para 11.

[58] Section 30(1) of the ECA.

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 (2610212016*)* 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."

Radio Frequency Spectrum Regulations

40. In terms of section 4(1) of the ECA, ICASA published the Radio Frequency Spectrum Regulations, 2015 on 30 March 2015. These Regulations provide the framework through which ICASA may allocate and assign radio frequency spectrum.

41. In terms of regulation 7(1), ICASA "*will at all times publish an ITA (invitation to apply) where a radio frequency spectrum licence will be awarded / granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3) of [ECA]*".

42. In the light of this regulatory framework, we turn now to the requirements for interim relief.

GENERAL PRINCIPLES ON INTERIM RELIEF

43. In assessing an application for an interim interdict, a Court must consider the

following requirements;

43.1. The existence of a prima facie right to the final relief sought, although open to some doubt;

43.2. A well-founded apprehension of irreparable harm;

43.3. The balance of convenience; and

43.4. The absence of suitable alternative remedies.[59]

44. The Constitutional Court has affirmed that these principles remain relevant and applicable under the Constitution,[60] albeit that they must be applied in a manner that is mindful of the separation of powers.[61]

45. This does not change the common law test for interim relief.[62] It merely requires that where a party seeks to restrain an organ of state from conducting statutory powers, as in this case, there must be some assessment of the separation of powers in determining the balance of convenience.[63]

---

[59] ***Setlogelo v Setlogelo*** 1914 AD 221 at 227. See too ***Pikoli v President****, RSA 2010 (I) SA 400 (GP) at 404*

[60] ***City of Tshwane Metropolitan Municipality v Afriforum and Another*** 2016 (9) BCLR 1133 (CC) at para 49; ***South African Informal Traders Forum and Others v City of Johannesburg and Others*** 2014 (4) SA 371 (CC) at para 25; ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** 2012 (6) SA 223 (CC) at para 41 ("OUTA").

[61] ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** 2012 (6) SA 223 (CC) at para 45.

[62] Ibid at para 45.

[63] Ibid at para 47.

46. As we explain below, this is a case where respect for the separation of powers requires interim relief.

47. Before delving into an analysis of each of these interim interdict requirements, we deal in some detail with the judgment of Sutherland J in ***Minister of Telecommunications and Postal Services*** in relation to the interim interdict granted in relation to ICASA's 2016 ITA.[64] As we stressed at the outset of these heads, this is a case which, it is submitted, is effectively on all fours with the present application, and the findings of Sutherland J are apposite and instructive in these proceedings.

48. The facts of the matter were briefly these:

48.1. On 15 July 2016, as in 2020, ICASA issued an ITA to participate in an auction of rights to use certain bands of radio spectrum.[65]

48.2. The Minister, together with CellC, challenged the publication of the ITA on several grounds, including that ICASA had acted in breach of its statutory obligations, and acted irrationally. They sought an interim interdict pending finalisation of the review application. ICASA opposed the application.

48.3. Sutherland J found for the Minister and CellC and granted the interim relief

---

[64] ***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)

[65] ***Minister of Telecommunications*** at para 4.

application.

49. Sutherland J commenced the judgment by explaining the importance of spectrum from a competition and regulatory perspective, holding:

> *"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 the radio frequency plan. ICASA is responsible for licensing its use and in that context assigning bandwidth."*[66]

50. Against this background, Sutherland J turned to the interim interdict requirements. In finding that the applicants had established a *prima facie* right to the relief, Sutherland J held that "*section 34 of the ECA demonstrates amply that ICASA is bound by important process-bound constraints before it can make its decisions about frequency spectrum…*"

51. One of the issues raised by the applicants in that matter was the fact that the ITA was irrational inasmuch as the bandwidth in the IMT700 and IMT800 frequency bands:

> *"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*

---

[66] ***Minister of Telecommunications*** at para 11.

access to the bandwidth because broadcasters are still occupying parts of the spectrum."

52. Sutherland J upheld this contention, agreeing that it was *prima facie* unlawful for ICASA to embark on this process without providing an opportunity for the incumbent licensees to be heard, and that the decision was thus "*reckless*" and "*irrational*". Sutherland J's reasoning is as follows:

> *"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 reassign 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.*
>
> *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 of18 March 2015, 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.*
>
> *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."*

53. This reasoning applies with equal force to the present ITA. Notwithstanding Sutherland J's judgment, ICASA has repeated its mistake, and has sought (again) to issue the impugned ITA without adequately consulting the incumbent licensees (including e.tv), and by irrationally seeking to "*re-allocate*" spectrum that it had already allocated to analogue broadcasters. Its conduct in this regard is "*reckless*" and "*irrational*".

54. It is no good, as ICASA suggests in its answering affidavit, to allow the auction to continue (on the basis, says ICASA, that if the review in due course succeeds, the review court can under its remedial powers provide relief to those that have bidded within the unlawful auction). It is unfortunate to see that argument being

posited, given what Sutherland J has already had to say about it:

> *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****.*

55. In relation to irreparable harm and the balance of convenience, Sutherland J's findings were as follows:

> *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****.*

56. Accordingly, Sutherland J granted the interdict, with costs, pending the outcome

of the review.

57. As we now demonstrate, these findings around the rights of the applicants; the irreparable harm and the balance of convenience apply with equal (or greater force) to the facts before this Court.

PRIMA FACIE RIGHT

58. There are a series of clear constitutional rights at stake in this application. The proper management of radio frequency spectrum and the mobile broadband services this facilitates implicate the constitutional rights to equality, freedom of expression, freedom of trade and education, and the right to property (recalling that ICASA accepts that the spectrum is of great value to e.tv and other licensed broadcasters).[67]

First right: the right to know the rules of the game

59. I have set out above under the "*killer point*" section, that e.tv and other participants in the ITA auction process and interested parties have a right to know the rules of the game. When ICASA amends the rules part-way through the process, in an unfair manner and without any notice to affected parties, this grounds a clear right to the relief sought.

[67] Per Sutherland J in ***Minister of Telecommunications*** at para 10, citing ***City of Tshwane Municipality v Link Africa Ltd*** 2015 (6) SA 440 (CC) at paras 120-122.

Second prima facie right: The right to consultation as part of a fair administrative process

60. e.tv relies on its right to be consulted in relation to the impugned decision, given the impact of the decision on e.tv's rights, and the special position which e.tv holds as the incumbent licensee in relation to the IMT700 and IMT800 spectrum.

61. ICASA's obligations to consult arise from the following sources:

61.1. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This section is given effect to in PAJA, and under the principle of legality. In terms of the ICASA Act (section 1), the object of ICASA is to "*regulate broadcasting in the public interest*", and in terms of section 30(1) of the ECA, ICASA "*controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34*".

61.2. In the present case, ICASA was aware that there were entities (such as e.tv) with a special interest in the auction of the spectrum in question. In the circumstances, ICASA was under a constitutional obligation to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by ICASA in taking its far reaching decision; rendering the decision procedurally unfair and in breach of the provisions of sections 3 and 4 of PAJA.

61.3. ICASA's decision has the capacity to affect the property rights of e.tv, and there was thus an extra common law obligation on ICASA to consult with e.tv before the decision was taken.

62. Importantly, ICASA was warned about this potential risk, but it took no heed. ICASA's own experts advised the Authority to conduct consultations after a final draft set of rules or measures were included in the draft Auction ITA because "there are several to many material new proposals in the new set of rules compared to the 1st November 2019 IM."

63. The experts cautioned ICASA against proceeding with the Auction ITA without consultation in the following terms "We judge the legal risks (judicial review) due to no re-consultation (after the last 1st of Nov 2019 IM) to be VERY HIGH." [68] The capitals were provided by the experts, not us.

64. Our courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard across a wide range of contexts. That need for consultation arises particularly in cases there is a change in policy by the state, and is heightened when that change happens midway through a process. We have earlier in these heads (at para 19 above) set out the case law in detail and ask that they be read as if incorporated here.

65. Additionally, we reference the following:

[68] Acacia report p 986 paragraphs 88 and 89.

65.1. In ***Albutt,***[69] the Constitutional Court had to decide *inter alia* whether the President was required, before exercising a power to pardon offenders whose offences were committed with a political motive, to afford a hearing to victims of the offences. It held that the decision to undertake the special dispensation process under which pardons were granted without affording the victims an opportunity to be heard rendered the process irrational.[70]

65.2. In ***Scalabrini***, the Supreme Court of Appeal held, as regards the Director General's failure to consult with specially interested parties:[71]

> *"In this case the Director-General was pertinently aware that there were a number of organisations – including the Scalibrini Centre – with long experience and special expertise in dealing with asylum-seekers in Cape Town. His representative, Mr Yusuf, had In addition, however, I consider that he could not achieve the statutory purpose without obtaining the views of the organisations representing the interests of asylum seekers. His decision obviously would affect asylum seekers. The information available to the DHA internally and through the SCRA might tell the DG what he needed to know concerning the DHA's operational procedures, its capabilities and its history of operational problems in Cape Town but would not give him the perspective (or the full perspective) from the asylum seekers' side. This perspective appears to me to have been of obvious importance in reaching a rational conclusion as to whether or not an RRO in Cape Town was needed."*

65.3. In the premises, the SCA held that it was "*irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware*."

---

[69] ***Albutt v Centre for the Study of Violence and Reconciliation, and Others*** 2010 (3) SA 293 (CC).

[70] ***Albutt***, para 68.

[71] ***Scalabrini*** at para 69.

65.4. Moreover, in the ***Nuclear case***,[72] the Court accepted that a decision-maker who knows that a party has special expertise or a special interest will certainly call upon that party to give input, particularly where the decision is important and far reaching. Bozalek J and Baartman J explained:

> *[50] In the present matter NERSA must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power. In addition, in taking the decision, NERSA was under a statutory duty to act in the public interest and in a justifiable and transparent manner whenever the exercise of their discretion was required but also to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by NERSA in taking its far reaching decision to concur in the Minister's sec 34 determination. It has failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone."*

66. These principles apply *a fortiori* to the present case where e.tv is the incumbent licensee in relation to the very spectrum which ICASA intends to auction off. Under these circumstances, in order for its decision to be rational ICASA was obliged to consult and take into account e.tv's views. It failed to do so. In the words of Sutherland J, this failure was "*reckless*" and "*irrational*".[73]

67. ICASA's failures in this regard are made worse by the fact that e.tv asked for an opportunity to consult with ICASA in its letter of 29 September 2020 but this

---

[72] ***Earthlife Africa Johannesburg and Another v Minister of Energy and Others*** (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017)

[73] ***Minister of Telecommunications*** at para 59.

request was simply ignored and ICASA proceeded to go ahead and take the decision without taking into account e.tv's views and e.tv's rights.[74]

Third prima facie right: The right against interference

68. ICASA's process, and its belated indication that, post-auction, e.tv will be compelled to share the licensed spectrum which it currently uses and in the degradation of its broadcast signal constitutes a violation of e.tv's right to property.

69. ICASA acknowledges that this will result in interference[75] but its solution is to state that parties must "*cooperate*" and "*share*".

70. ICASA's submissions in this regard are fanciful. e.tv illustrates the point thus: If a three-floor building, is leased to different tenants, the top floor for residential purposes, the second as a factory making clothing and the ground floor as a panel beating shop there will be many problems which arise between the tenants: noise problems, parking problems, water and electricity, lift usage, sewerage and waste collection, etc. Those tensions stand to be particularly exacerbated if two of the tenants are forced to conduct their competing businesses on the same floor (akin to the same spectrum).[76]

71. ICASA purports to justify the deprivation with reference to section 30 and 33 of

---

[74] e.tv's letter of 29 September 2020 appears at annexed AL6; Caselines Record, p. 139.

[75] ICASA's Answering Affidavit (e.tv's Application); Para 6.1.1; Caselines Record, p. F772.

[76] e.tv's Replying Affidavit, para 51; Caselines Record, p. G23.

the ECA. The sections 30 and 33 processes do not offer a practical alternative for the consequences of allocating the same spectrum to telecommunication companies and broadcasters. It is not clear what plans ICASA could have to attempt to reduce or eliminate potential interference in the IMT 700-800 spectrum band if it continues to licence frequencies in that band to both telecommunication companies and broadcasters. It certainly has not sought any input from any party in this regard. In addition, these sections only require ICASA to reduce the interference to "*the extent reasonably possible*".

72. Even ICASA's own Frequency Assignment Plan of 2013 (which ICASA refers to in its affidavit) states that only after dual illumination will the band 790 MHz to 862 MHz be free for IMT. In its response to stakeholders which sought clarity on the ITA, ICASA states that obligations to reach coverage and throughput obligations for IMT700/IMT800 low-band spectrum will be only enforced when the IMT700 and IMT800 spectrum is available for use (i.e. after digital-to-digital migration). ICASA further states that the availability of the spectrum in IMT700 and IMT800 bands is subject to the digital migration process which is under way.

73. In the premises, e.tv has at least a *prima facie* right to exercise the rights in its licence without interference, and to protect its property from unlawful interference.

Fourth prima facie right – the right to audi

74. Aside from the right to consultation, which we have detailed above, there is a separate right to a fair process and hearing for e.tv, which was flouted by ICASA.

As set out above, e.tv made representations in its letter of 29 September 2020, and again on 19 October 2020, when e.tv addressed a further letter to ICASA requesting that its letter of 29 September 2020 should be treated as a request for clarification in terms of the ITA.[77]

75. In the letter of 29 September 2020, e.tv set out that currently 63% of the people who constitute e.tv's audience access the e.tv channel through analogue broadcasting. If e.tv's analogue spectrum is taken away or interfered with, e.tv will lose its viewers. e.tv thus submitted that there were three materially relevant issues which ICASA was obliged to take into account when exercising its public powers in relation to re-allocating e.tv's analogue spectrum to telecommunications companies:

> a. *First, telecommunications companies offering streaming services that compete with that of e.tv and other broadcasters, should, in terms of the Electronic Communications Act correctly interpreted, be licensed to provide broadcasting services.*
>
> b. *Second, the licensing of additional spectrum to telecommunications companies should be made subject to conditions that ensure that the competitive equilibrium is maintained, to avoid the unfairness of a situation in which e.tv and other broadcasters compete with telecommunications companies which do not operate under the same onerous ICASA licence conditions as e.tv and those broadcasters.*
>
> c. *Third, the reasonable and constitutionally complaint reallocation process should require that the telecommunications companies who benefit from the re-allocation of spectrum which was previously used by e.tv, should be required to pay compensation to e.tv."*

[77] AL8; Caselines Record, p. I157.

76. ICASA responded to certain of the interested parties' requests for clarification in relation to the ITA on 11 November 2020 and published reasons for its decisions on 4 December 2020. In doing so, ICASA entirely ignored e.tv's submissions.

77. ICASA's documents did not deal with e.tv's submissions relating to streaming services; it did not deal with the requirement to ensure the fairness of the allocation; and it did not deal with the issue of compensation.

78. In the footnotes to its clarification document, ICASA sets out which submission it is addressing from which entity. e.tv's submissions are not addressed at all. ICASA did not engage with the submissions made by e.tv (or the other analogue broadcasters affected by its decision).[78]

79. In this regard, ICASA has derelicted its duty to take into account e.tv's submissions.[79] e.tv's submissions were highly relevant, but they were not taken into account.

Conclusion on the prima facie right

80. For all of these reasons, e.tv submits that it has (at the least) a *prima facie* right to the interim interdictory relief.

---

[78] e.tv's founding affidavit, para 102; Caselines Record, p. I40.

[79] ***Sentrachem Ltd v John NO & others*** (1989)10 ILJ 249(W) at 254J

IRREPARABLE HARM AND NO SUITABLE ALTERNATIVE REMEDY

81. There is a well-founded apprehension of irreparable harm if this interim interdict is not granted pending the final determination of the review. No suitable alternative remedies exist to prevent or address this harm.

82. As the Constitutional Court explained in ***City of Tshwane v Afriforum***:[80]

> *"Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted."*

83. Three are at least five irreparable harms which will be suffered by e.tv and the public:

83.1. 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.[81]

---

[80] ***City of Tshwane Metropolitan Municipality v Afriforum and Another*** 2016 (9) BCLR 1133 (CC) at para 59.

[81] e.tv's Founding Affidavit, para 93; Caselines Record, p. I39.

83.2. 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;

83.3. 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;[82]

83.4. 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;

83.5. Finally, once the sale is completed, bidders will have bid at the relevant reserve prices (of some Rl 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.[83]

---

[82] e.tv's founding affidavit, para 139.2; Caselines Record, p. I54.

[83] e.tv's founding affidavit, para 139.4; Caselines Record, p. 155.

BALANCE OF CONVENIENCE

84. Given that e.tv has a clear right to the relief sought, and that there are substantial prospects of success in the applications to review and set aside ICASA's decision, the principle in ***Olympic Passenger Services v Ramlagan***[84] has clear application here:

> *"The stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."*

85. In any event, the balance of convenience strongly favours granting interim relief. We have previously quoted at length (from paras 51 and 54 above) from Sutherland J's judgment where he carefully balanced the interests and found that the auction had to be interdicted.

86. ICASA will suffer no conceivable prejudice if the licensing process is delayed pending the final determination of Part B of this application.

87. 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.

---

[84] ***Olympic Passenger Services v Ramlagan*** 1957 (2) SA 382 (D) at 383F.

88. 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.[85] What Sutherland J held on this score bears repeating:

> *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 I 00% of the assigned spectrum is made available. The balance of convenience favours a grant of the relief sought.*

89. On the other hand, the harm to fundamental rights, the wasted expenses that will be incurred by interested parties, the adverse competition effects, the harm to the rule of law, and the wasted public resources all militate in favour of granting interim relief. Once the sale is complete, it cannot be undone and the harm to e.tv and the public will be irreparable.

---

[85] e.tv's Founding Affidavit, para 141; Caselines Record, p. I56.

90. In line with the principles established in ***OUTA,***[86] the separation of powers is an important consideration in assessing the balance of convenience.

> *"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. Whilst 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."*[87]

91. Respect for the separation of powers is, however, not synonymous with judicial passivity or undue deference. In appropriate cases, the separation of powers will require courts to grant interim relief to prevent violations of the Constitution and to protect against unlawful invasions of rights. In ***Doctors for Life***,[88] the Constitutional Court explained that the separation of powers often *requires* judicial intervention:

> *"while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."*[89]

92. This is such a case where the separation of powers does not merely permit

---

[86] ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** 2012 (6) SA 223 (CC).

[87] Ibid at para 65.

[88] ***Doctors for Life International v Speaker of the National Assembly*** 2006 (6) SA 416 (CC).

[89] Ibid at para 200. See also ***Minister of Health and Others v Treatment Action Campaign and Others (No 2)*** 2002 (5) SA 721 (CC) at paras 98 – 99.

interim relief, but requires this relief in order to –

92.1. ensure the careful management of a scarce national resource in the interests of protecting and promoting fundamental rights;

92.2. ensure that ICASA complies with its statutory and constitutional obligations; and

92.3. avoid the wastage of public and private funds.

93. Interim relief granted at this stage, before the licensing process proceeds further, would also limit the disruption to ICASA's functions and avoid frustrating the swift rollout of mobile broadband services.

94. If the review application succeeds in Part C in the absence of interim relief then this is likely to cause far greater expense and disruption.

95. Any licenses issued by ICASA are at risk of being set aside and the licensing process will also have to start from scratch.

96. The uncertainty and disruption this will cause presents a far greater threat to ICASA than an interim interdict pending the final determination of the review application, which can in any event be heard in a matter of months.

97. As a result, this case is entirely distinguishable from the case presented in ***OUTA*** for at least three important reasons:

97.1. First, in ***OUTA***, the interim interdict was sought to prevent SANRAL from levying and collecting e-tolls on Gauteng roads, almost four years after the e-tolls project had been initiated. By contrast, this interim interdict is sought to prevent ICASA from embarking on a process rather than seeking to disrupt a process that is already far advanced.

97.2. Second, the Constitutional Court accepted that if SANRAL was interdicted from collecting e-tolls, then it may default on its loans, potentially costing the public purse billions of rand. This is entirely different from this case, where this interim interdict is sought precisely to prevent the wastage of public and private money, rather than incurring wasted expenses. ICASA has made no such case.

97.3. Finally, and perhaps most significantly, this case involves clear breaches of ICASA's statutory obligations which implicate constitutional rights and procedural requirements. The interim interdict is necessary to enforce these obligations and to protect these rights pending final determination of this matter. This differs from ***OUTA***, where the interim relief was primarily sought to prevent inconvenience to motorists. And the relief that is sought in this case is to protect critical process rights.[90]

---

[90] That is perhaps best illustrated by the decision of Tuchten J in **Retail Motor Organisation and Another v Minister of Water and Environmental Affairs and Another** [2012] ZAGPPHC 273 (12 November 2012). There the North Gauteng High Court was faced with a challenge to an Integrated Industry Waste Management Plan – the Redisa Plan – dealing with the problem of the disposal of waste motor vehicle tyres. The applicant (an industry representative organisation) sought to interdict the implementation of the Redisa Plan pending the outcome of review proceedings to set aside the approval of the Redisa Plan by the Minister. The OUTA defence was raised by the Minister. In response, Tuchten J held at para 58: *"I do not see the case as raising any separation of powers issues. The issue on which I have found the applicants have prospects of success relates not to the polycentric evaluation*

98. Accordingly, we submit that this is one of the "*clearest of cases*" where interim relief is appropriate to restrain the exercise of statutory powers.

99. There is no alternative remedy available to e.tv.

URGENCY

100. e.tv fully aligns itself with the grounds of urgency set out in Telkom's affidavit.

101. ICASA has refused to suspend the ITA process, despite being requested to do so, and has indicated in notices issued to the public subsequent to these proceedings being launched that it intends to proceed with the process notwithstanding the interdict and review proceedings instituted by Telkom and MTN.[91]

102. As a consequence, urgent interim relief is required to prevent this process from unfolding and the substantial, irreparable harm that this will cause.

OVERALL CONCLUSION AND RELIEF SOUGHT

103. For these reasons we respectfully submit that:

103.1. e.tv has made out a case for joinder as a second applicant;

---

of policy considerations, a power which has been entrusted to the Minister by legislation, but to whether the procedure followed by the Minister in relation to item 15.1 is in compliance with law."

[91] e.tv's Founding Affidavit, para 140; Caselines Record, p. I55 the notices appear at AL12; Caselines Record, p. I173.

103.2. the interim interdict falls to be granted;

103.3. 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