

**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 PRACTICE NOTE:
INTERDICT APPLICATION (PART B)**

1. **DATE OF HEARING**

The matter is set down in the Urgent Court on 9 February 2021.

The parties agreed to a timetable in terms of which the affidavits were completed and heads of argument are to be filed by 16h00 on Friday 5 February 2021.

All of the relevant papers appear on Caselines.

2. **COUNSEL AND ATTORNEYS FOR THE INTERVENING APPLICANTS**

COUNSEL

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3. **NATURE OF THE APPLICATION**

The Intervening Applicant (“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. The intervention application is unopposed.

e.tv together with Telkom seek 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.

4. **ISSUES**

The primary issues are:

- 4.1 Whether e.tv has made out a case for joinder;
- 4.2 Whether the requirements for an interim interdict have been established.
- 4.3 The question of costs.

5. **RELIEF SOUGHT**

e.tv and Telkom seek an interim interdict 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.

6. **SUMMARY OF E.TV’S SUBMISSIONS**

e.tv submits that the interdict falls to be granted for the following reasons:

- 6.1 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.”¹ 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.
- 6.2 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

¹ *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.

of ICASA's auction. On this point alone the process must immediately be stopped.

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

6.3.1 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.

6.3.2 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;

6.3.3 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;

- 6.3.4 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;
- 6.3.5 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.
- 6.4 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. 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.
- 6.5 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.²

7. URGENCY:

The matter is urgent.

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

8. ESTIMATED DURATION

e.tv estimates that the matter will take not more than 4 hours.

e.tv anticipates that it will need 45 minutes for its oral submissions.

9. PAPERS:

² e.tv's Founding Affidavit, para 141; Caselines Record, p. 156.

e.tv and Telkom agree that the Judge is requested to read the following portions of the papers:

- 9.1 Telkom's notice of motion and founding affidavit (caselines B1 to B123);
- 9.2 Annexure FA1 to Telkom's founding affidavit (caselines B124 to B191)
- 9.3 [e.tv](#)'s founding affidavit (caselines I1 to I56);
- 9.4 ICASA's answering affidavit to Telkom (pages 525 to 648; caselines F3 to F127);
- 9.5 ICASA's answering affidavit to [e.tv](#) (pages 178 to 226; caselines F737 to F785);
- 9.6 [e.tv](#)'s replying affidavit (caselines G7 to G55);
- 9.7 Telkom's replying affidavit (caselines G75 to G160);
- 9.8 Acacia report of May 2020: Annexure AA11 to ICASA's answering affidavit to Telkom (paginated pages 962 to 1040);
- 9.9 Telkom's temporary Licence for IMT700 and IMT800: Annexure AA14 to ICASA's answering affidavit to Telkom (pages 1089 to 1095);

- 9.10 Information Memorandum of November 2019: Annexure AA5 to ICASA's answering affidavit to Telkom (Rule 53 record pages 8 to 43; caselines M8 to M43);
- 9.11 Competition Commission's submissions in response to the Information Memorandum of November 2019 (Rule 53 record pages 81 to 104; caselines M81 to M104);
- 9.12 Reasons document of 4 December 2020 (Rule 53 record pages 814 to 965; caselines M814 to M965); and
- 9.13 The ITA which is the subject of this application and is filed with Telkom's heads of argument.

GILBERT MARCUS SC

MAX DU PLESSIS SC

SARAH PUDIFIN-JONES

CELESTE MOODLEY

Chambers, Sandton and Durban

5 February 2021