Representations on Information Memorandum on Licensing Spectrum in the IMT700, IMT800, IMT2600 and IMT3500 bands

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As invited in Notice 587 of 2021 appearing in *Government Gazette 45255* 1st October 2021.

Principal Submission: The Authority is wasting the public's time and abusing the public's trust by continuously acting in flagrant and intentional disregard of its legal obligations in ensuring that high demand spectrum is available on a competitive basis in accordance with a just and reasonable process. The outcome and effect of an Authority that continues to disregard the statutory and regulatory framework within which it is required to operate is that the cost to communicate is maintained at artificially high levels.

Opening Remarks

ICASA is in persistent violation of its responsibility to create a rational, Rule of Law embracing, enabling environment for the information technology and communications sector.

South Africa continues to experience a severely constrained telecommunications landscape in which high costs to communicate and a lack of innovation are symptoms of something deeply wrong. The lack of widespread cost-effective broadband internet connectivity is a serious inhibitor to achieving economic growth and job creation.

While various factors contribute to the unfortunate state of affairs if blame is to be located at any single organization or organ of state then that organization is without a doubt ICASA. The Electronic Communications Act (ECA) provides a framework within which a converged electronic communications sector and industry is able to thrive. Yet rather than ensuring that the ECA forms the statutory and regulatory framework, ICASA has taken it upon itself to attempt – unsuccessfully – to determine the shape of the market. In so acting ICASA has invited continuous fruitless and wasteful litigation (and the associated expenditure). Since 2016 ICASA has found itself restrained through judicial interdicts wholly of its own making.

The unfortunate reality of telcos, broadcasters and even the relevant ministers being forced to litigate to prevent ICASA from undermining the industry, does not serve the public interest. At least ten years has been wasted and on the current course this wasting of time will continue indefinitely. ICASA's continued failure to adhere to basic tenants of ensuring that administrative decision making is undertaken justly will undoubtedly result in further litigation. Since the 1st October 2021 the total disregard for upholding even a semblance of good faith on the part of ICASA makes is increasingly likely that the indefinite crisis of ICASA will only come to an end when a litigating party secures punitive and personal costs against councillors and executive staff of the organization who fail and refuse to adhere to the heightened standards demanded of public officials by the Constitution as has been ordered against a rogue and derelict holder of the office of the Public Protector (see the majority decision in *Public Protector v South African Reserve Bank* [2019] ZACC 29).

The time is fast approaching when litigants engaged with ICASA ought to seek punitive costs orders made personally against councillors and executive staff of ICASA.

Structure and Nature of Submissions

Fully canvassing the multitude of defects evident from the published Information Memorandum is a futile exercise. It is inevitable that that the body of submissions received will largely ignored while ICASA takes irrelevant considerations into account as it adheres to its set out timeline. It is inevitable that at a certain point a telco or broadcaster will be forced to litigate on the matter again. Moreover it is clear from the Information Memorandum that inputs received as invited on the 1st November 2019 have been for irrational and improper purposes ignored.

Fundamental problems within the Information Memorandum include:

The Authority has not set out the applicable caps for various bands as envisaged by the Radio Frequency Spectrum Regulations 2015 (as amended, the Regulations)

Having amended the Regulations (Regulation 7(3)) to modify (and frankly circumvent judicial outcomes) the HDI/BBBEE requirements in a profoundly illogical manner, the Memorandum ignores the amendment (or at least the wording of the amendment).

The Authority is seeking to shift the responsibility for undermining the interests and rights of the Broadcasters onto the Minister while making an administrative decision which compels such an undermining.

Submission: Insufficient regard for public participation has been shown

ICASA appears to view the public and courts as a nuisance factor. By extension ICASA has placed its own perception of its institutional interests above the public interest. This attitude is wholly incompatible with our constitutional order and paradoxically is the greatest threat to the institutional interests of ICASA.

CHRONOLOGY OF ENGAGEMENT CONCERNING THE INFORMATION MEMORANDUM

1. On Friday 1st October the administrative process for the issuance of an ITA currently under way was announced. It is pertinent to note that despite announcing the release of the Information Memorandum same document was not available on ICASAs website and interested parties had to source the document.
2. On 2nd October at 0h56 I wrote to pmaleka@icasa.org.za which address has previously responded timeously. Included in this email was a query "If you could please advise as to the process by which to register for the workshop scheduled for the 15th October 2021". No response to my query was given.
3. On the 8th October 2021 I again wrote to pmaleka@icasa.org.za and added IMTLicensing@icasa.org.za. Again I asked "[p]lease advise as to the process to register for the workshop". Same correspondence has gone unacknowledged.
4. On the morning of 15th October 2021 I again wrote to ICASA:

> Pursuant to my earlier emails
> I haven't received an acknowledgement of receipt (uncharacteristically) and the scheduled date for the workshop enquired about is today.
>
> Am I correct in ascertaining from https://www.icasa.org.za/news/2021/icasa-conducts-a-workshop-in-respect-of-the-published-information-memorandum-on-the-licensing-of-imt-spectrum that the workshop will be this afternoon starting at 13:00? Furthermore that participation is not on an invitation/RSVP basis but rather is open and that the announcement reference to " Panellists and Delegates" is not an indication of the announcement representing an invitation for public observance with

the Authority having responded to some communication as to participation but not all.

5. During the workshop on the afternoon of the 15th October I raised in text a query as to emails having gone uncharacteristically ignored. Apart from the chair being dismissive and an implied denial of the correspondence having been received through feigned ignorance.
6. It was indicated that due to the public holiday declaration for the 1st November submissions were required by the 2nd of November.
7. The questions being asked during the workshop were roundly ignored and an ambivalence as to ICASA's understanding of the effect and purport of the High Court order prevailed.
8. Eventually I was afforded the floor for a "second round" during which I stated "the plea to the Authority is to stop fucking around". At this point without caution I was ejected from the meeting by a clearly irate chairperson acting *ex mero motu*.
9. I submit that as a matter of law the ejectment without warning in a context in which no represents a violation of PAJA by the chairperson. This submission is based on three salient facts:
    a. The use of a profanity was not directed at any person, it was no conveyed as a threat nor was it menacing.
    b. The use of a profanity as a rhetorical device - "please stop fucking around" – is not and was not proscribed by any rules of order or agreement arising within the context of conducting the engagement. Swearing in public in the Republic is not an offence even if sensitive listeners are offended. There were no children present.
    c. The act of ejectment was disruptive rather than the profanity used rhetorically. While a chair of proceedings must maintain order, control and discipline over proceedings and this duty gives rise to a power of ejectment, the rational purpose of using that power is to prevent disruption to proceedings. In this instance the chair caused the disruption.
10. Should it be necessary to litigate a personal costs order will be sought.
11. I am reliably informed that an inference was made of my having an affiliation with Telkom after I was ejected. I believe Telkom denied same and such denial is re-affirmed by me. It may be that my comment to the effect "when Telkom and I sit in full agreement on an issue you should know that something is wrong" was gravely misunderstood. Any rational person with knowledge of the respective submissions and processes in the sector would understand that the comment is jest and a rhetorical device.

TOTAL DISREGARD FOR A SIGNIFICANT BODY OF INPUT THAT SETS OUT RELEVANT CONSIDERATIONS OF THE APPROPRIATE BASIS UPON WHICH TO MAKE THE ADMINISTRATIVE DECISION

12. ICASA appear to be trying to frame a "reconsideration" of its decision to issue the ITA as issued as an invitation for it to try to steam-roll through a fatally flawed approach through some minor tweeks to satisfy the complaining telcos and broadcasters.

13. This framing is disingenuous and ignores the fact that the PUBLIC INTEREST rather than short term commercial shenanigans must prevail. It also represents a degree of contumacy for the High Court and litigation outcomes.
14. In reconsidering the issuance of an ITA the Authority is required to consider all relevant considerations – including submissions and expert representations (such as from the SAIEE) – as to the process being reconsidered, the Information Memorandum has no evidence of this being the case. It must however cease considering irrelevant considerations and it must be exceptionally cautious about the decision becoming embroiled in a dispute as to the validity of the mythical "Acacia Economics Report".
15. The chair of the workshop (Mr Zimri an ICASA councillor) showed nothing but contempt for the participants of the workshop who were not representing a telco. Undue deference and an allotment of time (or more pertinently "rounds") was afforded to same. In particular the condescending attitude shown to Mr William Bird was peculiar and absurd. Mr Zimri may have acted with a particular pre-existing dislike for me personally but that disdain being shown to other public interest rather than the commercial interests of a telco.
16. The insistence as to which commercial organization a person was representing and disdain shown was wholly at odds with our Constitutional democracy decision making ethos.
17. Moreover the failure to demonstrate any regard for rights of natural justice during a public inquiry process violates section 4 of PAJA. The fact that the Authority is adhering to unwarranted dictates and with irrelevant considerations invites judicial review under section 6(2)(e) of PAJA.

Submission: The Information Memorandum is wholly insufficient as a means by which to conduct an administrative decision making process

18. Section 3(2)(iii) of PAJA requires that in a "clear statement of the administrative action" be furnished when such action is proposed. The decision of the ICASA to issue a particular invitation is the administrative action and therefore the language and terms of the proposed ITA is what is a "clear statement" from which the devil is in the detail. Absent the language of the proposed invitation it is impossible for the plethora of interested and affected parties or the public at large to exercise a reasonable opportunity to make representations.
19. Even if ICASA were to argue that the Information Memorandum represents a step towards making the decision as to the issuance of a particular ITA on particular terms this would simply mean that there will be insufficient time to consider and make representations on the actual language of the proposed ITA.
20. In fact if ICASA were to on the 15th of November issue out a draft of the language of the proposed ITA there is insufficient opportunity to scrutinise and comment by the 29th November.
21. Based on experience there is no rational basis to presume that the Authority will remedy any discovered problems with the specific language in the ITA which it proposes to put out.
22. This prior experience includes correspondence to ICASA on 16th October 2020 wherein the logical flaw in the approach to defining Tier-1 and Tier-2 operators was pointed out.
23. Therefore rather than providing interested parties and organizations whose rights are adversely affected by the administrative decision to be made by ICASA what the process has been designed to do is to "workshop to death" any objection to what ICASA has pre-determined it wishes to do. This is bad faith from the administrator.

Conclusion

24. I do not see how ICASA can proceed with the current Information Memorandum and fatally defective workshop towards issuing an ITA that will survive legal challenge. Quite simply it is never to late for ICASA to undertake a serious reconsideration of its attitude and to actually act in good faith and adherence to the ITA.
25. Prior to issuing a new ITA the disastrous amendment to the Regulation 7 needs to be remedied.
26. It is deleterious for temporary use assignments of spectrum to be in use but it is wholly unsound to revoke such assignments while a state of disaster for which the assignments were made continues to be in effect. A reasonable inference may be drawn that the action of seeking to cause the discontinuation of use of that spectrum by operators is with a view to force same to accept the ITA envisaged by ICASA.